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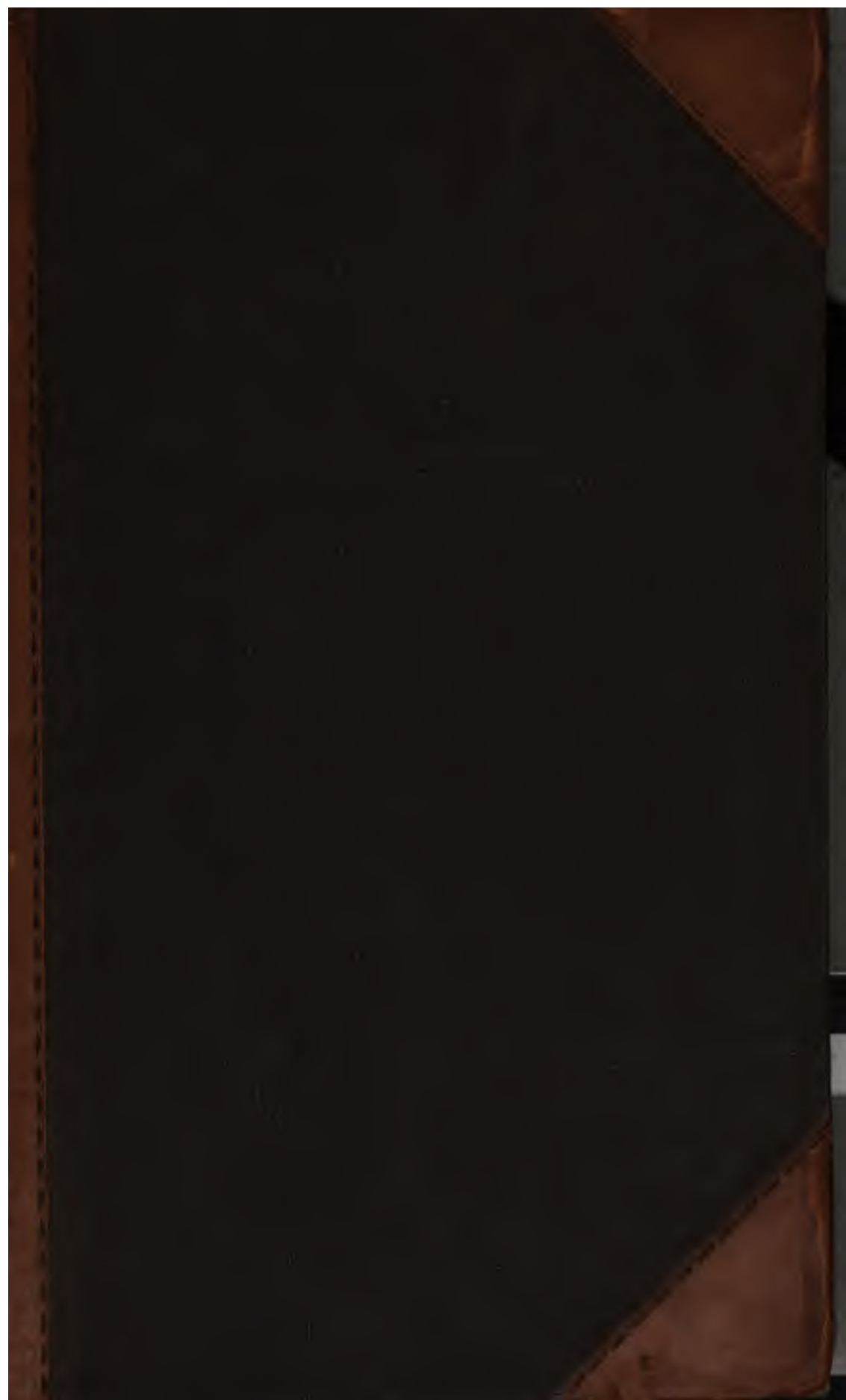
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REPORTS

OF THE CASES RELATING TO

MARITIME LAW,

DECIDED BY

THE COURT OF ADMIRALTY,

AND BY ALL THE

SUPERIOR COURTS OF LAW AND EQUITY;

SALVAGE AWARDS;

AND A SELECTION OF

Cases decided in the Courts of the United States,

THE CONSULAR COURTS, &c, &c.



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REPORTS

OF

All the Cases Argued and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

COMMENCING HILARY TERM 1864.

PRIV. CO.]

DURANTY v. HART. CARGO *ex* HAMBURG.

[PRIV. CO.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATERSON, Esq., of the Middle Temple,
Barrister-at-Law.

Wednesday, March 16, 1864.

(Present—The Right Hon. Lords CHELMSFORD and
KINGSDOWN and Sir J. T. COLERIDGE.)

DURANTY v. HART.

CARGO *ex* HAMBURG.

Ship—Bottomry bond—Power of master to bind owner
of cargo—Duty to communicate with owners.

The master of a ship is an agent for the owners of the cargo for the purposes of hypothecation only in cases of necessity, but not in a case where means exist of communicating with such owners and obtaining an answer within a time not inconvenient with reference to the circumstances of the case. It is the duty of the leader on bottomry first to inquire of the master whether he has so communicated or made an attempt to communicate with the owners of the cargo; and if the master has not done so, the bond is void as against the cargo.

This was an appeal from a judgment of the Court of Admiralty pronounced on the 31st March 1863.

The app. Alexander Duranty was a merchant in Liverpool. The resps. were the three firms of Judah Hart and Co., John Charles White and Sons, and Fruhling and Goschen, all carrying on business in the city of London.

The app. sued *in rem* in the Court of Admiralty as the assignee and holder of a certain bottomry bond granted on the 24th July 1861 in the island of St. Thomas, upon the ship *Hamburg*, her freight and cargo, by the master of the ship.

The owners of the ship, who resided in Hamburg, did not appear to make any defence to the action, but suffered judgment to go by default against the ship and freight.

The resps., who were the owners of the cargo, opposed the bond, contending that it was not valid against the cargo.

In their answer in the court below the resps. made several allegations attacking the good faith of the bottomry transaction, as that the master of the

Hamburg might without bottomry have obtained advances at St. Thomas from a certain firm of J. T. Levy and Co., and that the money specified in the bottomry bond was neither borrowed nor expended for the necessary expenses of the ship; but at the hearing of the cause the good faith of the transaction was not disputed, and the resps. contended that the master had no authority to bind the cargo by the bottomry bond, and that the bond was wholly invalid against the cargo for each of the three following reasons:

First, that, considering the total value of the ship, freight, and cargo, compared with the amount of the money required for the expenses at St. Thomas, the master was not justified in subjecting the cargo to the bond.

Secondly, that the master of the ship had not communicated, or attempted to communicate, with the resps. before hypothecating their cargo.

Thirdly, that the master had had opportunity of transhipping the cargo at St. Thomas.

The learned judge of the court below held, that there was no obligation in law to tranship; but decided that the bond was invalid against the cargo, apparently on each of the two first grounds alleged above.

The following were the material facts of the case:—

The *Hamburg* was a schooner belonging to the port of Hamburg, in the Hanseatic League. In the year 1860 the *Hamburg* sailed from the port of Hamburg to the island of St. Thomas, being consigned there to the house of Z. T. Levy and Co. The *Hamburg* thence proceeded to Grey Town, Nicaragua, where, on the 15th Jan. 1861, she was chartered to Juan Mesnier, merchant of Grey Town, to load a full cargo of Brazil wood and other lawful produce, and carry the same to Liverpool for freight, at the rate of 2*l.* 10*s.* for every ton of Brazil wood, and all other produce in the like and fair proportion. The freight was by the charter-party made payable in Liverpool in cash on delivery of the cargo, and the master engaged to sign bills of lading as presented to him, without prejudice to the charter-party. In pursuance of this charter, the *Hamburg* took on board at Grey Town, for several shippers, a cargo consisting chiefly of Brazil wood,

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india-rubber, indigo and turtle shell. The master having signed bills of lading, sailed with the vessel so laden for Liverpool.

After leaving Grey Town the *Hamburg* met with severe weather and suffered considerable damage, and on the 25th April 1861 was forced to put into the island of St. Thomas to repair.

The master immediately reported himself to the Hamburg consul, and in all the subsequent transactions relating to the ship, surveying, ordering repairs and final execution of the bond, acted, as he was bound by the law of Hamburg to do, under the express directions and with the public official sanction of the said consul.

On the day of the vessel's arrival (25th April 1861) the consul appointed three surveyors, who, after surveying, reported the same day, recommending the cargo to be discharged forthwith, in order to examine the extent of the damages the vessel had suffered.

The cargo was accordingly discharged and warehoused, and on the 6th May 1861 a further survey was ordered by the consul to be held, to report what was best to be done for the interests of all concerned.

A survey was accordingly held, and in a report, dated 6th May 1861, the surveyors recommended extensive repairs to be done to the ship to fit her to complete the voyage, estimating such repairs at 4820 Spanish dollars (or 1025*l.* sterling), "not including extra work that might be necessary after repairs had commenced."

On the same day, the 6th May 1861, the surveyors reported the value of the vessel, with all her tackle and apparel, in her then state, to be 2000 dollars (or 425*l.*), and no more.

Upon his arrival at St. Thomas, the master had applied to the firm of Z. T. Levy and Co. to take charge of the vessel, and furnish him with the money required for the repairs and other necessary expenses of the ship, but that firm declined so to do, and the master thereupon appointed the firm of Paulsen and Co. agents for the vessel.

In pursuance of the survey, dated 6th May 1861, and with the sanction of the consul, the repairs recommended were set in hand immediately. They were not completed till the 5th July 1861.

The master thereupon again applied to the firm of Z. T. Levy and Co. to advance him money for the repairs, upon bills to be drawn upon the owners of the ship, but they again declined to assist him. The master also made a similar application to other houses, but to no result.

Being thus without funds or credit, the master then, by the direction of the consul, on the 9th July 1861, advertised for the loan of 6000 dollars on bottomry of the ship, freight and cargo; tenders to be sent in to the Hamburg consulate. The only tender made was by a merchant named Bartolomei Lange, which tender was accordingly accepted.

The total sum required by the master for defraying his average expenses, that is to say, not only the expenses of repairing the ship, but other port expenses, and the expenses of discharging, warehousing, and reshipping cargo, amounted to 7592 dollars 88 cents., or 1615*l.*, which sum was advanced by Bartolomei Lange, and duly applied by Paulsen and Co. to the purpose aforesaid, the accounts having been previously certified by the consul.

On the 24th July 1861 a bottomry bond for that amount upon ship, freight and cargo, made payable with a maritime premium of 33*½* per centum ten days after the arrival of the ship in Liverpool, was executed by the master in the presence of the consul. The amount of the bond, with interest, was 2154*l.*

The ship then sailed on her voyage, and arrived in Liverpool with her cargo on the 13th Aug.

1861. Upon the bond becoming due, the present cause was instituted by the app., to whom the bond had been indorsed.

The ship was sold by order of the court, upon the 11th Dec. 1861, and fetched the gross sum of 560*l.*

The freight due upon the cargo amounted to 201*l.* 12*s.* 10*d.* The cargo was valued on arrival in Liverpool at the sum of 895*l.*, and was delivered to the resp. on bail being given to that amount. The total value of the property hypothecated was thus at Liverpool, and upon the conclusion of the voyage, 1656*l.* 12*s.* 10*d.*

Milward and V. Lushington, for the app., contended that the bond was valid. The small amount realised on a forced sale was no test of the disproportion at the time the bond was executed; and the fact was that the value of the ship and cargo seemed to be adequate. As regards the duty of communicating with the owners of the cargo, there was no such duty imposed by the law of Hamburg, or by the British law. The case of the *Buonaparte*, 8 Mo. P. C. 459, did not lay down the rule that in all cases the owner must be communicated with; but at the utmost only applied such a rule where there was a considerable interval between the time of arrival in the port of distress and the time of commencing the repairs. Here there was no such interval. The master is the representative of the owner of the ship, but has no relation to the owners of cargo, of whom he may know nothing, and he is seldom in possession of their address. To endeavour to find them out and communicate would be in general a needless waste of time:

The Gratitude, 3 Rob. 241;

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If the cargo is hypothecated for ship's expenses, the owners of the cargo may recover from the shipowner: (*Duncan v. Benson*, 1 Ex. 537; 3 Ex. 644.) And there are few occasions in which there is any actual duty of the master to communicate with the owners of cargo. Moreover the lender on bottomry has no opportunity of informing himself if the master has communicated with the owners of cargo. In the circumstances of this case the master was not bound to communicate with the owners of cargo; nor was he bound to tranship the goods. His duty having been, therefore, performed properly, the bond was valid.

The *Queen's Advocate* (Phillimore) and Dr. *Tristram*, for the resp., contended that the master was only the agent of the owners of cargo in cases where the act was for their benefit, and there was no opportunity of communicating with them, and that in the circumstances the master ought to have transhipped the goods or unshipped them at St. Thomas and awaited further orders.

Cur. adv. vult.

Sir J. T. COLERIDGE.—This was an appeal from the judgment of the High Court of Admiralty, which has been pronounced for the invalidity of a bottomry bond, in so far as it applied to the cargo of the ship *Hamburg*; and the question arose under the following circumstances: The *Hamburg* was a schooner of five Hamburg commercial lasts. She was proceeding from Nicaragua to Liverpool with a cargo of Brazil wood, gum, indigo and india-rubber; and on the 25th April 1861 she put into St. Thomas for the purpose of repairing the damage she had sustained on the voyage. On the 9th July the master advertised for tenders for a loan to defray the expenses incurred for the repairs, landing and reshipping the cargo, and on the 24th July 1861 executed the bottomry bond in question, whereby he hypothecated the ship, freight and cargo for the sum of 7592 dollars, with a maritime interest of 33*½* per cent., the total amount of the bond in English money being 2154*l.* The

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ship arrived at Liverpool on the 13th Aug. 1861; in September proceedings were commenced on the bond: as to the ship and freight no defence was offered, and the bondholder became entitled to the proceeds of these, amounting to 704l. 17s. This left a deficiency of 1449l. 3s., for which it was sought to make the cargo responsible, and that was sold for 895l. This sum was the matter in contest; the learned judge decided against the claim, and the decision is now appealed against. Two objections were made in the court below to the claim of the bondholder, and were relied on in the argument on the appeal. It was urged, in the first place, that, looking to the small value of the ship, even when repaired, together with the freight, the master was not justified in incurring expenses which led to the necessity of borrowing so large a sum, but ought to have transhipped the cargo. In the second place, it was contended that, considering the circumstances just stated, and some which will presently be added, it was, at all events, the duty of the master, before he incurred these expenses and signed a bond which was to bind the cargo, to communicate, or at least attempt to communicate, with the owners of the cargo in England, and to have waited at least a reasonable time for their instructions. The facts now to be stated, which in some measure apply to both objections, but principally to the last, are these. The cargo consisted, as has been stated, of Brazil wood, gum, indigo and india-rubber—articles not of rapidly perishable nature. It was consigned in different proportions to three separate houses in London, and their Lordships are not prepared to differ from the learned judge's opinion that the master, if he were ignorant of the addresses of these firms, had the means at St. Thomas of ascertaining them, or one or more of them, or of procuring a letter to be forwarded to one or more of them. The means of postal communication between St. Thomas and England are fortnightly; the *Hamburg* arrived at St. Thomas on the 25th April, and the bond was executed on the 24th July. Mail steamers left St. Thomas for England on the 29th April, 14th and 29th May, 18th and 29th June and 15th July, and mails for St. Thomas from London were made up on the 2nd and 17th of each of the months of May, June and July. Had the master, even if he passed over the mail of the 29th April, written by that of the 14th May (which for anything that appears he certainly might have done), he would probably have had an answer by the mail which left England on the 13th June, and might have been expected to arrive at the latter end of that month, and it appears that the negotiation for the bottomry loan did not commence until the 11th July. It may be added, that although the master's conduct is severely reflected on as unauthorised and wanting in good sense and consideration, no fraud or collusion is imputed to him; indeed, he seems to have acted under advice which, by the law of his country, he deemed himself bound to be governed by—a circumstance not entirely without significance as a fact, although their Lordships entirely agree with the learned judge of the Admiralty that the case is to be decided by the general maritime law, as administered in England. Lastly, no fraud is imputed to the lender of the money on the bond. Upon this statement of facts their Lordships have to consider the propriety of the judgment. The first objection was disposed of by the learned judge very shortly and without difficulty, and, as their Lordships think, quite correctly. The master was certainly not bound to tranship his cargo; indeed, his first duty was to carry his cargo to its destination in the same bottom, unless under the greatest difficulty. The learned judge rightly thought that the true force of

this objection was not as an independent one, but that the circumstances on which it was rested might have their weight in the consideration of the second, on which indeed the judgment itself and the argument on the appeal mainly turned. This brings their Lordships to the consideration of that objection, and it is impossible for them not to perceive that in dealing with it in the court below it has been considered that it derived whatever weight it was entitled to from the decision of this committee in the case of the *Buonaparte*, 8 Moore P. C. 459, which it was supposed had introduced a new rule of decision into this branch of maritime law. Whether this supposition be correct or not, undoubtedly if in itself that decision was both rightly understood below and also rightly applied to the circumstances of this case, the learned judge could only determine the case before him as he has done. The important sentence in that judgment is to be found at p. 473, and is as follows: "That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo must communicate, or endeavour to communicate, with the owner of the cargo has not been alleged, and is a position that could not be maintained, but it may safely, both on authority and on principle, be said that in general it is his duty to do so, or it is his duty in general to attempt to do so." This sentence is followed by one which in the report is printed as follows: "If, according to the circumstances in which he is placed, it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken therefore upon authority and principle that it is the duty of the master to do so, or at least to make the attempt." This passage is obviously inaccurate. The judgment was not written, but appears to have been printed from a shorthand writer's note. It is not, however, difficult to collect what really was said by the learned judge, and with a slight correction of the text it would stand thus: "If according to the circumstances in which he is placed it be reasonable that he should, if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt." That this is the true wording of the passage we have ascertained by communicating with Knight Bruce, L. J., who delivered the judgment. It is a most important passage, and the complement and explanation of what goes before. The preceding sentence states that it is the duty of the master in certain circumstances to make or attempt to make the communication, and this sentence explains what the circumstances are in which this duty is imposed upon him. It shows what the learned judge understood by the expression "in general," if such words were used by him. The reporter has accurately stated in his marginal note the general rule established by the decision, though he has unfortunately omitted to correct the press in that portion of the judgment in which it is expressed. In the rule thus enunciated their Lordships are unable to discern any novelty either in the principle on which it rests, or in its application to the case of the hypothecation of the cargo of a ship by the master. The character of agent for the owners of the cargo is imposed upon the master by the necessity of the case and by that alone. In the circumstances supposed something must be done, and there is nobody present who has authority to decide what shall be done. The master is invested by presumption of law with authority to give directions on this ground, that the owners have no means of expressing their wishes. But when such means exist, when commu-

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ship arrived at Liverpool on the 13th Aug. 1861; in September proceedings were commenced on the bond; as to the ship and freight no defence was offered, and the bondholder became entitled to the proceeds of these, amounting to 704*l.* 17*s.* This left a deficiency of 1449*l.* 3*s.*, for which it was sought to make the cargo responsible, and that was sold for 895*l.* This sum was the matter in contest; the learned judge decided against the claim, and the decision is now appealed against. Two objections were made in the court below to the claim of the bondholder, and were relied on in the argument on the appeal. It was urged, in the first place, that, looking to the small value of the ship, even when repaired, together with the freight, the master was not justified in incurring expenses which led to the necessity of borrowing so large a sum, but ought to have transhipped the cargo. In the second place, it was contended that, considering the circumstances just stated, and some which will presently be added, it was, at all events, the duty of the master, before he incurred these expenses and signed a bond which was to bind the cargo, to communicate, or at least attempt to communicate, with the owners of the cargo in England, and to have waited at least a reasonable time for their instructions. The facts now to be stated, which in some measure apply to both objections, but principally to the last, are these. The cargo consisted, as has been stated, of Brazil wood, gum, indigo and india-rubber—articles not of rapidly perishable nature. It was consigned in different proportions to three separate houses in London, and their Lordships are not prepared to differ from the learned judge's opinion that the master, if he were ignorant of the addresses of these firms, had the means at St. Thomas of ascertaining them, or one or more of them, or of procuring a letter to be forwarded to one or more of them. The means of postal communication between St. Thomas and England are fortnightly; the *Hamburg* arrived at St. Thomas on the 25th April, and the bond was executed on the 24th July. Mail steamers left St. Thomas for England on the 29th April, 14th and 29th May, 18th and 29th June and 15th July, and mails for St. Thomas from London were made up on the 2nd and 17th of each of the months of May, June and July. Had the master, even if he passed over the mail of the 29th April, written by that of the 14th May (which for anything that appears he certainly might have done), he would probably have had an answer by the mail which left England on the 13th June, and might have been expected to arrive at the latter end of that month, and it appears that the negotiation for the bottomry loan did not commence until the 11th July. It may be added, that although the master's conduct is severely reflected on as unauthorised and wanting in good sense and consideration, no fraud or collusion is imputed to him; indeed, he seems to have acted under advice which, by the law of his country, he deemed himself bound to be governed by—a circumstance not entirely without significance as a fact, although their Lordships entirely agree with the learned judge of the Admiralty that the case is to be decided by the general maritime law, as administered in England. Lastly, no fraud is imputed to the lender of the money on the bond. Upon this statement of facts their Lordships have to consider the propriety of the judgment. The first objection was disposed of by the learned judge very shortly and without difficulty, and, as their Lordships think, quite correctly. The master was certainly not bound to tranship his cargo; indeed, his first duty was to carry his cargo to its destination in the same bottom, unless under the greatest difficulty. The learned judge rightly thought that the true force of

this objection was not as an independent one, but that the circumstances on which it was rested might have their weight in the consideration of the second, on which indeed the judgment itself and the argument on the appeal mainly turned. This brings their Lordships to the consideration of that objection, and it is impossible for them not to perceive that in dealing with it in the court below it has been considered that it derived whatever weight it was entitled to from the decision of this committee in the case of the *Buonaparte*, 8 Moore P. C. 459, which it was supposed had introduced a new rule of decision into this branch of maritime law. Whether this supposition be correct or not, undoubtedly if in itself that decision was both rightly understood below and also rightly applied to the circumstances of this case, the learned judge could only determine the case before him as he has done. The important sentence in that judgment is to be found at p. 473, and is as follows: "That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo must communicate, or endeavour to communicate, with the owner of the cargo has not been alleged, and is a position that could not be maintained, but it may safely, both on authority and on principle, be said that in general it is his duty to do so, or it is his duty in general to attempt to do so." This sentence is followed by one which in the report is printed as follows: "If, according to the circumstances in which he is placed, it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken therefore upon authority and principle that it is the duty of the master to do so, or at least to make the attempt." This passage is obviously inaccurate. The judgment was not written, but appears to have been printed from a shorthand writer's note. It is not, however, difficult to collect what really was said by the learned judge, and with a slight correction of the text it would stand thus: "If according to the circumstances in which he is placed it be reasonable that he should, if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt." That this is the true wording of the passage we have ascertained by communicating with Knight Bruce, L. J., who delivered the judgment. It is a most important passage, and the complement and explanation of what goes before. The preceding sentence states that it is the duty of the master in certain circumstances to make or attempt to make the communication, and this sentence explains what the circumstances are in which this duty is imposed upon him. It shows what the learned judge understood by the expression "in general," if such words were used by him. The reporter has accurately stated in his marginal note the general rule established by the decision, though he has unfortunately omitted to correct the press in that portion of the judgment in which it is expressed. In the rule thus enunciated their Lordships are unable to discern any novelty either in the principle on which it rests, or in its application to the case of the hypothecation of the cargo of a ship by the master. The character of agent for the owners of the cargo is imposed upon the master by the necessity of the case and by that alone. In the circumstances supposed something must be done, and there is nobody present who has authority to decide what shall be done. The master is invested by presumption of law with authority to give directions on this ground, that the owners have no means of expressing their wishes. But when such means exist, when commu-

nication can be made to the owners, and they can give their own orders, the character of agent is not imposed upon the master, because the necessity which creates it does not arise. It is clear that the rule as to communication must be either that in no case and under no circumstances it is incumbent on him so to do; either the universal negative, or the particular affirmative proposition must hold, and both cannot be true, although one must be. But it has not been contended, and cannot reasonably be argued, that the first proposition is true. Where the cargo belongs to a single individual known to the master, the ship in a port in the same country, or near to it, in which that owner is resident, the means of communication sure and speedy, the probable delay inconsiderable, the cargo not of a perishable kind, the money to be borrowed so large as to be sure to bring it within the operation of the bond, it could not be contended that the master could properly hypothecate it for the repairs of the vessel without first communicating with the owner. Equally clear it is, that where all these circumstances were reversed no such duty would be incumbent on him. But if the first proposition be false and the latter true, what is, in effect, the practical conclusion but that the question whether a master must communicate or not is one which can only be decided by the circumstances in each particular case? And this, which certainly seems consistent with the principle on which, as we have already observed, the maritime law makes the master under certain circumstances an agent for the owner in respect of the cargo, their Lordships believe to have been recognised by Lord Stowell in the case of the *Gratitude*. This was not the precise point for decision in that case; but no one can read that admirable judgment attentively without perceiving that the duty of communication with the owner of the cargo before hypothecation under circumstances and dependent on circumstances, was familiar to the mind of the great judge who decided it. Thus in the *Gratitude*, 3 Ch. Rob. 259: "There are other cases also in point in which the master has the same authority forced on him. Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed or to stand in need of repairs to enable her to proceed." Again, p. 261: "Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship: what is the master to do in the situation before described, being a stranger in a foreign port in a state of distress without an opportunity of communication with the owners or their agent—what is his duty under such circumstances?" Again, p. 262: "It cannot be said that he is in all cases to wait till he hears from a distant country. The repairs may be immediately necessary; it may be hoped that the repairs will be far advanced before he can hear from the consignees. The master may not know the proprietors at all, but only the consignees; they may be mere consignees, and have no power to direct him but in the single case of an actual delivery to them; if owners, they may be very numerous, for in a carrier ship there may be a hundred owners of the cargo, and the master may be in danger of receiving a hundred different opinions, supposing it were possible for him to apply to all; what does the necessity of such a case offer to be done?" Again (p. 266), he answers an extreme case put at the bar of a valuable ship with a cargo of a considerable value belonging to Dover, being in distress at Calais, and says: "Undoubtedly the master should use his utmost endeavours to correspond with the consignees or proprietors; but a case of instant necessity might occur even so near; the master might not be able to receive their directions; all communication might be interrupted, as it is sometimes for a fortnight or

three weeks." That the rule laid down in the case of the *Buonaparte* was properly applied in that case no person who attends to the facts can entertain a doubt. There may be more doubt in the present case; but the learned judge has examined the evidence with great care, and appears to us to have arrived at a right conclusion. As to the supposed convenience of the rule, their Lordships do not for that the lender of the money is the party interested in the event of the suit, and not the master. There is no hardship in requiring from one who is about to advance a large sum of money under such circumstances, that he should inquire of the master whether he has communicated, or made an attempt to communicate, with the owners the circumstances of his distress, and what he purposes to do in regard to their goods. And it must be remembered, on the other hand, that the owners of the goods are equally interested; and unless communicated with, have the same means of protecting their own interests which the lender undoubtedly has. If it be said that a decision in their favour will tend to increase the difficulty of procuring loans in foreign ports for the repair of vessels in distress, it may also be said on the other hand, that it will tend very much to the benefit of commerce in general to discourage improvident or fraudulent advances. Their Lordships will humbly recommend to Her Majesty that the judgment be affirmed, and the appeal dismissed with costs. *Judgment affirmed*

Apprs.' solicitors, *Telks and Sons*.

Resps.' solicitors, *Brooks and Dubois*.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMSON and T. W. SAUNDERS, Esqrs.
Barristers-at-Law.

Friday, Nov. 20, 1863.

CARR AND ANOTHER v. THE ROYAL EXCHANGE ASSURANCE COMPANY.

Marine policy of insurance—Average loss.

A policy of marine insurance contained these words: "Free from average or claim arising from jettison or leakage, unless consequent upon stranding, sinking, or fire."

Held, the cargo having suffered an average loss arising from jettison or fire, that the above words "arising from jettison or leakage," qualify the words "average and claim."

This was a special case, stated upon a verdict for the plaintiff in an action upon a marine policy of insurance upon a cargo of guano, from Montevideo to a port in the United Kingdom, the policy being "free from average or claim arising from jettison or leakage, unless consequent upon stranding, sinking, or fire." In this case the cargo had suffered an average loss not arising from jettison or leakage, for which the action was brought.

E. James, Q. C. (Kempsey with him) for the plaintiff.

Brett, Q. C. (T. Jones with him), for the defendant.

COCKBURN, C. J.—I am of opinion that the parties are entitled to recover, though it is doubtful whether the parties really meant by the language which they have used. I have no doubt, however, that the object was to prevent disputes arising with respect to this particular description of commodity, when coming over in large quantities, and liable to deterioration by contact with sea water. But strange in endeavouring to obviate the necessity for litigation, they have just led to it. If there had been any punctuation, a couple of commas would have made the meaning of the parties perfectly clear; but in these instruments all punctuation is deemed superfluous. In the absence, therefore,

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this assistance, there is, I think, great force in the argument which has been pressed upon us, that if the construction contended for by the defts. were the true one, the words "or claim arising from jettison or leakage," would be perfectly superfluous as being synonymous with the word "average." I think, therefore, that the true way of reading it is, "free from average or claim arising from jettison or leakage;" so as to make "average or claim" refer to "jettison or leakage;" and that the word "claim" was put in to enlarge the word "average" in case there might be any claim which the parties might think not to fall within the term "average."

WIGHTMAN, BLACKBURN and MELLOR, JJ. gave similar judgments. *Judgment for the plts.*

Plts.' attorneys, *Oliverson and Co.*

Defts.' attorneys, *Freshfield and Co.*

Nov. 17, 1863, and Feb. 22, 1864.

TAYLOR v. DEWAR.

Marine insurance—Non-liability of assurer for damages for loss of life by negligent collision.

In a marine policy of insurance there was a clause as follows: "In case the vessel shall by accident or negligence of the master and crew run down or damage any other ship or vessel, and the assured shall thereby become liable to pay and shall pay as damages any sum not exceeding the value of the said vessel and her freight."

the assurers, shall and will bear and pay such proportion of three-fourth parts of the sum so paid as aforesaid as the sum of 4000l. hereby assured bears to the value of the said vessel Rowen and her freight:

Held, that the liability of the insurer under this clause does not extend to damages paid by the assured in respect of loss of life or personal injury arising from collision through negligence.

This was a demurrer to a declaration.

The declaration was upon a policy of marine insurance effected with the defts. upon the hull and furniture of a ship called the *Rowen*, which policy contained a clause as follows: "And we, the assurers, do further covenant and agree that in case the said vessel shall by accident or negligence of the master or crew run down or damage any other ship or vessel, and the assured shall thereby become liable to pay and shall pay as damages any sum or sums not exceeding the value of the said vessel the *Rowen*, and her freight, by or in pursuance of any judgment of any court of law or equity, we, the assurers, shall and will bear and pay such proportion of three-fourth parts of the sum so paid as aforesaid as the sum of 4000l. hereby assured bears to the value of the said vessel *Rowen* and her freight." The declaration then averred that the said vessel the *Rowen* ran down the *Magyar* and sunk her with her master and crew, and that the owner (the plt.) had to pay a sum of money to the personal representatives of the deceased master and crew, whereof he now claimed three-fourth parts under the terms of the said policy.

Sir G. Honyman, in support of the demurrer, argued that the above clause in the policy did not cover loss by reason of money paid for personal injuries to persons on board the ship damaged, and that, in order to render the underwriters liable, the loss sought to be recovered must be attributable to the ship having run down or damaged the other ship, and that only:

De Vaux v. Salvador, 4 A. & E. 420;

Coey v. Smith, 22 Court of Ses. Cas. 955.

Manisty, Q.C. (J. Brown with him) contended that the defts. was liable, there being nothing in the language or object of the clause to confine it to damages done to the vessel run down:

Coey v. Smith (supra);

22 Vict. c. 10, s. 7;

17 & 18 Vict. c. 104, ss. 509, 523.

Sir G. Honyman, in reply, referred to

Ionides v. The Marine Insurance Company, 14 C. B., N. S., 259; 8 L. T. Rep. N. S. 705.

Cur. adv. vult.

Feb. 22.—MELLOR, J.—This case was argued before the Lord Chief Justice, the late Mr. Justice Wightman, my brother Blackburn and myself, and the question in the case turns on the effect to be given to a clause in a policy of marine insurance, of recent introduction into such instruments, and generally known by the name of the "collision clause," the object of which is to secure the shipowner against damages which he may be compelled to pay for injury done to others by his vessel coming into collision with another, either through accident or negligence, such damage not being by the law of England, as settled by the case of *De Vaux v. Salvador*, 4 A. & E. 420, recoverable under a policy of insurance in the ordinary form. In the present case the clause is as follows: "In case the vessel shall by accident or negligence of the master and crew run down or damage any other ship or vessel, and the assured shall thereby become liable to pay and shall pay as damages any sum not exceeding the value of the said vessel and her freight, by or in pursuance of any judgment of any court of law or equity, the assurers shall pay such proportion of three-fourths of the sum so paid, as the 4000l. assured bears to the value of the ship and her freight." The vessel insured under this policy, the *Rowen*, having come into collision with and run down another ship called the *Magyar*, and the master and five of the crew of the latter having been drowned, the owners of the *Rowen* have, by the judgment of the Court of Admiralty, been condemned to pay damages to the personal representatives of the deceased, and such damages have been paid accordingly; and the question raised by the demurrer in this case is, whether, under the clause in question, the amount thus paid can be recovered back, the controversy being, whether the provision for indemnity applies to damages paid by the assured in respect of personal injury arising from collision through negligence. We are, after much consideration, of opinion that it does not, and that our judgment should be for the defts. It was contended on the part of the plt., that the death of the deceased having been occasioned by the running down of the *Magyar*, through the negligence of the master and crew of the ship insured, the damages which the plt. had been condemned to pay were within the words of the clause, and must be held to be within the indemnity. But it is to be observed on the other hand, that the language of the clause is altogether silent as to personal injury. It speaks of the vessel insured, "running down or damaging any other ship or vessel," and of "the assured thereby becoming liable to pay damages." It seems to us that the more reasonable construction is to consider the damages herein referred to as limited to such damages as shall be payable in respect of the loss of or damage done to the ship run down or damaged, or possibly as extending to her freight or cargo, which for this purpose may perhaps be treated as part of herself. This view becomes very materially strengthened when it is considered that the present is a policy of marine insurance, and that hitherto policies of marine insurance have never been applied to the purpose of insurance against loss of life, or indemnity in respect of personal injury arising from perils of the seas. This being so, it appears to us more reasonable, in the absence of express agreement, to limit the general language of

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the clause to those matters which have alone been the subject of marine insurance. And it is to be observed, that the clause provides not only for damage occasioned by negligence, but also for damages arising from accident; the latter provision being, probably, introduced to meet the possible case of the vessel becoming subject to a foreign jurisdiction in a country by the maritime law of which, in case of accident, the damage is to be divided. Now, it is clear, that the shipowners never could be liable for damages for loss of life or personal injury arising from accidental collision; their liability to such damages depends on the relation of master and servant between them and those whose negligence occasions the death or personal injury; and the running down or damaging the other ship is only material in so far as it may connect the death or personal injury with that negligence. By providing in the same sentence for the case of accident as well as for that of negligence, the parties would appear to have been looking to what might become payable in respect of damage to the ship, not to those on board of her, who never could have any claim in respect of injury arising from accident. There is a further circumstance deserving of notice. By the terms of the policy the liability of the underwriters is limited "to such proportion of three-fourths of the sum paid as the 4000*l.* assured bears to the value of the ship insured and her freight." Now, this must be taken to mean the actual value of the ship and freight. But, by the express provision of the 504th section of the 18 & 19 Vict. c. 104, in no case where liability is incurred in respect of loss of life or personal injury to any passenger, shall the value of any ship or freight be taken to be less than 15*l.* per register ton. The absence of any reference to this special provision in the case of damage arising in respect of loss of life or personal injury, tends strongly to show that the parties were contemplating the case of damage paid in respect of loss of, or damage to, the ship and her appurtenances, as to which the statutory enactment as to value would not apply. We regret that, in coming to this conclusion, we find ourselves in conflict with the decision of the Court of Session in the case of *Coe v. Smith*, Court of Sess. Cas. vol. 22, p. 956, to which our attention was called on the argument. The words in the policy in that case are not, indeed, identical with these occurring in the present, but we think they are in substance the same; and it is, therefore, with very great reluctance that we find ourselves compelled to differ from a court whose decisions, although not binding on us, are entitled to the highest consideration at our hands. But, after the best consideration we have been able to give to the case, we cannot arrive at any other conclusion than that the view taken by the Lord Ordinary in that case was the right one, namely, that on such a clause as the present, occurring in a policy of marine insurance, the liability of the insurer does not extend to damages paid by the assured in respect of loss of life or personal injury. Our judgment will therefore be for the defts.

Judgment for the defts.

COURT OF COMMON BENCH.

Reported by W. MAYD and L. SMITH, Esqrs.,
Barristers-at-Law.

Monday, Jan. 18, 1864.

DAKIN v. OXLEY.

Shipping—Freight—Right of shipowner to recover fr freight when by reason of his negligence the cargo ha been damaged.

An action was brought on a charter-party by the ship owner for freight due, to which the charterer pleade that by the fault of the master and mariners of th vessel, and by reason of their negligence and unski fulness in the navigation and management of th vessel on the voyage, and not otherwise, the cargo wa so damaged and deteriorated in condition during th voyage, that on its arrival at the port of destination had become of less value than the amount of the freig and that thereupon the deft. abandoned the cargo; th plt. for the freight, and was thereby discharge from payment of the freight:

Held, that the plea was bad on demurrer.

Declaration.—For that by a certain charter-part in which the plt. was described as Capt. Geo. Dakin of the British good ship or vessel called the *Contes* it was mutually agreed by and between the plt. an the deft. that the said ship being tight, staunch an strong, and every way fitted for the voyage, shoul without any delay, sail and proceed to Newpor Mon., and there take on board in the usual an customary manner from the factors of the defts. full and complete cargo of coals, which was to b brought to and taken from alongside at me chant's risk and expense, not exceeding wh she could reasonably stow and carry over an above her tackle, apparel, provisions, and furni ture (including a sufficient supply of coals fo ship's use during the voyage which the plt. boun himself to take on board), and being so load should therewith proceed to Nassau, N. P., an there deliver the same on being paid freight at an after the rate of 22*s.* 6*d.* sterling per ton of 20 cwt delivered in full of all port charges whatsoever including trimming, customary dues, lights an pilotage; the act of God, the Queen's enemies, fir frosts, riots and strikes of pitmen, and all an every other damages and accidents of the se rivers and navigation, mines and works of whateve nature or kind soever during the said voyag always excepted. The freight to be paid on th right and true delivery of the cargo in cash a current rate of exchange, or approved bills o London, at sixty days' sight, one-half freight to b advanced on signing bills of lading by acceptanc at three months less 5 per cent., for all charges seven days is to be allowed the said merchants (i the ship is not sooner dispatched) for loading, an the ship to be discharged (weather permitting) a not less than thirty tons per running days, Sunday excepted, and the defts. to have the option of kee ing the ship for ten days on demurrage over an above the said laying days at 5*l.* per day; th said vessel to be addressed to the deft.'s agents a the port of discharge, paying 2 per cent. commissio on amount of freight; and the plt. says that the sai ship sailed and proceeded to Newport aforesaid, an there took on board a full and complete cargo c coals according to and in pursuance of the sai charter-party, and being so loaded, proceeded there with to Nassau aforesaid, and all things have hap pened and been done, and all conditions preceden have been performed and fulfilled, and all time have elapsed necessary to entitle the plt. to main tain this action for the breach of the charter-part in this count complained of; and, although large amount of freight, to wit, 258*l.* 2*s.* 6*d.* is due to the plt. according to the said charter

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party, the deft. has not paid to the plt. the said amount, or any part thereof, either in cash or in bills, according to the terms of the said charter-party, but has wholly made default in so doing; and the plt. also sues the deft. for money payable by the deft. to the plt. for freight for the conveyance by the plt. for the deft. at his request of a certain cargo of coals in a certain ship, and for money found to be due from the deft. to the plt. on accounts stated between them; and the plt. claims 500*l*.

The sixth plea, which alone was material, was as follows:—

Sixthly, and for a further plea to the first and second counts of the said declaration the deft. says that the said cargo of coals in the said first count mentioned, and the said cargo of coals in the said second count mentioned, were and are one and the same cargo, and that the freight alleged to be due to the plt. according to the said charter-party and in the said first count mentioned, and the alleged freight for the conveyance by the plt. of the said cargo of coals as in the said second count mentioned, were and are one and the same freight. And the deft. says that the said cargo of coals became by the fault of the master and mariners of the said vessel, and by reason of their negligence and unskillfulness in the navigation and management of the said vessel on the said voyage, and not otherwise, so greatly damaged and deteriorated in condition during the said voyage, that on the arrival of the said cargo of coals at the said port of discharge, the same had become and were then of less value there than the amount of the said freight, and that thereupon the deft. abandoned the said cargo of coals to the plt., to wit, for the said freight, and was thereupon and thereby discharged from payment of the said freight.

Demurrer and joinder in demurrer.

Case in support of the demurrer.—It will probably be contended that no service was done to the merchant by conveying a cargo which became of less value than the freight; but the principle on which it is sometimes possible to defend an action for work done on the ground of its turning out to be useless, is only founded on the principle of avoiding the necessity of a cross-action. This is fully explained in 2 Sm. Lead. Cas., 22. In *Mondel v. Steele*, 8 M. & W., Parke, B. says, that that principle does not apply to freight. Moreover, and this is conclusive to enable that principle to be applied, it must always be shown that the damages in the cross-action would at least equal the sum claimed in the principal action, and therefore the plea is bad because it does not state that by reason of the negligence of the mariners the cargo was deteriorated in an amount equal to the freight. In fact, the damage might amount to 100*l*., whilst the freight amounted to 1000*l*. The defts. however, may say that the whole of the enterprise of the merchant was frustrated by reason of the damage. Now of course the delivery of the cargo in an undamaged condition is not a condition precedent to the right of freight, or else, if one ton of coals had been negligently lost or damaged, the merchant could refuse to pay the freight and reject the whole cargo; and it is conclusively shown in *Behn v. Burness*, 8 L. T. Rep. N.S. 207, that whether something is or is not a condition precedent cannot depend on the happening of an event subsequent to the contract, even though that event may frustrate wholly the object for which one party entered into the contract. In fact, if the deft. had pleaded that the cargo which the plt. was only ready and willing to deliver had been damaged by the negligence of the mariners, so as not to be worth the freight, the plea would have been clearly bad, because the delivering of a cargo damaged by negligence is not and cannot become a condition

precedent to the title to freight. He also referred to

Abbott on Shipping, 324;
Benecke, 13, 446;
Kent's Commentaries, lib. 2, 225;
1 Parson's Maritime Law, 192;
Maclachlan on Shipping, 399;
Code de Commerce, art. 310;
Christy v. Rowe, 1 Taunt. 311;
Vlierboom v. Chapman, 13 M. & W. 230;
Hotham v. The East India Company, 1 Doug.
272;
Basten v. Butler, 7 East, 479. •

Brett, Q. C., contra, referred to
Luke v. Lyde, 2 Burr. 882;
Lutwidge v. Grey, 891;
The Consolato del Mare, c. 192.

Cur. adv. vult.

WILLES, C.J. now delivered the judgment of the court.—This is an action by shipowner against charterer to recover the freight of a cargo of coal carried from Newport to Nassau. The first count is upon the charter-party. The second is the common count for freight. The deft. pleads that by the fault of the master and crew, and their negligent and unskillful navigation of the vessel, the coal was damaged, so as upon arrival at the port of discharge to be then of less value than the freight, and that he abandoned it to the shipowner. The plea, as it does not deny, admits that the cargo arrived as coal, and that it was of some value. The plt. demurs, and the question for us to consider is, whether a charterer whose cargo has been damaged by the fault of the master and crew, so as upon arrival at the port of discharge to be worth less than the freight, is entitled to excuse himself from payment of freight by abandoning the cargo to the shipowner. We think not; and we should not have taken time to consider but for the general importance of the subject, and of its having been suggested that our law was silent upon this question, and that the plea was warranted by the usage and law of other maritime countries, which it was said we ought to adopt. The principal foreign authorities upon the effect of damage to the cargo upon the right to freight are referred to in Abbott on Shipping, part 4, c. 9, pp. 324 *et seq.* of the 10th edition, by Serjt. Shee. The ancient and modern French laws are stated and discussed in Boulay-Paty, Cours de Droit Maritime, vol. 2, pp. 484 *et seq.* The Spanish law is to be found in articles 787 to 790 of the Código de Comercio, and in de Bacardi's Diccionario del Derecho Marítimo, title "Flentamento." The law of the United States is laid down in 1 Parson's Maritime Law 172, n. The continental authorities are not altogether consistent with one another, and, in so far as they tend to sanction this plea, they seem to have been founded upon two notions: first, that the cargo is the sole and exclusive security for the freight, to which the shipowner ought to be contented to look, and by abandoning which the merchant ought to be allowed to free himself from any responsibility; and, secondly, that in the case of culpable damage the freight is forfeited. The first of these propositions was maintained by some even in the case of fortuitous damage (2 Boulay-Paty, 44 *et seq.*; Casaregis de Commercio, Discursus 22, p. 60, No. 46); and it has even been insisted, but unsuccessfully, that it applied to the case of undamaged goods: (Gilbert's Code de Commerce, note 3 to art. 310, p. 89 of the edition of 1854.) This doctrine, as applied to fortuitous damage, must, however, now be considered as exploded, upon the plain ground that a contract to pay for the carriage of a thing in money cannot be satisfied by a cession of the thing itself in a damaged state to the carrier against his will. With respect

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to goods damaged by the fault of the master, it has also been laid down in general terms, in conformity with the second of the governing ideas already stated, that the master, besides being liable for the damage, shall lose his freight. This was the law of the Hanseatic League (2 Pardessus' Collection of Ancient Maritime Codes, p. 550), and of other commercial nations: (1 Casaregis de Commercio, Discursus 28, Nos. 85 to 89, p. 66.) Casaregis, besides being one of the best commercial lawyers who wrote before the introduction of the modern code, has given in his elaborate work references to the more ancient writers, and we content ourselves with referring to his summary of the law as then understood upon the continent. He was born at Genoa, in 1675, and died in 1737, after having been for twenty years a judge of the Rota of Florence. In one of the passages last referred to (No. 85), that great lawyer first states that the effect of culpable damage was to work a forfeiture of freight, "non solum tenetur navarchus ad emendationem damni ejus dolo, vel culpa mercibus obventi . . . sed mercedem sive naulum etiam pretendere non potest." Here the doctrine of forfeiture is clearly asserted, and the same in No. 16 of the same discourse. The author then proceeds to state, that, where damage is occasioned by accident, without fault, the merchant may abandon if he thinks proper: "Adverte tamen quod si merces corruptæ vel vitiatæ fuerint ob casum fortuitum, non culpa navarchi, mercator tenebitur integrum naulum solvere, vel si ei non inter erit integrum naulum solvere poterit loco nauli merces relinquere, et ratio est quia naulum debetur propter merces." He goes on to state, upon the authority of Targa, that this only applies in favour of the consignee, and not of the charterer of the entire ship, who is bound by his contract to pay the stipulated freight upon the arrival of the goods: "Id procedit in mercatore, cui consignandæ sunt merces à navi conductæ, cæsus in nautizatore totius navis, quia ille indistinctè tenetur semper naulum conventum pro tota navis locatione solvere: (Targ. Ponder. Marit. c. 84, s. per ei noli.)" Moreover, he adds, that in the case of culpable damage, it is not competent to the merchant to abandon the cargo to the shipowner and the claim of the whole value, except where the goods are reduced to a state of uselessness or nearly so; clearly showing that the right of abandonment in such a case affected the amount of damages, and not the freight. In No. 89, citing John de Hevia, a Spanish writer of repute, Casaregis expressly says: "Non autem est in electione dominorum mercium, aut recipere res deterioratas et petere damnum vel eas relinquere magistro et petere ut solvat pretium, sed illas præcisè recipere debent, et petere à magistro damnum, quod passæ fuerint, præter quam si hujusmodi damnum esset inutile quia ferè res reductæ fuerint ad inutilitatis statum, tunc enim illas relinquere poterunt et simul pretium ab eo petere, ad latè tradita: (per Hæviam de Commercio Navale, c. 12, n. 38.)" It should seem, therefore, that the notion of the cargo being the sole security in case of fortuitous damage, and that of forfeiture of freight by culpable damage, neither of which is consistent with our law of contracts, was the prevailing idea amongst those lawyers who held an abandonment to be a satisfaction of freight, and that it was not a condition in their laws that the cargo should be worth less than the freight, although practically it was only in such a case, or where he wished to get rid of a troublesome adventure, that the merchant would, with his eyes open, exercise the right to abandon. We have to add, that the law of the United States is unfavourable to this plea. Professor Parsons, in his learned work on Maritime Law, vol. 1, p. 172, lays down as the rule of those States, that, if the cargo arrives in specie, notwith-

standing that it is damaged, whether fortuitously or culpably, so as to be worthless, the freight is saved, although, in case of culpable damage, set-off is allowed. This allowance of set-off, it must be observed, affects procedure only; so that we could not adopt it even in the case of a contract made where such law prevails. Indeed, in this case a set-off could not avail the debt; for the damage is not alleged to have been equal to the freight. It ought to be borne in mind, when dealing with such cases, that the true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and, according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged state when they arrive. If the shipowner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carry part, but not the whole, no freight is payable in respect to the part not carried, and freight is payable in respect to the part carried, unless the charter-party make the carriage of the whole a condition precedent to the earning of any freight—a case which has not within our experience arisen in practice. As to freight *pro rata itineris*, in respect of goods accepted and their future carriage waived, at an intermediate port, it becomes due not under the charter-party, but by a new contract, inferred from the conduct of the parties, so that we need not stop to discuss it. It was in such a case that Lord Mansfield in *Luke v. Lyde*, 2 Burr. 882; 1 W. Bl. 190, said that the merchant, "if he abandons, is excused freight, and he may abandon all though they are not all lost." This is correct, if instead of "abandon" be read "decline to accept," because it is clear that when the goods have not been carried all the way the merchant need not, in order to prevent a liability for freight *pro rata*, give up the property to the shipowner; and abandonment, in maritime law, involves a giving up of the property. Little difficulty exists in applying the above test where the cargo upon arrival is deficient in quantity. Where the cargo, without loss or destruction of any part, has become accidentally swelled (*Gibson v. Sturge*, 10 Ex. 622), or perhaps diminished, as by drying (Jacobson's Sea Laws, book 3, c. 2, p. 220) freight (usage of trade apart) is payable upon the quantity shipped, because that is what the contract refers to. The Spanish Code of Commerce makes a distinction between decrease and increase. Article 787 provides that the entire freight shall be due for goods which are deteriorated or diminished by accident without fault (*caso fortuito*) by intrinsic defect, or by the bad quality and condition of the packages. On the other hand, article 791 enacts, that if the merchandise is increased in bulk or weight by natural causes the merchant shall pay freight in proportion to the excess. In the case of an actual loss or destruction by sea damage of so much of the cargo that no substantial part of it remains; as, if sugar in mats shipped as sugar, and paying so much per ton, is washed away, so that only a few ounces remain and the mats are worthless, the question would arise whether, practically speaking, any part of the cargo contracted to be carried has arrived. Such a case seems to be within the principle of the French ordinance, and the second clause of art. 310 of the Code de Commerce, though they are both in terms confined to the case of liquids where all, or nearly all, has leaked out, so as to include molasses, but not sugar. Pothier, "Sur la Charter-partie" (4th vol. of Pothier's Works, by Bugnet, p. 404) deals with these as cases in which the thing contracted to be carried has perished before arrival. The Spanish Code of Commerce, art. 790, after enacting that the shipowner

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cannot be compelled to receive the cargo, whether damaged or not, in payment of the freight, arbitrarily laid down, as to liquids of which more than half has been lost, that the merchant may abandon for the freight. A reference to these provisions is enough to show that the task of finding an uniform rule in modern commercial law is at present impossible. Where the quantity remains unchanged, but by sea damage the goods have been deteriorated in quality, the question of identity arises in a different form; as, for instance, where a valuable picture has arrived as a piece of spoilt canvas, cloth in rags, or crockery in broken shreds, iron all—or almost all—rust, rice fermented, or hides rotten. In both classes of cases, whether of loss in quantity or change in quality, the proper course seems to be the same, viz., to ascertain from the terms of the contract, construed by mercantile usage, if any, what was the thing for the carriage of which freight was to be paid, and by the aid of a jury to determine whether that thing, or any and how much of it, has substantially arrived. If it has arrived, though damaged, the freight is payable by the ordinary terms of the charter-party; and the question of fortuitous damage must be settled with the underwriters, and that of culpable damage in a distinct proceeding for such damage against the ship, captain, or owner. There would be apparent justice in allowing damage of the latter sort to be set-off or deducted in an action for freight; and this is allowed in some (at least) of the United States: (1 *Furons on Merc. Law*, 172, n.) But our law does not allow deduction in that form, and as at present administered, for the sake, perhaps, of speedy settlement of freight and other liquidated demands, it affords the injured party a remedy by cross-action only: (*Davidson v. Gwynne*, 12 East, 381; *Stanes v. Hall*, 1 Hurl. & N. 831; *Sheils, or Sheilda, v. Davies*, 4 Camp. 119; 6 Taunt. 65; the judgment of Parke, B., in *Mondel v. Steele*, 8 M. & W. 858; *The Don Francisco*, 6 L. T. Rep. N. S. 183, per Dr. Lushington.) It would be unjust, and almost absurd, that without regard to the comparative value of the freight and cargo when uninjured, the risk of a mercantile adventure should be thrown upon the shipowner by the accident of the value of the cargo being a little more than the freight, so that a trifling damage, much less than the freight, would reduce the value to less than the freight; whilst, if the cargo had been much more valuable, and the damage greater, or the cargo worth a little less than the freight, and the damage the same, so as to bear a greater proportion to the whole value, the freight would have been payable, and the merchant have been put to his cross-action. Yet this is the conclusion we are called upon by the debt to affirm in his favour, involving no less than that damage, however trifling, if culpable, may work a forfeiture of the entire freight, contrary to the just rule of our law, by which each party bears the damage resulting from his own breach of contract, and no more. The case above supposed is not imaginary; for it has actually occurred on many occasions, and notably upon the cessation of war between France and England in 1748, which caused so great a fall in prices that the agreed freight in many instances exceeded the value of the goods. The merchants in France sought a remission of freight or the privilege of abandonment, but in vain: (2 *Boulay-Paty, Cours de Droit Commercial*, 485, 486.) It is evident enough from this review of the law that there is neither authority nor sound reason for upholding the proposed defence. The plea is naught, and there must be judgment for the plt.

Judgment for the plt.

Wednesday, Jan. 20, 1864.

THE SUBMARINE TELEGRAPH COMPANY v. DIXON.

Submarine telegraph—Liability of shipowners for damage done to the cable—Negligence.

In an action for damage done through negligence to the telegraphic cable of the plts. by reason of its being dragged and broken by an anchor from the defts.' ship, the defts.' pleaded that they were aliens, and that their vessel was more than three miles from the seashore of England and out of the jurisdiction, and that in the usual and ordinary course of navigation the ship had occasion to cast anchor and afterwards got it up again, and that the anchor, without any default of the defts.', and in consequence of the effect of the winds and waves upon the vessel, dragged the cable, and became entangled in it, and was necessarily a little injured; and that there was no buoy to mark the position and existence of the cable, of which the defts. were wholly ignorant: Held, that the plts. had a good cause of action, as it must be inferred that shipowners were aware of the existence of those cables, and therefore were bound to navigate their vessels with such care and skill as not to damage them.

Declaration, for damaging a submarine telegraph cable laid down within three miles from the shore.

The second count was the same as the first, only varying the distance from three to eight miles from the shore.

Demurrer and joinder to first and second counts.

Fifth plea, as to the said first count, that the cable was lying more than three miles from the seashore of England, and therefore out of the realm, that the vessel was and is a Swedish vessel, and not subject to the laws of England; and that the anchor was cast in the regular course of navigation, and that in consequence of the effect of the wind and waves upon the vessel dragged and became entangled with the part of the cable, and that on getting up the anchor it became necessary to disentangle it from the cable, and that in so doing it was necessarily a little dragged and injured; and also that there was no buoy or mark of any kind to show the spot in which the cable was lying, which was at the bottom of the sea and incapable of being seen, and the place and position and existence thereof was wholly unknown to the defts. and their servants having the management, direction, and control of the said vessel and anchor.

The ninth plea to the second count was to the same effect as the fifth plea to the first count.

A replication to this plea averred that defts. had means of knowledge of the existence of the cable, and where it lay, and it was through the carelessness, negligence and want of ordinary or any care of the defts. and their said mariners and servants that they did not know of the position and existence of the cable; that the anchor was not cast and got up in the due course of navigation, and that it was through the carelessness and mismanagement and culpable want of knowledge of the defts. that the grievance occurred.

Third replication to so much of the fifth plea as alleged the grievances to have been committed out of the realm, the plts. averred that one end of the telegraphic cable was fastened to the soil of the county of Kent, and carried thence across the seashore of the county unto and into the sea abutting thereon, and the part injured was within three marine miles of the seashore and coast of the county of Kent.

And by way of new assignment the plts. alleged that the part of the cable injured was within three miles of the shore, and that defts. were informed and had express notice of, and well knew, the position and existence of the cable, and were warned

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and cautioned that they would injure the same, and that they used unnecessary force in disentangling the anchor and cable.

There were similar replications and new assignments to the ninth plea.

Demurrer and joinder to above replications and new assignments.—And as to so much of the fifth plea as puts in issue the realm, dominion, sovereignty and jurisdiction of our Lady the Queen in and over the said high seas, and alleges that the defts. were aliens domiciled in and subject to the laws of Sweden and not to the laws of England, and that the ship was a foreign ship on a foreign voyage, and puts in issue the deft.'s liability to answer in this court in respect of the grievances in the first count mentioned, the pls. say that the said fifth plea is bad in substance.

Joinder in demurrer.

There were like demurrers and joinders to the ninth plea to the second count.

Rockfort Clarke, for the pls., contended that persons using a highway were bound to use due care so as not to damage anything, and that the defts. were liable, as they had shown that they were acting negligently; and as to the question of their having no notice of the cable being there, it was a point for the jury to decide; and even if they had no notice when they cast anchor, yet they had no right to allow their anchor to drag along the bottom, and then to carelessly pull it up, and so damage the cable. He referred to

Wyatt v. Harrison, 3 B. & Ad. 871;

Chadwick v. Trower, 6 Bing. N.C. 1;

Dodd v. Holme, 1 A. & E. 498;

The Mayor of Colchester v. Brooke, 7 Q. B. 339;

Butterfield v. Forrester, 11 E. 60.

(He was stopped by the Court.)

Archibald (Bovill and Lush, Q. C. with him) contended that the direction was bad, as it disclosed no imperative duty on the defts.; and that it is not sufficient to aver negligence unless some breach of duty is shown. He cited

Metcalfe v. Hetherington, 11 Ex. 257;

Southcote v. Stanley, 1 H. & N. 247;

White v. Crisp, 10 Ex. 312;

Harmond v. Pearson, 1 Camp. 515;

The Saronia, 1 V. Lush. 410; 6 L. T. Rep. N. S. 6;

Dutton v. Powles, 31 L. J. 191, Q. B.; 6 L. T.

Rep. N. S. 224;

Cox v. Burbidge, 32 L. J. 89, C. P.

ERLE, C. J.—I am of opinion that the declaration which charges the deft. by reason of his negligence with damaging the cable of the pls. is good. I assume, for the purpose of this action, that the bottom of the sea may be used for lawful purposes as well as the surface, and the court may, I think, take judicial notice of there being submarine cables, as they are named in Acts of Parliament, and are known by every one, to belying at the bottom of the sea. The pls., in my opinion, had a right to use the bottom of the sea, and to place cables there for the purposes of telegraphic communication, and the deft. had also a right to traverse the surface of the sea for the ordinary purposes of navigation, and to let go his anchor if the need of navigation required it. In this case the two rights happened to conflict; the pls.' property was damaged and their right violated by the deft. breaking their cable with his anchor; but the deft. says, "I am not answerable, because I had a right to navigate my ship in the way I did, and to let go my anchor:" the pls. answer to which is, "You might have had that right, but you were bound to exercise that right with due care and skill, and you had no right, by your negligence, to damage my property." The whole case turns upon that word "negligence," and after this argument it seems clear to me that the deft. is liable if there was

negligence; that is, if the cable would not have been broken had the deft. used due care and skill a person is bound to use due care towards who has conflicting rights, I think the dir. good, and I think the plea is good also. Discussion has been a profitable one, as it was the question clearly before the jury. The further says, "I was exercising my right of navigation, and I let go my anchor, and the damage complained of was caused by your not putting and therefore I am not responsible, as I had no notice or knowledge of the cable being there; there is no notice, a man who is navigating with due care and skill is not responsible, but here the assignment in effect traverses the plea, and the deft. had notice, and that he did not use due care and skill. Now it appears to me that, although the defts. acted in the lawful enjoyment of a right, they have exercised that right negligently. If they had used the care and skill which they were bound to use, the mischief would not have happened. A person, knowing that another has claims which conflict with his own, carelessly forgets them, and is almost guilty of wilful injury. The declaration, therefore, in my opinion, is good, and the ninth plea is also good. With regard to the argument that the damage arose from the pls. having placed a buoy over the cable, and the defts., without notice, could not be responsible, that argument cannot be admitted. If there had been notice, a man navigating with due care would not be liable. But the new assignment effect traverses the plea, and alleges that there was no due care. If the defts. had no knowledge of the cable, at least the means of knowledge; and if it had been taken away, the declaration and new assignment are good. It has been said that if the vessel had been damaged by the cable the owners might have been sued. If such had happened, the same would have arisen as does here; and if it had been tried, the jury would be directed to say whether or not the pls. had laid down buoys with due caution, in order that other persons might have means of avoiding the damage.

WILLIAMS, J.—I am of the same opinion. I think the declaration is good, as it raises no substantial question in the case. With respect to the new assignment, I am willing to treat it as a part of the pleas, although it is somewhat opposed to the view of what was the object of a new assignment.

WILLES, J.—I am of the same opinion. The matter complained of took place on the high seas, and the pls. may support this action. A vessel navigating a vessel must navigate her in such a way that she shall not, by the negligence of her captain, damage the property of others. So, if any vessel is mentioned in the charts of the ports which she visits as lying at the bottom of the sea, and the captain has not these charts on board, or, if he has, does not choose to use them, he must nevertheless do no harm to that object. But the persons to take these matters into consideration are really more questions of fact than of law. The declaration, therefore, appears to me to be good, and so do the fifth and ninth pleas. The fourth replication, however, is bad, as it is a part of the plea which does, in our judgment, appear to be material. But as to the new assignment, I cannot but agree with my brother that the meaning to be put upon it is unusual.

Judgment for pls. on demurrers to new assignment and for defts. upon the demurrers to the ninth plea and third and fourth replications.

Attorneys for pls., *Davies, Son, Campbell & For deft., Bower.*

EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

ERROR FROM THE QUEEN'S BENCH.

Feb. 2 and 3, 1864.

(Before ERLE, C. J., WILLIAMS, J., MARTIN, B., WILLES, J. and CHANNELL and PIGOTT, BB.)

THE CALCUTTA AND BURMAH STEAM NAVIGATION COMPANY v. DE MATTOS.**DE MATTOS v. THE CALCUTTA AND BURMAH STEAM NAVIGATION COMPANY.***Contract—Transfer of property—Bill of lading—Policy of insurance—Non-delivery of the goods.*

By written contract A. agreed to supply B. with 1000 tons of coals delivered at Rangoon alongside craft, steamer, floating depot, or piers, as directed by B.'s agent there; the price to be 45s. per ton of 20 cwt., delivered at Rangoon. Payment, one-half of invoice value by bill at three months, on handing bills of lading and policies of insurance to cover the amount, or in cash under discount at the rate of 5 per cent. at A.'s option, the balance by B.'s Rangoon agent's drafts on B. in London, on completion at Rangoon:

A. accordingly shipped 1166 tons of coal, and handed the bill of lading and a policy of insurance to B., who paid half the invoice price, less discount. In consequence of foul weather, part of the coals were cast overboard, and the ship so damaged as to be unable to proceed. The captain chartered another vessel and forwarded the residue of the coals, 850 tons, to Rangoon. On the ship's arrival there, delivery of the coals was refused, unless B.'s agent paid the freight, which he declining, the coals were sold by auction, and bought by B.'s agent:

Held, per Erle, C. J., Williams and Willes, JJ., and Channell, B. (Martin and Pigott, BB. dissenting), that the property in the coals passed to B. on their shipment and handing over by A. of the bill of lading and policy of insurance to B.:

Held, further, that A. could not recover the unpaid moiety of the invoice price, as no delivery took place under the contract:

Held, lastly, (Williams, J. dissenting), that B. could not recover from A. the moiety paid, as A. had partially performed his part of the contract, and the parties could not be put in statu quo.

Error upon a judgment of the Court of Q. B. on the following

SPECIAL CASE.

The first-named action was brought by the plts. to recover damages from the deft. in respect of the non-delivery by the deft. of certain coal he had contracted to deliver to the plts.' agent at Rangoon under the circumstances hereinafter stated, and also to recover back from the deft. the sum of 1295*l.* 11*s.* 7*d.*, paid by the plts. to the deft. under the circumstances hereinafter set forth, with interest at 5 per cent. from the 5th July 1860.

The action secondly named was brought by the plt. to recover from the defts. the sum of 1311*l.* 15*s.*, being the balance of the contract price of the coal hereinafter mentioned, together with interest at 5 per cent. from the day when the balance ought, according to contract, to have been paid, and which he claimed to be due to him under the circumstances hereinafter set forth, or to recover the value of the 850 tons of coal bought by the company at Rangoon as hereinafter mentioned.

Both the company and De Mattos carry on business in London. In May 1860 De Mattos contracted with the company to supply them with 1000 tons of coals under the contract contained in the following letters:—

London, 1st May, 1860.

Gentlemen.—I am prepared to supply your company with 1000 tons of any of the first-class steam coals on the Admiralty list, at my option, delivered over the ship's side Rangoon, at 45*s.* per ton of 20 cwt., the same to be shipped within three months of the date of acceptance of this offer; payment of one-half of each invoice value in cash, on handing your bills of lading and policy of insurance to cover the amount, and balance by like payment upon delivery. Whilst holding this contract, it is of course understood as customary that you do not enter into any engagement with any other parties for this port that would involve a detrimental competition. Are you open for Moulmein? Awaiting your reply, I am, &c.

W. N. DE MATTOS.

The Calcutta, &c. Company (Limited).

W. N. De Mattos, Esq.

London, 4th May, 1860.

Sir,—In reply to your letter of the 1st inst., I am now authorised by the directors to accept your tender for the coals on the following terms, viz. that you supply our company with 1000 tons of first-class steam coals on the Admiralty list, the selection of the particular description to be at the company's option, delivered at Rangoon, alongside craft, steamer, floating depot, or pier, as may be directed by the company's agent of that port. The coals to be shipped in whole cargoes, or in quantities of not less than 400 tons, half the quantity, say 500 tons, to be shipped not later than 10th June proximo, and the remainder all in that month. The price to be 45*s.* per ton of 20 cwt., delivered at Rangoon, payment one-half of each invoice value by bill at three months, on handing bills of lading and policy of insurance to cover the amount; or in cash under discount at the rate of 5 per cent. per annum, at your option; and the balance in cash, at the current rate of exchange, on right delivery at Rangoon. Respecting the obligation to which you would bind our company not to enter into engagements with other parties for the shipment of coals to Rangoon, whilst you hold this contract, it can only be understood to refer to other parties in London. I shall be obliged by your letting me know as soon as possible if you agree to the above terms.—I am, &c.,

CHARLES REINER, Officiating Secretary.

London, 5th May, 1860.

Chas. Reiner, Esq., Officiating Secretary.

Sir,—With reference to your letter of the 4th inst., I note and confirm its contents, with the following exceptions:—First, that the selection of coals under my contract with your company be at my option. I always, insuring that the same be upon the Admiralty list. Secondly, that I will undertake the shipment of the whole quantity, viz. 1000 tons, by the 30th June, but cannot bind myself to 500 tons by the 10th June; but, of course, my best endeavours will be to ship some as much earlier than these dates as possible. Thirdly, that the payment of the balance of each invoice value, be made by your Rangoon agent's draft upon your company here at thirty days' sight, on completion of delivery of each cargo respectively. Fourthly, as regards fresh contracts for Rangoon during the time mine is in course of fulfilment, it is to be agreed between us that I am to have, at any rate, the refusal of any contract for coal supplies for that part during the said time.—I am, &c.

W. N. DE MATTOS.

London, 7th May 1860.

Sir,—In reply to your letter of the 5th inst., I have to inform you that the directors insist on retaining at the company's option the selection of coals obtainable at whatever port you may load the vessels. As regards fresh contracts, the only restriction to which the directors will consent is, that they will not enter into any fresh engagements with other parties in London during the time that you hold the contract. Unless, therefore, you are prepared to meet the views of the directors as to these two conditions, the negotiations must be broken off. An early reply will oblige yours, &c.,

CHARLES REINER, Officiating Secretary.

London, 7th May 1860.

Calcutta and Burma Steam Navigation Company (Limited). Gentlemen,—With reference to your letter of to-day's date, I hereby agree to contract for 1000 tons of coals for shipment to Rangoon upon the amended conditions contained in that letter. I will ship part, if possible by the 10th June, but I engage that the whole quantity shall be shipped by the 30th June next.—I am, &c.,

W. N. DE MATTOS.

De Mattos, for the purpose of carrying out his contract, chartered the ship *Waban* for Rangoon, but without the company being a party to the charter, and shipped on board thereof, in pursuance and upon the terms of his said contract, 1166 tons of coals and delivered to the company a bill of lading thereof, of which the following is a copy:—

"Shipped, in good order and well conditioned, by W. N. De Mattos, in and upon the good ship called the *Waban*, whereof is master for this present voyage S. A. Hartridge, and now riding at anchor in the port of Cardiff, and bound for Rangoon, 1166 tons of Swgbareven Merthyr steam coal which are to be delivered in the like good order and condition

alongside any craft, steamer, floating depôt, wharf, or pier where the ship can be afloat at the aforesaid port of Rangoon, as the agent of the charterer may direct (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind soever excepted) unto the agent of the Calcutta and Burmah Steam Navigation Company, or to his assigns. The ship to be discharged in regular turn at the rate of not less than 80 tons per working day (weather permitting), and when required by the charterer's agent, such extra quantity as may be practicable, and if not discharged in the time above specified, demurrage to be paid at the rate of 4*l.* per ton register per diem. Freight for the said goods to be paid by the charterer, as per charter-party, with average accustomed. In witness whereof the master or purser of the said ship hath affirmed to five bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void.—Dated in Cardiff, 29th June 1860.

"Weight unknown to S. A. Hartridge."

The charter-party was dated London, May 18, 1860, and was between S. A. Hartridge, master of the *Waban*, and De Mattos, for a full cargo of coals to be loaded at Cardiff, and to proceed to Rangoon, Moulmein, Singapore or Penang, at charterer's option, orders to be given on signing of bills of lading, or so near thereto as she may safely get and deliver the same alongside any craft, steamer, floating depôt or pier, where she can float as ordered by the consignee (the act of God, &c. mutually excepted). The freight to be paid in London, on unloading, and right delivery of the cargo at and after the rate of 40*s.* per ton of 20 cwt. on the quantity delivered in full of all port charges, pilotage, Bute dock, &c. dues, and such freight is to be paid, say one quarter at freighter's acceptance at three months, and one quarter by like acceptances at six months, from the final sailing of the vessel from her last port in the United Kingdom; the same to be returned if the cargo be not delivered at the port of destination; the freighter to insure the amount and deduct the cost of so doing from the first payment of the freight, and the remainder by a bill at three months from the date of delivery, at the freighter's office in London, of the certificate of the right delivery of the cargo agreeably to the bills of lading, less cost of coals or fuel short delivered, or in cash under discount at 5 per cent. per annum, at freighter's option. The vessel to be addressed to the freighter's agent abroad free of commission, paying 2 per cent. to freighter in London, to Pilkington Brothers, to whom commission of 5 per cent. on this contract is due, ship lost or not lost; 300*l.* to be advanced in cash at port of discharge on account of this freight, upon customary terms, against captain's draft on freighter at ninety days'sight. The ship and her freight are bound to this venture.

De Mattos also effected an insurance for the sum of 1400*l.* and handed the policy of insurance with the bills of lading to the company in pursuance of the contract. The policy was sent by De Mattos to the company with the following letter:

Waban. 5th July 1860.

Dear Sir,—Herewith I hand you Ocean Marine policy for 1400*l.* for this ship as collateral security against the amount payable by you on account of the invoice order, say 1311*l.* 15*s.*, receipt of which please own.—Yours truly,

W. N. De Mattos.

C. Reiner, Esq., Calcutta and Burmah S. N. Co.

This was acknowledged by their secretary the same day, as follows:

5th July 1860.

Dear Sir,—I beg to acknowledge receipt of your letter of this day's date with a policy of insurance for 1400*l.* on the cargo of coals per *Waban* to be held as collateral security for the payment to you of 1311*l.* 15*s.* on account of the invoice of that shipment.—Yours faithfully,

CHARLES REINER, Officiating Secretary.

W. N. De Mattos.

The policy was, in so far as any question in this case is involved, as follows:—

"And touching the adventures or perils of the seas, men-of-war, fire, pirates, rovers, thieves, jettisons, letters of marque, counter-marque, surprisals, takings at sea, arrests, restraints, and detainers of all kings, princes and people of what nation soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage to the aforesaid subject-matter of this insurance, or any part thereof, and in case of any loss or misfortune I shall be lawful to the insured, their factors, servants and assigns, to sue, labour and travail in and about the defence, safeguard and recovery of the aforesaid subject-matter of this insurance, or any part thereof, without prejudice to this insurance the charges whereof the insurers shall bear in proportion to the sum hereby insured. And it is declared and agreed that corn, fish, fruit, flour and seed shall be warranted free from average unless general, or the ship be stranded, and that sugar tobacco, hemp, flax, hides and skins shall be warranted free from average under 5*l.*, that all other goods, also the ship and freight, shall be and are warranted free from average under 3*l.* per cent unless general, or the ship be stranded."

The invoice value of the coals amounted to 2623*l.* 10*s.*, and the company on the 5th July 1860 paid to De Mattos on account of the said coals the sum of 1295*l.* 11*s.* 7*d.*, being one-half the invoice value of the coals, less discount for cash paid to De Mattos by the company, De Mattos having exercised his option of being paid the same in cash less discount.

The ship *Waban* sailed on her voyage on the 8th July 1860. On the 13th Sept. 1860 the ship whilst on her voyage, began to experience very heavy weather, which continued down to the 18th on which day the ship gave a heavy lurch, which caused the cargo to shift, and it became necessary for the preservation of the ship and the crew to throw overboard a part of the coals, and accordingly a part, but no more than was necessary for the purpose, was thrown overboard. The ship, though leaking badly, continued on her voyage till the 22nd Oct. 1860, when the weather continuing very tempestuous, the ship still leaking, and the crew being worn out and disabled, it became necessary for the preservation of the ship, her cargo and her crew, to deviate from the voyage and to proceed to the island of Mauritius, and the ship arrived at Port Louis in that island on the 4th Nov. 1860.

On the 5th Nov. 1860 the ship was properly surveyed at that port, and on the 3rd Dec. 1860 a second survey was held, when it was found that the ship was wholly unseaworthy, that the necessary repairs could not be done at Port Louis, and that the ship could not, consequently, complete her voyage. The remainder of her cargo was, consequently, discharged, and the master of the ship *Waban* reshipped 850 tons of the coals, being a portion of the *Waban's* cargo, on board the United States ship *Alfred Lamont*, then lying at Port Louis.

The following is the bill of lading signed by the master of the *Alfred Lamont*:—

"Shipped in good order and well conditioned, by S. A. Hartridge, master ship *Waban*, in and upon the good ship called the *Alfred Lamont*, whereof I am master for this present voyage William D. Anderson, now riding at anchor in the harbour of Port Louis, and bound for Rangoon, 850 tons of Cardiff steam coals, more or less, not accountable for weight; all on board to be delivered, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Rangoon, the act of God

EX. CH.] THE CALCUTTA AND BURMAH STEAM NAVIGATION COMPANY V. DE MATTOS. [EX. CH.]

the Queen's enemies, fire and all every other dangers and accidents of the seas, rivers and navigations of whatever nature and kind soever (risk of coals so far as ships are liable to excepted) unto the agents of the Calcutta and Burmah Steam Navigation Company, or to their assigns. Freight for the said goods to be paid in cash on right delivery of cargo, at 2*l.* 5*s.* per ton, with prime and average accustomed."

In the margin of this bill of lading was this stipulation: "The ship to be discharged in regular turn at the rate of not less than forty tons per day; if over that time, 10*l.* per day demurrage for every day; ship free from commission." The cost and expenses of discharging the coal from the *Waban* and reshipping 850 tons on board the *Alfred Lamont* amounted to 597*l.* 6*s.* The master of the *Waban* being unable to raise that amount in any other way, sold 222 tons of the coal, part of the *Waban's* cargo, at Port Louis, which realised 371*l.* 14*s.*, and he drew a bill for the balance (including interest thereon), viz. for 237*l.* 7*s.* 4*d.*, upon De Mattos, of which he advised De Mattos by letter dated the 5th Feb. 1861. The company were not parties or privies, nor was De Mattos, to any part of the transaction above detailed, which occurred between the 9th July 1860 and the 5th Feb. 1861. De Mattos refused to accept or pay the above bill for 237*l.* 7*s.* 4*d.*

The *Alfred Lamont* arrived at Rangoon on or about the day of 1860 with the said coals on board. These coals were by the captain of the *Alfred Lamont* offered to the company's agent at Rangoon, but the captain of the *Alfred Lamont* claimed freight at the rate of 2*l.* 5*s.* per ton before he would make delivery of the said coals; whereupon the said agent of the company refused to pay the said freight, and the said coals were by the direction of the captain of the said barque *Alfred Lamont* put up for sale by public auction, and sold at Rangoon. Such sale was conducted in the manner in which sales by auction in that country are usually conducted, and at the sale so conducted the agent of the company at Rangoon became the *bonâ fide* purchaser of the coals on behalf of the company at the price of 1*l.* 5*s.* per ton (there being no competition for coal in such large quantities, and the said price being the best that could be got). No part of the said cargo of 1166 tons of coal shipped to Rangoon by the *Waban*, and mentioned in the said bill of lading, was ever delivered to the company, or to any agents of theirs, at Rangoon, save as aforesaid, but 850 tons of the said cargo did come into possession of the company and their agent at Rangoon in the manner aforesaid.

The Court was to be at liberty to draw any inference of fact and to direct any amendment in the case necessary for determining all questions between the company and De Mattos.

The questions for the opinion of the Court were:

1. Whether the company are entitled to recover back from De Mattos the moneys so paid by them to De Mattos on account of the said coals, together with interest at the rate of 5 per cent. per annum from the 5th July 1860.

2. Whether the company are bound to pay De Mattos the contract price of the said 850 tons, together with or without interest at 5 per cent., less any, and if any, what deductions.

3. Whether De Mattos has any and what claim, and for what amount, against the company, in respect of the sale to and purchase by them of the coals at Rangoon, as above set forth.

Judgment was to be entered in both actions according to the judgment of the court, and for such amount as the court might determine.

The case was argued in the Court of Q. B. in *Michaelmas Term 1862*, and the Court, after taking

time to consider, were divided in opinion, Cockburn, C.J., and Wightman, J. holding that the property in the coals passed to the company, but that De Mattos was bound to deliver them at Rangoon, and not having done so, was bound to refund the moiety of the purchase-money paid: and Blackburn and Mellor, J.J. holding that, under the circumstances, neither party had any right of action against the other.

Mellor, J., the junior judge, withdrew, and the judgment was entered up in conformity with the opinion of Cockburn, C.J. and Wightman, J.

De Mattos thereupon brought error.

Mellish, Q. C., (*Beresford* with him) for De Mattos.—The principal point in the case is, whether the property in the coals passed to the company upon being put on board the ship, and the bill of lading and the policy of insurance handed over by De Mattos. It is submitted that the right construction was put by Blackburn, J., in his judgment in the court below, and that the property did pass to the company. The contract was not to deliver at Rangoon, and the words "delivered at Rangoon" were only inserted to show that the agreed price was to include every expense up to the delivery, which was contemplated to be Rangoon. The bill of lading was made out to the company's agent, and it was unnecessary for De Mattos to have an agent at Rangoon:

Freeman v. The East India Company, 5 B. & Ald. 617;

Shipton v. Thornton, 9 A. & E. 314;

Gibbs v. Gray, 2 H. & N. 22.

Bovill, Q. C. (*T. Salter* with him) for the company.

—The contract was to deliver at Rangoon 1000 tons of coal. Until delivery, the company could not tell whether the coal was of the agreed quality or quantity. The property did not pass, because De Mattos was bound to deliver: (*Tregelles v. Sewell*, 7 H. & N. 574.) The captain of the *Alfred Lamont* was of necessity agent for De Mattos. As there was no delivery to the company at all, they are not bound to pay the residue of the invoice value, and they are entitled to recover back the moiety they have paid:

Logan v. Les Mesurier, 6 Moo. P. C. 116;

Covas v. Bingham, 2 E. & B. 836;

Acruman v. Morice, 8 C. B. 449;

Couturier v. Hastie, 8 Ex. 40; 9 Ex. 102; 5 H. of L. Cas. 673;

Great Indian Peninsular Railway Company v. Sanders, 1 B. & S. 41;

The Gratitude, 3 Rob. Ad. 257.

Feb. 3.—*ERLE, C.J.*—The questions that we have to answer are apparently two. The third question, whether Mr. De Mattos had a claim against the company with respect to the purchase by them of the coal at Rangoon, it is not necessary to answer. The first question is, whether the company are entitled to recover back from Mr. De Mattos the money paid by them to him on account of the said coal. I am of opinion that the company are not entitled to recover back from Mr. De Mattos the half price of the cargo that was paid to him; and my view of the contract is the same as that taken by my brother Blackburn. It is a mercantile contract, and taking the whole of it together, although it is capable of the construction that the seller contracted to deliver at Rangoon, in my opinion it was a contract for the coal, saving the perils of the sea; and it would be to my mind entirely out of course with respect to the sale of the specific cargo, with a bill of lading and a policy of insurance put upon it, to construe that to be a contract at all events to deliver 1000 tons of coal at Rangoon. There is no time mentioned for it. I asked, yesterday, would Mr. De Mattos be bound, if

the coal went to the bottom of the sea, to send out another cargo? It is also in my mind entirely out of the contemplation of the parties, that the seller of such a cargo going by sea, in respect of which a policy of insurance has to be effected, should be liable for a breach of contract in case the cargo was swallowed up by the sea. It seems to me to stand to reason between the buyer and seller of such a cargo, to be conveyed from Cardiff to Rangoon, that the seller did not contract to be liable for a breach of contract which he was prevented carrying out by the perils of the sea. If he was liable for the breach of contract, it stands to reason he must have been, as one of the contracting parties, still liable, by reason of its not being performed, for the price that the company would have to pay at Rangoon to get the 1000 tons of coal which he contracted to deliver, and which would be to my mind a consequence that the seller, making such a contract as this, did not contemplate. If so, there would be no right to recover back. I quite agree in the grounds taken by the learned judge, Blackburn, J., in the court below, and according to that, the objection to the property passing, and so forth, would have no application. I quite agree with the minor ground that has been taken, that it was a contract for a sum of money to be paid by the company, and to receive in consideration of that payment a bill of lading, and a policy of insurance, which involves a cargo set afloat, a cargo appropriated past retraction by the seller to them, by delivering the bill of lading in which the company are the consignees, and that the price was paid for that consideration. That being so, the first question would be answered against the company. As to the second question, whether the company are bound to pay Mr. De Mattos the contract price of the 850 tons which did arrive at Rangoon, it is clear to me that they were not tendered to the company in performance of the contract of De Mattos, who was to deliver the coals free from the freight. The coals arrived at Rangoon in the American ship to which they had been transhipped, and the American captain refused to deliver them to the consignee without the payment of 2*l.* 5*s.* for the freight, and the company had agreed to have the coal delivered to them free of freight at Rangoon. Therefore Mr. De Mattos, or his agent the American captain, never contracted, and had no right to impose the term that he should pay 2*l.* 5*s.* freight, and therefore Mr. De Mattos has no right to say the company were guilty of a breach of contract in not paying it.

WILLIAMS, J.—I have come to a contrary opinion. This case depends entirely on the construction of the contract. I take the same view of it as Cockburn, C.J. did in the Court of Q.B. I do not think it is necessary to add anything more in the expression of my opinion upon it than to say that I have read the opinion given by him, which is very clear, and I agree with him, and I do not think I can do anything more by adding any words of my own.

MARTIN, B.—I am also of opinion the company are not entitled to recover back from Mr. De Mattos the money paid by them on account of "the said coal," and I found my opinion entirely upon the contract, and for the purpose of arriving at that opinion I take the written language, and I put upon it, as far as I can, the common, ordinary and natural construction, and I endeavour to carry out as well as I can the contract which the parties really made, and in my judgment the result is, that the company are not entitled to recover the money. Now the contract is contained in some letters. The first is one from Mr. De Mattos to the company on the 1st May 1860, in which he states, "I am prepared to supply your company with 1000 tons of coal delivered

over the ship's side at Rangoon at 45*s.* per ton 20 cwt." Now if a man were proposing to another that he would take upon himself the risk of sending a cargo of coal to Rangoon, I am utterly at a loss to know what more apt words he could use. How is a man to express himself, when he so bargains with another, but by saying, "I am prepared to supply your company with 1000 tons of coal, deliver over the ship's side at Rangoon, at 45*s.* per ton of 20 cwt.?" And as I read the language it is, "I will deliver to you a ton or tons of coal over the ship's side at Rangoon, upon your paying me 4*l.* for each ton." And that seems to me the clear, ordinary, common-sense meaning. There is nothing either illegal, or, as I think, unusual, in a man proposing to take upon himself to deliver goods at a distant place. Now that is Mr. De Mattos's proposition. It is answered by the letter of the 4th May from the company, and they say, "In reply to your letter, I am authorised by the directors to accept your tender, on the following terms: that you shall supply our company with 1000 tons of coal delivered at Rangoon alongside the craft, steam floating depot, or pier, as may be directed by the company's agent at that port." Now, there is, as seems to me, clearly a proposition, on the part of the company, and what they propose to buy is coal delivered at Rangoon alongside the craft. Then it goes on to say, "The price to be 45*s.* per ton of 20 cwt. at Rangoon," and how can that be read other than that they were proposing to buy this coal at the price of 45*s.* per ton at Rangoon, without entering into the question of whether the property passed or not? What did the one propose to sell, and the other propose to take? It was, the one to deliver, and the other to accept, at Rangoon, 1000 tons of coal. Then it goes on thus (on which my judgment turns, with respect to the not recovering): "Payment one-half of the invoice value, by bill at three months, on handing bills of lading and policy of insurance to cover the amount, or in cash under discount, at the rate of 5 per cent. per annum, at your option; and the balance in cash on delivery." That, in my judgment, is as much a part of the contract as the other, and, in my mind, has a very clear and intelligible meaning, and requires nothing but the application of attention to it to ascertain what the parties intended; and I apprehend what they meant was this: "We propose to buy from you coal to be delivered at Rangoon but you probably will want part payment to enable you to ship it, therefore we will agree to pay you beforehand half the invoice, on your handing to us bills of lading and satisfactory evidence that the coal has been put on board ship, and in addition, as we may possibly lose this, you shall give us a policy of insurance to that amount to cover us. And what is there unnatural or unreasonable in this? Both parties have thought that the only cause to prevent the coal being delivered at Rangoon would be its loss by the perils of the sea. They procure the policy and by that policy they were protected, and in the event of the goods not being delivered, they would be *in statu quo* to obtain the half-price back by the policy of insurance, and so far from thinking that there is anything unreasonable in this, it seems to me a reasonable contract as people can well enter into. I am giving this judgment upon the assumption that the 1000 tons were actually shipped. On the other point I say nothing; but I do, for myself, protest against matters being put in special cases (which ought to decide as matters of law) on which the judges are called upon to give an opinion on questions of fact. My judgment is founded on the assumption that this contract is performed by delivering 1000 tons; there is a contract accepted by this: "With reference to your letter of this day's date, I agree to the 1000 tons

there is a contract in writing, and why is the court to imagine states of things different from that which the persons set down in their own written contracts? There is a rule of law that you cannot add to a contract, nor vary it, nor depart from it, where it is in writing; but in point of fact you do break that rule of law if, instead of acting upon the terms people set down themselves, you introduce other suppositions for the purpose of arriving at a conclusion. It is idle for the law to say, "you shall not add to the contract by parol evidence, you shall not alter it, or vary it when the contract is in writing," if, instead of reading the words used, you introduce other matters or suppositions which are not in the contract at all, but are supposed to be in the minds of the parties. Then, what takes place afterwards is this. The coals were put on board this ship. In my judgment the charter-party has nothing to do with it. I think the charter-party was a matter between Mr. De Mattos and the parties from whom he chartered the ship. With respect to the bill of lading, it was in exact pursuance of the contract. I am now assuming that the 1000 tons were in the bill of lading. This and the policy of insurance are delivered, and thereupon Mr. De Mattos writes:—"Herewith I hand you Ocean Marine policy for 1000*l.* for this ship as collateral security against the amount payable by you on account of the invoice." Then there is a letter written in exact compliance with the contract: "I hand you this bill of lading, as I am bound to do, and in addition I hand you a policy for 1400*l.* as collateral security against the amount payable by you on account of the invoice." It seems to me that that letter is in exact conformity with the contract. And then the company again write back: "I beg to acknowledge the receipt of your letter of this day's date, with a policy of insurance for 1400*l.* on the cargo of coal per *Waban*, to be held by the company as collateral security for their payment to you of 1811*l.* 15*s.* on account of the shipment." Therefore it is not merely that Mr. De Mattos wrote it, but there is a letter from the agent entirely adopting it, and stating it, and this is what I believe to be the contract and the manner it is carried out. What then is the legal result of it? Now, I apprehend the legal result is this, that for the purpose of enabling a party to recover back money, he must maintain that the consideration has wholly failed, and unless he is able to put the other party *in statu quo*, he has no right to recover back money he has paid; and my judgment is founded upon this, that it was a part of the contract that Mr. De Mattos was to deliver to the company a bill of lading of the coals, which he did; but then, in addition to that, he was to effect and deliver to them a policy of insurance to the amount of that payment, 1400*l.*, to cover them, and if the money is to be recovered back, what is the consequence? Mr. De Mattos was bound to effect that policy, and he was bound to pay the premiums, and if the money could be recovered back from him, who is to pay to Mr. De Mattos the premiums that would be entirely lost to him? It is impossible, therefore, to put Mr. De Mattos *in statu quo*; and, applying the ordinary rule, that to recover back money that is paid you must put the party entirely *in statu quo*, my judgment is founded upon this, that Mr. De Mattos is not bound to pay the money; that the money must be paid in pursuance of the terms of the contract as written; that Mr. De Mattos was put to the trouble of getting the coal on board the ship; that he was put to the further expense of getting the policy of insurance and paying the premium; and having done this, he has performed a portion of the contract, and an action can never be maintained against

him as for an entire breach or failure of consideration, and upon that ground I think the first question is to be answered in Mr. De Mattos's favour, and in favour of the view suggested by Mr. Mellish. With respect to the second question, that is too clear, it seems to me, to be argued. He was to be paid on delivery. He never delivered the coal, and the delivery of the coal was coupled with a stipulation that 45*s.* was to be paid for freight. The company never contracted to receive coal on these terms, and therefore the contract never was performed; consequently it is utterly impossible for Mr. De Mattos to recover. With respect to the third question, I do not say I have no opinion upon it, but it is not necessary to give it. Mr. Mellish has said exactly what I expected he would say, and I think he is right; but with respect to that matter I am not called upon to give any opinion. I have stated my judgment on this case, and I have stated my own judgment independently. If I am called upon to say, do I agree with my brother Blackburn's judgment, I say I cannot agree with him, but I give my own independent opinion founded on the words of the contract.

WILLES, J.—I am of opinion that the first question ought to be answered in the negative, against the company. It appears to me, on the true construction of the contract, the company were, in respect of the payment which they made before the vessel left this country, to be at the risk, provided Mr. De Mattos fulfilled his part, which part was the shipment of the cargo and procuring a bill of lading which should vest that cargo in them, and insuring the cargo to an extent sufficient to protect them against sea risks and default in the delivery of the cargo. And I agree with my brother Williams, that the security to the company by the policy of insurance shows that they chose to take the risk upon themselves with that security. Now, that being so, in my judgment the company cannot recover back the price. Of course it is immaterial as a matter of reasoning whether I adopt the opinion of my Lord Chief Justice Erle, in accordance with that of my brother Blackburn, that the property did pass, or with the opinion of my brother Martin that the property did not pass; but the risk was to be imposed upon the company. The result is the same; because, if the property was in the company, they must stand the risk, or if not in the company, according to my brother Martin, there are special terms in this contract from which it ought to be concluded they adopted the risk, although the property was not in them. But I may state that, in my own judgment, the property did pass, and it passed because there was a contract between the parties for the value. The company was an independent contracting party for value, because the bill of lading was made out deliverable to the agents of the company or their assigns, so that, after Mr. De Mattos had deposited that bill of lading with the company for the value, he had no longer any control over the goods, and he had not only irrevocably and totally appropriated the cargo to them, but he had, by the contract between himself and the buyer of the cargo and the shipowner, vested the property in the company, they assenting to have that property. That such is the meaning of a bill of lading made out to the purchaser or his order, I have always understood to be settled, and the judgment of Lord Wensleydale in the case of *Bryans v. Nix*, 4 M. & W. 775, concludes, as it appears to me, the whole matter. It shows on the bill of lading how between the seller and the shipowner, upon a contract for value, the property vests in the person designated by the bill of lading, as the person to whom the property is to be delivered, and that person in

this case is the company, because it is to the company's agent. That disposes of the first question. Now, with respect to the second, whether Mr. De Mattos can recover against the company with respect to the remainder of the 850 tons which arrived at Rangoon, I believe all the judges who have considered the matter are clearly of opinion that he cannot, because he was, as I have already stated, bound to deliver at Rangoon to the company, receiving the sum of 17. 2s. 6d. per ton, remaining unpaid, for as much as should arrive in the due course of navigation there. It appears that the coal arrived at the Mauritius, diminished by a large quantity which was thrown overboard, which reduced the 1166 tons to the 850 which arrived at Rangoon. With respect to any damage sustained by the company by the throwing overboard of these coals, they have the policy of insurance to resort to; as I have already said, they have, by the contract, expressed their satisfaction with that security. With respect to the 850 tons which were so transhipped at the Mauritius, the first vessel having become unnavigable, I agree with Mr. Bovill, that this must depend upon the circumstances of the case, into which I shall not enter in detail. Those coals must be taken to have been transhipped and sent on to Rangoon in the due course of navigation, and they arrived there, and then the performance of the contract by Mr. De Mattos imposed upon him the duty of giving the coals to the company's agent, being satisfied with the payment of 17. 2s. 6d. per ton remaining unpaid under the contract. He did not so, and Mr. De Mattos's agent bought them at a sale by the captain of the vessel, rightfully or wrongfully, at the price of 25s. That is, of course, not a delivery under Mr. De Mattos's contract; therefore Mr. De Mattos cannot recover. It might be a question—and I do not think it would be right to pass that by—whether the company are not entitled to recover of Mr. De Mattos the 2s. 6d. per ton which they or their agents had to pay over and above the 17. 2s. 6d. which they had bound themselves to pay on the receipt and true delivery of the cargo. That may well be a question. I do not express an opinion different from that my brother Williams has pronounced, because it is on the application of the principles of law only that I differ from him. I by no means mean to say that, by reason of there being no delivery by Mr. De Mattos at Rangoon, on payment of 17. 2s. 6d. under the contract, they are not entitled, in an action for not delivering, to recover as damages the 2s. 6d. a ton which they had to pay over and above the contract price. It is not necessary to express an opinion on a question that is not raised, because the company are not suing for damages, but for the return of the whole sum of 1800l. and odd which they paid as part price. The question of trover is abandoned. I cannot help, in dealing with questions of this description, considering how the decision at which I feel disposed to arrive tallies with the figures, and if you consider for a moment what the figures are, I think they show plainly, as a matter of business, that neither the company nor Mr. De Mattos can be entitled to recover in respect of the causes of action on which our opinion is asked. First of all, with respect to the recovery back of the 1800l. and odd. As to so much of the 1800 and odd pounds as relates to the coal thrown overboard to save the lives of the crew, there is a remedy on the policy of insurance. As to so much of it as you ought to apportion to the 850 tons that went out to Rangoon, what is the upshot of the facts? They have those 850 tons; they were to pay by their contract with De Mattos for those tons 45s. per ton; they have paid in London 17. 2s. 6d., and they have obtained them at Rangoon at 17. 5s.; therefore the plain upshot is that which I have already indicated, that the

settlement of the matter would consist, if we were to settle it, upon Mr. De Mattos giving them the 2s. 6d. per ton in the form of damages, so that he should return to them the 17. 2s. 6d. per ton which they have paid. But for that ex half-crown they never had the full benefit. It appears to me, on the whole of the case, that neither the company with respect to the price advanced nor Mr. De Mattos with respect to the delivery of the 850 tons, have any claim one against the other.

CHANNELL, B.—On the first question that arises in this case, I am of opinion that the plaintiff, Mr. De Mattos, is entitled to our judgment. Looking at the contract that was made by the latter, which has been so often referred to, and which it is necessary to recur again, I do not think Mr. De Mattos undertook absolutely to deliver a certain quantity of coal at Rangoon for the benefit of the company, so as to be responsible in an action of damages for nondelivery. I think the true effect of the contract was this, that he undertook that payment of the deferred price, that is, the money not paid in London, should not be demandable unless the goods were delivered at Rangoon; and that sense the goods were carried at his risk. It entitles him to recover the amount of the deferred price, it was necessary the goods should arrive at Rangoon. I also agree with my brother Martin in the view he has taken, that we must look at the whole of the contract, and what the question is, whether the company are entitled to recover back from Mr. De Mattos the money paid him on account of the coal, I am of opinion the company are not entitled to recover, looking at the whole bargain, which is, "You shall pay half in London, you shall have a bill of lading, making the goods deliverable to your consignees, and you shall have a policy of insurance." Then, as regards the money paid, the transaction may be considered as concluded between Mr. De Mattos on the one hand and the company on the other; and as regards the deferred price, the goods were carried in the ship just as if no such contract in the bill of lading or policy had been entered into. On both grounds I think the first question must be answered in the negative; but I also think it right to state that I adopt the view taken by my brother Blackburn in the court below and that expressed by the L. C. here, and my brother Willes in this court. On either ground the question must be answered in the negative. As to the second, it does not appear to me that any real difficulty arises. It is clear to my mind that the company are not bound to pay Mr. De Mattos the contract price for the 850 tons taken at Rangoon under the circumstances.

PICOTT, B.—I am of opinion that the company are not entitled to recover back from Mr. De Mattos the money paid by them to him. I take the view of the contract so fully expressed by my brother Martin. It appears to me a very special contract as regards the mode of payment, but as regards the delivery of the coal, the language used by the parties is really almost too plain for argument. It is repeated again and again, that the coal is to be delivered at Rangoon. I do not think, in arriving at that view, we conflict with the decision of the court in *Tregelles v. Sewell*, where the words were "delivered at Harbury." I think Mr. Mellish's argument may be applied to that case, that those words were introduced as ruling the price, and up to that time the price was so much a ton, and that would be very consistent in that case, and yet not at all conflict with our view, that here the goods are to be delivered at Rangoon. It seems to me, upon the whole of the contract, the meaning of the parties is very plain; and then no doubt I would not be at the risk of the company during

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the time the goods were in transit from this country to Rangoon; and it would have had a bearing on the question of their recovering back the money they have paid, but for the special terms of the contract with reference to those payments. I take the view my brother Martin has so fully expressed upon that point, that Mr. De Mattos has complied with all the conditions that entitle him to receive the money and to hold it. He has given the consideration for it and the company are not entitled to recover it back. On the second question, I answer it as the rest of the court, it being clear there is nothing that can entitle Mr. De Mattos to claim from the company the price of 850 tons of coal that were not delivered.

Mellish.—Then it is judgment reversed on the first question, and affirmed on the second and third.

ERLE, C. J.—It was a mere formal judgment in the Q. B. One judge gave way.

WILLES, J.—The result is according to the judgment of Blackburn and Mellor, J.J.

Mellish.—Neither party has any costs of action against the other.

MARTIN, B.—Yes.

ERROR FROM THE QUEEN'S BENCH.

Tuesday, May 10, 1864.

(Before *ERLE, C. J., WILLIAMS, WILLES, and KEATING, J.J., and BRAMWELL, CHANNELL and PIGOTT, BB.*)

OPPENHEIM v. FRY.

Policy of insurance—Particular average.

*A policy of insurance on a steamer stated that the value should be taken as 14,000*l.* on the hull, and 8000*l.* on the machinery, 17,650*l.* average payable on the whole or each, as if separately insured. There was also the usual memorandum that the ship and freight were warranted free from average under 3 per cent. unless general or the ship was stranded. While in harbour at C., after her cargo had been discharged, the ship took fire. The flames were ultimately extinguished, but not until the hull had been seriously damaged. The machinery was not injured. The expenses consequent upon the accident were 377*l.* 12*s.* 6*d.*; the actual damage done to the hull 91*l.* 0*s.* 1*d.*, the cost of the survey of the ship, and 55*l.* 5*s.* 10*d.*, paid for extra labour in putting out the fire. The plt. claimed to treat these sums as particular average to be applied to the hull.*

Held (supporting the decision of the court below), that whether the two latter items were to be considered as general or particular average, yet, as they were to be expended for the benefit of the hull and machinery generally, they must be apportioned; and that, as, adopting that calculation, the portion belonging to the hull would not, with the 377*l.* 12*s.* 6*d.*, the actual loss, make 3 per cent. on the value of the hull, the deft. was not liable.

This was an appeal against a decision of the Q. B. (See *Oppenheim v. Fry*, fully reported in 8 L. T. Rep. N. S. 385.)

MacLachlan (*Edward James, Q.C.* with him) appeared for the plt., and contended as he did in the court below. He cited

2 *Arnould on Insurance*, s. 327, p. 895;

Birkley v. Presgrave, 1 East, 220;

2 *Phil. on Ins.* s. 1269;

Code de Commerce, s. 400;

1 *Emerig.* 584, 585;

Job v. Langton, 26 L. J., 97, Q. B.;

Morgan v. Jones, 26 L. J., 187, Q. B.;

Great Indian Railway Company v. Saunders, 30 L. J.

218, Q. B.;

4 L. T. Rep. N. S. 240;

Sweeting v. Pearce, 29 L. J., 265, C. P.;

30 L. J., 109, C. P.;

5 L. T. Rep. N. S. 79.

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Mellish, Q.C. (Borill, Q.C. and Sir G. Honyman with him) were not called upon.

ERLE, C.J.—Notwithstanding the very able argument of Mr. MacLachlan, I am of opinion that the judgment of the court below must be affirmed. The insurance in this case was upon a steamer, the hull and the machinery being valued in the policy separately, as "average payable on the whole or on each, as if separately insured." Now the perils insured against were the usual perils, and there is the common memorandum, "warranted free from average under three pounds per cent., unless general or the ship be stranded." It appears that a fire occurred on board, and the damage caused by it to the hull amounted to the sum of 386*l.* 12*s.* 6*d.*, which is under three per cent. upon the sum insured upon the hull, and the question in the case arises in respect of a sum of 55*l.* 5*s.* 10*d.*, expended in putting out the fire. Now the assured claims to have that amount added to the amount of damage as expenses incurred in preventing further damage to the hull, and as an expense incurred in respect of the hull only. But at the time when the ship was insured the danger to the machinery was as great as the danger to the hull, and by the expense of 55*l.* 5*s.* 10*d.* the damage both to the ship and to the machinery was prevented. I am of opinion therefore that the average stater has properly appropriated part of the expense to the hull and part to the machinery. The same principle which would have applied if there had been two policies, one on the hull and the other on the machinery, applies. The case is very clearly stated by the learned judges in the court below.

The other Judges concurred.

Judgment affirmed.

Plt.'s attorneys, Ashurst and Morris.

Def't.'s attorneys, Walton and Bubb.

ADMIRALTY COURT.

Reported by ROBERT A. FRITCHARD, D.C.L., Barrister-at-Law.

Jan. 29 and 30, and Feb. 12, 1864.

THE NORWAY.

Breach of duty and breach of contract by the master—Damage to goods by non-delivery and short delivery—Jurisdiction.

In construing the 6th section of the Admiralty Court Act 1861, the court will not be limited by considerations as to whether or not there would be a corresponding right of action at common law, but will so interpret the section as to give a remedy in all cases contemplated by the statute itself.

The St. Cloud, 8 L. T. Rep. N. S. 54, distinguished.

D., by a charter-party between himself and the master of a vessel, stipulated that the vessel should load an outward cargo, proceed to Rangoon, there load homeward cargo (3000 tons dead weight), return to one of various ports at the charterer's option, and there discharge cargo. Freight, a lump sum, part payable in advance before sailing from this country, part in advances on the voyage, part on arrival at return port of delivery, and remainder on final delivery of cargo. The vessel loaded at Rangoon 36,000 bags of rice amounting to less than 3000 tons dead weight of cargo, and some portions of the cargo were thrown overboard, and other portions sold during the voyage. On the ship's arrival at Liverpool, as the port of discharge, the master claimed a sum of money as lump freight, without any deductions for average contribution, or in respect of short cargo, and refused to give particulars for apportioning the average, or to deliver any cargo without payment of the freight which he considered to be due. The plts. tendered the amount.

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conceived by them to be due, and security for the remainder. Part of the cargo was subsequently, by order of the master, landed and improperly warehoused, whereby the plts. received damage.

The vessel having been arrested by the assignee of the bill of lading, who was also owner of the cargo:

Held, that an owner of goods and an assignee of a bill of lading cannot, if he is no party to the contract of charter-party for the ship, sue for any breach of the contract per se, but that he can sue for breaches of such portions of the charter-party as by construction are included in the bill of lading:

That the master was guilty of a breach of duty in not giving information as to the circumstances necessary to ascertain the amount of freight and average due:

That he was guilty of a breach of contract in non-delivery and short delivery of cargo:

That the plt. might sue for compensation in respect of the cargo improperly thrown overboard; but that he was not entitled to set off the damage against the amount due from him for freight.

The Salacia, 8 L. T. Rep. N. S. 91, distinguished.

The plts. in this case, Ashburner and Co., the assignees of the bill of lading and owners of a cargo of rice shipped on board the *Norway*, at Rangoon, and brought to Liverpool, sued the vessel in respect of damage done by jettison and sale abroad of part of the cargo, and in respect of various breaches of duty and contract on the part of the master.

The plts. filed a petition, to which various objections were taken on behalf of the defendants. The material portions of the petition are as follows:—

Art. 2. Charter-party between Captain Major of the *Norway* and W. N. de Mattos, Esq., of Liverpool, merchant, viz.: That the said shipload at Liverpool a cargo of salt, not exceeding 2200 tons, and therewith proceed to Calcutta, and after the discharge of the outward cargo reload (or at freighters' option, proceed to Rangoon, Akyab, or Bassim) a full and complete cargo . . . not exceeding what she can reasonably stow and carry . . . and proceed therewith to Cowes, Queenstown, or Falmouth, at master's option, for orders to proceed to London, Liverpool, Bordeaux, Havre, Antwerp and Marseilles. . . . The vessel to be unloaded at port of discharge according to the custom of the port. . .

In consideration whereof . . . the said merchant does hereby promise and agree to . . . pay 11,250*l.* lump sum, if ordered, to the United Kingdom, Havre, or Bordeaux, 11,625*l.* sterling, if ordered, to Antwerp, or Marseilles. The master guaranteeing to carry 3000 tons dead weight of cargo upon a draft of 26 feet of water, or to forfeit freight in proportion to deficiency. . . . Payment to be made as follows, viz., 2000*l.* to be advanced on the vessel's clearing at Liverpool, subject to insurance only, say 1000*l.* by freighters' acceptance at four months, and 1000*l.* at six months. Sufficient cash for ship's disbursements not exceeding 2500*l.*, to be advanced at Calcutta, and the necessary disbursements, if ordered, to the rice ports, subject to interest and insurance only at current rate of exchange for six months' bills in London, against the captain's receipts, such advances to be made on account of chartered freight, and the balance as follows, namely, one-third in cash on arrival at port of delivery, and the remainder on true and final delivery of the cargo at the said port of discharge by good and approved bills, payable in London, or cash equal to three months' date from the delivery if discharged in the United Kingdom, or in cash at current rate of exchange if discharged on the continent, less three months' interest. . . . It being agreed that for the payment of all freight, dead freight, demurrage,

or other charges, the said master or owners shall have an absolute lien and charge on the said cargo or goods laden on board.

3. At the time of entering into the said charter-party, Captain Major, who was also part owner, well as master of the ship, well knew that the *Norway* could not carry 3000 tons dead weight of cargo upon a draft of 26 feet of water, as stipulated in the charter-party; the ship not being, in fact, as I well knew, of sufficient capacity for that purpose.

4. Agreement between de Mattos and Ashburner and Co., of Calcutta. That the shipment homeward should be on joint account.

5 and 6. Arrival of vessel at Calcutta; thence to Rangoon. There, laden with a cargo of rice, 36,000 bags.

8. Bills of lading for 36,000*l.*, signed by master. Bills of lading as follows: Shipped . . . by . . . in and upon . . . the *Norway*, as per charter-party, 13,000 bags of cargo rice, to be delivered in the like good order and condition at the port of discharge . . . unto order or assigns. Freight for the said goods payable as per charter-party, with primage and average accustomed.

9. Bills of lading indorsed and assigned to plt., who was also the owner of the rice included in the bill of lading.

10. The 36,200 bags of rice, deficient several hundred tons of the 3000 tons mentioned in the charter-party. Draught of water of *Norway* when laden with the rice, less than twenty-six feet.

11. Jettison of some part and sale of other part of cargo.

12. Arrival of ship at Falmouth; orders by charterer that she should proceed to Liverpool and discharge in either the Albert, Stanley, or Wapping Docks, the usual docks for rice-laden ships.

13. On or about the 17th Nov. the *Norway* arrived at Liverpool, but the master . . . said that he would insist on payment of full freight before delivery of any part of the cargo.

15. On the 24th Nov. the master of the *Norway* wrongfully demanded to be paid 6500*l.*, as freight and a further sum of 1000*l.* by way of general average contribution as a condition precedent to delivery of any part of the cargo, and refused to deliver the cargo on any other terms, and on the same day caused his ship to be taken into the Canada-dock without being lightened.

16. Canada-dock not suitable for discharging cargo of rice.

17. The plt. was at all times ready, upon the delivery of the cargo, to pay to the master of the *Norway* all sums due to him as freight and general average, and expressly offered the master to pay into the hands of a third party the full amount in dispute to await the final result, which the master refused.

19-21. Various interviews and letters between Bushby and Co., the agents for the cargo, and Messrs. A. — Taylor and Co., the brokers acting for the ship, proving a determination to retain cargo as lien for freight, and waiver by shipowner of a tender for amount actually due or security.

21. Special damage from wrongful discharge of cargo.

22. The master of the *Norway* has persisted in refusing to give the plts. particulars concerning the weight of cargo shipped at Rangoon, the alleged jettison and sale of part cargo, and other matters necessary for the right calculation of the amount of freight and general averages due from the cargo to the ship.

The master of the *Norway* has actually received from De Mattos, the charterer, or his agents, or the charterer has paid and incurred on account of chartered freight, the following sums, namely, . . . an

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the plt. claims that . . . the said sums are to be deducted from the gross sum of 11,250/., the lump freight mentioned in the charter. The plt. further claims to deduct the value of his goods thrown overboard by the master as aforesaid, and deduction in proportion to amount of cargo not carried as per charter-party. . . . The plt. further claims that in respect of the one-third balance by the charter-party to be paid on arrival of the ship at port of delivery, the defts. had no lien, inasmuch as the said sum being payable before delivery of the cargo is not freight.

The plt. contends that by reason of the premises the master of the *Norway* has committed breaches of duty and breaches of contract, for which the ship and freight are responsible to the plt. by the provisions of the Admiralty Court Act 1861, in respect of, amongst others, the following matters, namely:

For wrongfully guaranteeing in the charter-party that the *Norway* could carry 3000 tons dead weight of cargo, he, the said master, well knowing that the said ship could not carry the said 3000 tons as provided in the said charter.

For not carrying 3000 tons dead weight of cargo, as provided for in the charter.

For throwing overboard part of the plt.'s cargo on the voyage.

For selling part of the plt.'s cargo on the voyage. For refusing to discharge in either the Stanley Albert or Wapping Docks, as lawfully directed by the charterer, and in persisting, without lawful excuse, in such refusal.

In not unloading the ship at Liverpool, the port of discharge, according to the custom of the port as provided for by the charter-party.

In placing the rice of the plt.s. on and in wharfs and warehouses, on and in which goods of a like nature are not usually placed, thereby violating the requirements of the Merchant Shipping Act Amendment Act 1862.

In wrongfully claiming from the plt.s. for alleged freight and general average contribution a larger sum than was due to him, the said master, for same, and in wrongfully detaining the plt.s.' cargo by way of lien for such excessive sum.

In wrongfully withholding from the plt.s. particulars of the weight of cargo shipped, of the jettison, and sale of part cargo, and of other matters necessary for the right calculation of the amount of freight due from the cargo to the ship.

In not delivering the rice of the plt.s. according to the contract contained in the bill of lading.

In breaking the contracts contained in the said charter-party and bill of lading.

The following are the material portions of the Admiralty Court Act 1861, sect. 6:—

The High Court of Admiralty shall have jurisdiction over any claim by the owner . . . or assignee of any bill of lading of any goods carried into any port in England or Wales for damage done to the goods, or any part thereof, by the negligence or misconduct of or for any breach of duty, or breach of contract on the part of the master.

The following were cited in the argument or judgment:

The St. Cloud, 8 L. T. Rep. N. S. 54;

The Kusan, 32 L. J. 97. Adm.; 9 Jur. N. S. 235;

The Tigress, 8 L. T. Rep. N. S. 117; 9 Jur. N. S. 361;

The Santa Anna, 32 L. J. 198. Adm.;

The Salacia, 8 L. T. Rep. N. S. 91; 32 L. J. 41. Adm.;

Wegener v. Smith, 15 C. B. 285;

Hallett v. Wigram, 9 C. B. 580;

Hoe v. Kirchner, 11 Moo. P. C. C. 21;

Kirchner v. Venus, 12 Moo. P. C. C. 361;

Santos v. Brice, 30 L. J. 108. Ex.;

Kern v. Deslandes, 30 L. J. 297, C. P.; 5 L. T. Rep. N. S. 349;

Foster v. Colby, 3 H. & N. 705;

Hall v. Janson, 4 E. & B. 509;

Langridge v. Levy, 2 M. & W. 519; 4 M. & W. 337;

Grant v. Norway, 10 C. B. 665, 16 L. T. Rep. 504;

Coleman v. Rich, 16 C. B. 104;

Bloxam v. Sanders, 4 B. & C. 941;

Smith v. Sieveking, 4 E. & B. 945; 5 E. & B. 581;

Scarje v. Morgan, 4 M. & W. 270;

Hockater v. De la Tour, 2 E. & B. 678;

Dutton v. Poolea, 31 L. J. 191, Ex. Ch.; 5 L. T. Rep. N. S. 224;

Chappell v. Comfort, 10 C. B., N. S., 802; 8 Jur. N. S. 177; 31 L. J. 58, C. P.;

3 & 4 Vict. c. 65;

18 & 19 Vict. c. 111.

Brett, Q.C. and *Cohen* appeared for the defts. in objection to the petition.

V. Lushington (Mellish with him) contra.

Dr. LUSHINGTON.—This is an action purporting to be brought under the 6th section of the Admiralty Court Act 1861. A petition has been filed on behalf of the plt.s. The defts. object thereto, and say the petition ought to be rejected, either wholly or partly, and for the purpose of discussing the admissibility the averments of fact must be taken to be true. [The learned Judge then referred to the material parts of the petition, and continued:] It is said that at common law the plt. would have no right of action in respect of several important matters made the subject of this suit; that there he could not sue under a charter to which he was not a party, nor for a reduction of the lump freight, for which the ship-owner has a lien, on account of loss of goods improperly thrown overboard or injured, nor for any other breach of contract, nor for injury done to goods before the plt. was entitled to delivery of them, nor against the master for withholding the information by which alone the plt. could satisfy himself as to the justice of the demand of freight made by the master; and it is argued, that if no action would lie at common law, this court has no jurisdiction under the 6th section of the Admiralty Court Act 1861, and reliance was placed upon the case of the *St. Cloud*. In that case I declared my opinion that, where a suit was instituted by a bare assignee, the action could not be maintainable, not only because such action could not be brought at common law, but because of the consequences which would have arisen from a contrary opinion. I was, and am, of opinion, that no new right as related to a bare assignee was created by the statute, and I refer to the report for my reasons; but I never said, and never intended to say, that with respect to all matters whatsoever the same restriction was imposed by the 6th section; on the contrary, I am of opinion that it is my duty so to construe the statute as to afford a remedy for all the evils contemplated in the statute itself. I am of opinion that if in the case of any goods carried, or to be carried, into any port in England or Wales, damage has been done by the negligence or misconduct of the owner, master, or crew, or if there has been any breach of duty or breach of contract, then, provided that the owner of the vessel is not resident in this country, the court has jurisdiction over a claim by the owner, consignee, or assignee of the bill of lading, and that it is my duty to afford a remedy, whether or not there would be a remedy in the like case at common law if the owner of the vessel was resident in this country. As to the objection that the plt. sues for a breach of a charter, to which contract he was not

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a party—the parties to that charter being the owners of the ship and De Mattos—I am of opinion that the present plt. cannot sue for any breach of the charter-party *per se*. The plt., however, sues as owner of the cargo and holder of the bills of lading. He is entitled to sue upon the contract contained in the bill of lading, and, so far as that includes stipulations in the charter, he is entitled to sue upon them, not as violations of the contract in the charter, but as breaches of the contract in the bill of lading. The plt. claims that the contract of the bill of lading incorporates all of the charter-party that remained to be carried out, and that, looking to all the circumstances of the case, this must be taken to have been the intent of the parties. The contract of the bill of lading was made by the master, as the agent for the shipowner, with the charterer's agent, and with the charter-party before the eyes of the contracting parties, and referred to expressly in the bill of lading. The freight was the freight payable as freight by charter-party, and that was lump freight, and it is said lump freight implies lump cargo, and therefore full freight is payable without any deductions. This view, however, seems to me to be unsustainable. [The learned Judge then referred to the case of *Chappell v. Comfort*, cited above, and said:] Now, applying these observations to the present case, what is the reference in the bill of lading to the charter-party? The bill of lading declares that the vessel is bound for Cowes, Queenstown or Falmouth, for orders as per charter-party. This includes what is omitted in the bill of lading, but inserted in the charter "at Master's option," and it includes the delivery at all the ports mentioned in the charter. Again, the bill of lading states the goods are to be delivered, the freight payable as per charter-party. I think that these expressions include everything mentioned in the charter-party in relation to freight. There may be great difficulty in ascertaining what that freight is, but the principles by which it must be ascertained are the stipulations contained in the charter. The first stipulation is, that 11,250*l.* lump be paid if ordered to the United Kingdom, Havre or Bordeaux, 11,625*l.* if ordered to Antwerp or Marseilles. As to the next clause, the master guarantees to carry 3000 tons dead weight of cargo upon a draught of twenty-six feet water, or to forfeit freight in proportion for deficiency. I do not say that the holder of the bill of lading could bring an action upon the guarantee, but I do say, that in calculating the freight to be paid, a deduction ought to be made in proportion to the deficiency. I do not say that the holder of the bill of lading could sue on the stipulation for the loading at Rangoon, as the freighter or his agents might consider safe. Under the existing circumstances, the amount due for freight can only be ascertained through the medium of a complicated account of advances and disbursements. The question then arises as to the power of the master to detain the cargo for freight and average until any amount demanded by him, however exorbitant, be complied with, and to require that the holder of the bill of lading in this case shall make a tender to him of the proper amount of freight and average, he, the master, refusing to give any information to him as to the circumstances indispensably necessary to ascertain the amount of freight and average due, and which cannot be in the knowledge of the holder of the bill of lading, and which are within the master's knowledge. That this is a breach of duty under the statute I cannot doubt; and the consequence is that a loss has accrued, by the default of the master to the holder of the bill of lading. Objection was taken to the 11th article before mentioned, and the *Salucia* was cited. That case was different from the present. The present action is not to reduce the freight, for which

there is a lien, by the value of the goods improperly sold; but it is, in substance, an action for breach of contract in non-delivery and short delivery of cargo as per bill of lading. It is said that, even if the alleged breaches are breaches of the contract, the plt. is not in a position to sue upon them. It is urged that he is not entitled to delivery of the goods; he may never be so; until he is, he cannot claim for damage done to the goods to be delivered. It is true that the deft. has a lien upon the goods for his freight, and the plt. cannot reduce this freight by setting off any damage done to his goods; and if this be so, it may be that at common law the plt. cannot bring an action of trover for the goods, because trover requires in a plt. the right, not only of property, but of possession, and this cannot exist with a hostile lien; and I think upon this point reference was made to *Bloxam v. Sanders* (cited above). But I think the same case decides, that though trover does not lie, a special action will lie for damages on the contract, and I think, therefore, the plt. can sue for damage on account of any injury done to his goods by being improperly thrown overboard, for sale, or unloading, or wharfing. He can also sue for damages caused by the delay, from the deft. making improper claims, and refusing to specify particulars. Lastly, he can sue for damages for non-delivery. All that is necessary to enable the plt. to recover is, that he should be willing to perform his part of the contract. The plt. has, indeed, neither paid the freight nor made a tender; but the petition alleges that all tender was waived, and that the plt. was ready and willing to pay what was fair. The result is, that the petition must be reformed by striking out all those articles or paragraphs which purport to allege a breach of the charter-party—that is, of all those stipulations in the charter-party not imported into the bill of lading; that all which imports a breach of the bill of lading, as I have now interpreted it, shall remain, and also all that shows a damage or loss occasioned by the alleged misconduct of the master, whether it be called breach of duty or otherwise.

Tuesday, Feb. 16, 1864.

THE SKIPWITH.

Claim for repairs to a vessel—Subsequent mortgagee liable—Maritime lien—Amendment.

A subsequent mortgagee is liable for repairs previously done to the mortgaged vessel.

The institution of a suit as a cause of necessities does not estop the plt. from pleading and proving subsequently that his claim is in respect of repairs; but the title of the cause must be amended.

Quære, whether a claim for repairs constitutes a maritime lien?

The schooner *Skipwith* being under arrest in a suit for wages, this action was entered as a cause of necessities on behalf of the plts. Charles Hill and others, of Cardiff, Glamorganshire, shipbuilders. Their claim was in fact for repairs done to the vessel in July 1863. The deft. was an assignee of a mortgagee, the mortgage having been transferred to him on the 17th Sept. 1863.

The answer stated (amongst other things) that the repairs were done on the personal responsibility of the owner, that the vessel belongs to the port of London, and at the time of the institution of the cause her owner resided at Swansea.

V. Lushington, for the plts., moved the court to reject the material portions of the answer. The action is properly for repairs under sect. 4 of the Admiralty Court Act 1861. There is a mistake in the præcipe, and the action has consequently been entered as one of necessities; but that does not

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conclude the plt. Besides, repairs are necessaries. The mortgagee can be in no better position than the owner (*The Caledonia*, Swab. 19), and the plt.'s claim would therefore take precedence.

Clarkson for debt.—The cause was entered as one of necessaries, and by that entry the plt. is bound. He must therefore recover, if at all, under sect. 5 of the Admiralty Court Act 1861; but then he cannot recover under that section, as the owner is domiciled in Wales.

The following are the sections of the Act of Parliament referred to:

Sect. 4. The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court.

Sect. 5. The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court, that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales, provided always, that if in any such cause the plt. do not recover twenty pounds he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court.

Dr. LUSHINGTON.—There might be many circumstances which would raise questions of considerable difficulty with regard to the construction of the 4th and also of the 5th section of the Admiralty Court Act 1861, but I cannot say that upon the present occasion I feel much embarrassed. Now the facts of the case are these—that these articles, whether you call them repairs to the vessel, or whether you call them necessaries—were done and furnished in the month of July last, and the plaintiff in this case took a transfer of the mortgage on the 17th Sept. following. He, therefore, in point of time, is clearly posterior to the original demand. The suit is instituted as a cause of necessaries, and if it had happened that the owner of this vessel had not been resident in England, I am strongly inclined to think it would have been well so instituted, for I think that between the repairs which are mentioned in this account and necessaries in the general explanation of the term, there is very little distinction to be found. But, however, it appears that the suit was instituted as a cause of necessaries, and the first is a technical objection, whether the court under these circumstances ought, if I may use the expression, to non-suit the parties, or whether it ought not to allow some means in order to remedy that which is a mere technical accident. Reference has been made to the past practice of this court, and I have no doubt that Mr. Clarkson is right when he says it has always been customary to state that a cause was of this or that description, but there never was a case to my knowledge, in which, in consequence of an erroneous description in the title of the cause, of the person who was unfortunately guilty of that mistake, by negligence or otherwise, was estopped from suing in this court. There has been no such case, and I apprehend the court has ample means of reforming that difficulty, supposing it to occur; for I should have nothing to do but to give leave to the plt. to amend, and say it was a case of repairs, and not a case of necessaries. Now, with respect to the meaning of the 4th section, which is as follows. [The Court read the 4th section cited above, and proceeded:—] I am of opinion that, however the claim originally arose, whether it arose from giving credit to the master of the vessel, or not—provided that the claim was not satisfied at the time, and that the work for building, equipping, or repairing had been done and provided, also

that the ship and proceeds were under the arrest of the Court—it was and is competent to the party to proceed here. A difficult question might arise, whether in the wording of this section the claim which has been given in can be called a maritime lien or not, and if not, what would be the proper denomination of it. But Mr. Clarkson has argued, and very properly argued for his client, that his client never would have been responsible for these repairs, because the mortgagee was not in possession. That is perfectly true, but I do not see how that benefits him in the slightest degree, because he stands in the position of the original owner of the property, and takes his mortgage *cum onere*, and is, therefore, liable to all the repairs and all the debts legally attaching to the ship. I will give leave to amend the title of the cause, and with regard to the other questions I have expressed my opinion.

Answer rejected, but without costs, the question decided being primæ impressionis and depending upon an ambiguous section of an Act of Parliament.

March 12 and 22, 1864.

(Before the Right Hon. Dr. LUSHINGTON.)

THE PACIFIC.

Necessaries and mortgage—Priority—Domicil—Admiralty Court Act 1861, s. 5.

The term "domiciled" in the Admiralty Court Act 1862, s. 5, is used in the ordinary legal sense, and if the owner of a ship is only temporarily absent from this country, an action for necessaries cannot be maintained against his ship.

A material man has not by the mere fact of supplying necessaries a maritime lien against the ship. To obtain that lien he must have arrested the ship by warrant from the High Court of Admiralty.

In the months of Nov. and Dec. 1861 and Jan. and Feb. 1862 the plt. furnished a vessel with necessaries. On the 12th Dec. the debts became mortgagees of the vessel and duly registered the mortgage. On the 4th Feb. 1862, the plt. arrested the vessel in a suit in respect of the necessaries:

Held, that the plt.'s claim in the Admiralty Court accrued at the date of the arrest of the vessel, and must therefore be postponed to the mortgage of the debts.

The Skipwith, 10 L. T. Rep. N. S. 43, not followed.

This was a suit for necessaries, and was brought by Joseph Hodgkinson, of Southampton, engineer, against the steamship *Pacific* and against John Morris and Frederic Palmer Martindale, joint mortgagees of the ship intervening.

The question in this case came before the court on objection to the debt's answer.

The petition alleged, amongst other things, that the plt., being duly employed for that purpose, executed in the months of Nov. and Dec. 1861, and the months of Jan. and Feb. 1862, certain work, consisting of a new gallery to the *Pacific*, and repairs to her hull, cabins and machinery; that in the month of Aug. 1862, Arthur Turner Clarke, the sole registered owner, quitted this country and went to reside at New York, or elsewhere in America, and that at the time of the institution of this suit he had no domicile in this country, and that the mortgagees of the ship have intervened and given bail in the suit.

The answer alleged, amongst other things, that the said Arthur Turner Clarke left this country for the purpose of meeting his said ship at New York, but that he then intended to return to England, and still intends so to do, and that he was at

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the time of the institution of this suit only temporarily absent from England, and was at such time domiciled in England or Wales, within the intent and meaning of the Admiralty Court Act 1861. That, if the court has jurisdiction, the mortgagees claim priority of payment.

Deane, Q. C. and *Middleton* appeared in objection to the answer; and *Mellish, Q. C.* and *E. C. Clarkson* in support.

DR. LUSHINGTON.—This is a suit for necessities, and is brought by *Joseph Hodgkinson*, and defended on behalf of the mortgagees of the ship. A petition has been given in, and an answer filed, and the present question arises on a motion to reject the answer. The necessities were supplied partly in Nov. 1861, and partly subsequently. The mortgage bears date Dec. 12, 1861, and was duly registered at the time. On the 4th Oct. 1863 the mortgagees took possession; and on the 4th Feb. 1864 this suit was instituted. The owner left England in Aug. 1862. There are two objections which I am about to consider, and which I think will dispose of the question before me. The first is, that at the time of the institution of this suit the owner was domiciled in England, and if true, the court could not entertain the case. In order to oust the jurisdiction of the court, the statute requires that the plt. shall prove that the owner was so domiciled at the institution of the suit. A discussion having arisen as to the meaning of the word domiciled, I am of opinion that the Legislature has used it in its known legal sense, such as we find it defined by the highest legal authorities, and I think that if the owner was only temporarily absent *animo revertendi* the action would not lie. And though it may be true that such a construction would very much narrow the effect of the statute, which is remedial, no such consequence would justify the court in giving to the word domiciled a meaning different from that which legally appertains to it. I cannot reject this article, but it must, if it is to be relied upon, be reformed by more specific pleading, that is to say, by alleging where this person was resident at the time when the order for the necessities was given, and when they were furnished. In its present form the article is too vague, as it states merely that he quitted this country at a particular time, and is likely to return, and does not proceed to set forth where he was previously domiciled, and where he is now resident. The most important question, however, is, whether the material man can maintain his claim to priority of payment before the mortgagee. If he cannot, then he has in this case no effectual remedy, for the amount advanced on mortgage would exhaust the funds arising from the proceeds of the ship. The essential element in a mortgage transaction is the pledge of the ship itself; for though the mortgagee may also take the personal covenant of the mortgagor, he relies mainly upon the ship as his security, which becomes fixed when the deed is registered, and which cannot be displaced by the subsequent act of any third person, unless that third person is possessed of some lien which entitles him to precedence. By the law of some countries the material man has a lien upon the ship, and in very early times in this country also he could maintain a suit against the ship in the Court of Admiralty. But the decision of the Privy Council in the case of the *Neptune*, 3 Knapp, 94, took from this court the last vestige of such a jurisdiction, and from that date until recently the only remedy of the material man was at common law, and there of course he could only proceed against the owner, and not against the ship. This state of things was partly altered by the 3 & 4 Vict. c. 65, s. 6, which gave the

Admiralty Court jurisdiction to decide all claims and demands whatsoever for necessities supplied to a foreign ship, and to enforce the payment thereof, whether such ship or vessel might have been within the body of a county, or upon the high seas, at the time when the necessities were furnished. This statute not applying to British vessels the Admiralty Court Act 1861 gave the court jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it should be shown to the satisfaction of the court that at the time of the institution of the suit any owner or part owner of the ship is domiciled in England or Wales. The reason of these enactments seems to be plain. A real action in the Admiralty Court is given against a foreign vessel in all cases, because the owner is assumed to be beyond the jurisdiction and *vice versa* it is denied against a British vessel where the owner is within the jurisdiction, or for a similar reason where the necessities are supplied in the home port, because the presumption is, that the supplies were made upon the personal credit of the owner, who would there be known and trusted. In other words, the remedy against the ship is given only where a personal action against the owner would be fruitless, and then only when the supplies have not been made upon his personal credit. The material man, therefore, by the mere fact of his furnishing necessities, in no case obtains the ship as a security until he commences a suit in the Admiralty Court; and in the case of a British ship may never obtain it at all, if by reason of the owner having his domicile in this country the suit cannot be instituted. This, I think, shows that the material man has not a maritime lien, for that accrue instantly with the circumstances creating the claim, and not from the date of the intervention of the court. In the present case the debts on the 12th Dec. 1861, by registering their mortgage, acquired the ship as a security, and at that time the plt., though they had supplied the necessities, had not instituted a suit, and therefore had no lien on the ship. And it was not until Feb. 4 1864, that the plt. arrested the ship, and thereby acquired security, but the ship was then by law subject to other claims. Under these circumstances the plt. must take the ship, subject to the incumbrances of the debts, unless the Act clearly prescribed that the claim of the necessities man should override that of the mortgagee. But of this no trace whatever is to be found. It has, indeed, been urged that the court should follow equitable principles in regulating the priority of incumbrances and that the mortgagee having, if the fact be so had the benefit of the supply of the necessities, his claim must be postponed to that of the material man, in the same way that in bottomry bonds the first bondholder is postponed to the second. This argument is not without weight, for upon such grounds rests the law of all those countries which give the material man a lien upon the vessel. But this is not the view of the English Legislature as expressed in the Act, which, as has been before stated, gives him no lien upon, but only a right to proceed against, the ship. For these reasons, after having given the question the best consideration in my power, I have come to the conclusion that, in the circumstances of this case, the mortgagee is entitled to be paid in preference to the material man; and in such case, according to the answer, the whole funds, viz. the proceeds of the ship, would be exhausted. Now, I think I am bound to notice the case of the *Skipwith*, as reported—and I have no reason to say not correctly reported. It may be that in that case some of the observations made by me, either really or apparently, are not reconcilable with this judgment. The observations may have

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been correctly reported, but erroneously applied to the facts of the case, as I am now able to ascertain them. I regret that the case of the *Skipwith* was not brought before the court in a more formal shape, and that it was not more maturely considered; but, if I was in error in that case, assuredly I would never for a mere nominal consistency persist in it. I must order the answer to be amended, but I shall not give the costs of the motion, as the case well deserved serious consideration.

SOUTHERN DISTRICT OF NEW YORK.

(Before Hon. W. D. SHIPMAN.)

THE GEORGE WASHINGTON.

Damage by tort—Collision.

Where a large propeller, lying in a slip, was running her screw for the purpose of testing her machinery, causing a powerful current to set towards the screw, and it becoming necessary to move barges which lay on the other side of the slip, the engineer of the propeller was requested to stop his engine for the purpose, and did so; but while a barge was being moved by his vessel, he started his engine again, and the current made by the screw drew the barge against it, and one arm of it cut into the barge and sunk her, causing damage, to recover which the owners of the barge libelled the propeller:

Held, that the case must be governed by the rules of Admiralty law relating to collisions:

That the case was not one of inevitable accident or mutual fault:

That the engineer was negligent in starting his engine as he did.

Evidence was given of a custom for propellers to run their screws while lying in the slips of New York city:

Held, that, if such a custom exists, the privileges it confers should be exercised with great caution and in such a manner as to interfere as little as possible with the use of the slips by other vessels:

That even though such a custom were proved, yet when the engineer of the propeller had consented to stop his engine for the purpose of moving the barges, the latter had a right to rely on its remaining motionless until they had accomplished their object, provided they were proceeding with no unnecessary delay.

This action was brought to recover about 20,000*l.* damages for an alleged maritime tort. The facts were as follows:—On the 24th Nov. 1862, the steam propeller, *George Washington*, lay at pier No. 9 in the North River, in the city of New York, on the north side of the pier. She was a large new vessel, and was in the process of being completed and fitted for sea. For the purpose of trying and perfecting her machinery, she had been running her engine and turning her screw during the day. The screw was 13 feet in diameter, and the effect of its revolution, as she lay fastened to the dock, was to cause a powerful current to set towards her screw from the opposite side of the slip. The slip was about 85 feet wide.

The barge *Fair Lady*, a vessel belonging to the Philadelphia Steam Propeller Company, who were the libellants in the cause, lay in the same slip on the opposite side from the *George Washington*. Outside of her lay the barge *Garibaldi*, and ahead of them both lay another propeller, nearer to the end of the pier. During the day it became necessary for the libellants to move the *Fair Lady* out towards the end of the pier. This could not be done safely, at least by any ordinary means, while the screw of the *George Washington* was in motion, as the *Fair Lady* would be in danger of being sucked over by the current caused by the revolution of the screw within reach of its arms. The engineer of the

George Washington was therefore requested to stop his engine while the barges were being moved. He accordingly stopped it, and the *Garibaldi* was moved out and made fast near the end of the pier. The *Fair Lady* was then breasted out from the dock to be also moved forward. She had got about two-thirds of her length past the screw of the *George Washington*, when the engineer of the latter started his engine, thus setting her screw in motion. The powerful current caused at once by its revolution sucked the *Fair Lady* over to the stern of the *George Washington*, where an arm of the screw struck her and cut a hole in her bottom, causing her to sink, by which she and her cargo were greatly damaged, and it was for the recovery of this damage that the action was brought.

For libellants were Messrs. *Benedict, Burr and Benedict*. For respns., Mr. *Parsons* and Judge *Curtis*.

SHIPMAN, J.—This is a somewhat novel case. It must be subjected to the rules of Admiralty jurisprudence in cases of collision, so far as they are applicable to the peculiar features of the case. Of course, contrary to the rule of common law, if both parties are found to be in fault, the damage should be divided. There is no room for doubt that there was fault, and gross fault. The damage cannot therefore be attributed to inevitable accident. But, after a careful review of the evidence, and a full consideration of the very elaborate and able argument of the advocate for the claimants, I am clearly of opinion that the fault is exclusively chargeable to the negligence and unreasonable act of the person in charge of the *George Washington's* engine. His own testimony was taken on the trial, and I think, when fairly weighed with the facts stated by the witnesses for the libellants, it confirms the allegation contained in the libel, of negligent and improper conduct on the part of the steamer, and it satisfies me that the collision was brought about wholly by his unjustifiable act in starting his engine at the time he did. The libellants' witnesses furnish clear proof that he was requested to stop his engine, so that the barges could be moved. He admits himself, in his testimony, that he was requested to stop until they could move a boat or boats; he does not recollect which. He did stop, and the libellants proceeded to move the barges. The *Garibaldi* had to be moved first, as she lay outside of the *Fair Lady*. While the latter boat was in the act of moving without any delay, he suddenly started his engine and precipitated the collision. He states that, in his judgment, his engine was stopped twenty minutes. He then says, "Before I put the engine in motion again I went on deck and looked, and saw that the space between my ship and the boats on the opposite side, at Pier 10, was greater than where I stopped. I then went below and put my engine in motion again." The collision immediately followed. I think the course of the engineer wholly unjustifiable. He knew, or ought to have known, the effect of the motion of his ship's screw on the waters of the ship, and the danger that must attend the movement of any vessel on the opposite side of the ship. He had been requested to stop his engine for the purpose of allowing the vessel to be moved with safety, and that movement was still in progress. Before he ventured to start his engine, he should have fully satisfied himself that the object for which he had been requested to stop had been accomplished. Why he could not have ascertained that it was not accomplished by his own personal inspection it is difficult to conceive; for the proof is overwhelming that the *Fair Lady* was in plain sight, but a few yards from the side of his ship, with quite a number of men on her, engaged at that moment in the act of hauling her past his ship.

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If he looked at all, with any desire to ascertain the true condition of the *Fair Lady*, he could only have failed to discover it through great carelessness and inattention. A proper precaution, I think, for him to have taken, would have been to have hailed those in charge of the moving vessel, and thus ascertained from them the condition of things. Some evidence was offered by the claimants to prove that it is a custom for steam propellers to work their screws in the slips of this city; and it has been argued that this is a custom of which the libellants were bound to take notice, and against the consequences of which they should have taken precaution, by holding their barge with stronger lines and more force. An accomplished navigator was examined as an expert, who testified to the custom referred to, and also gave it as his opinion that the movement of the *Fair Lady*, with no more secure lines than she had out when she was moved, was negligence under the circumstances. But one element upon which he founds his opinion consists in the assumption that the screw of the *George Washington* was liable to be put in motion at any minute. If the custom exists at all, it must be reasonable and strictly construed. No custom has been proved in this case broad enough to include the assumption of the experts, that propellers may start their screws at any moment without notice to vessels in the same slip and within reach of the dangerous currents produced by their motion, and thus throw upon such vessels the obligation of using perpetual vigilance and extraordinary means of protection. But, whatever may have been the rights of the *George Washington* under any custom when she had stopped her screw for the purpose of allowing the libellants to move the boats, the latter had a right to rely on its remaining motionless until they had accomplished that object, provided they were proceeding without unnecessary delay. Had not the screw of the *George Washington* been started, the *Fair Lady* would have been removed in perfect safety in a few minutes; and, assuming the custom proved to the extent claimed by the claimants, I think she had so far waived her supposed rights under it for the time being as to deprive her of the privilege of then starting her engine until the movement of the *Fair Lady* could be effected in safety, by the ordinary means and in the ordinary way. There is nothing in the evidence to show that the engineer of the *George Washington* was deceived or misled by any fault of the libellants, or their servants or agents. In disposing of this case I do not intend to adjudicate upon the validity or extent of the custom set up by the claimants; but it is very clear that if such a custom as is claimed exists, the privileges it confers should be exercised with great caution, and in such a manner as to interfere as little as possible with the ordinary use of the slips by other vessels. Let a decree be entered for the libellants, with an order of reference to compute the damages.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs., Barristers-at-Law.

Tuesday, Nov. 17, 1863.

CARR AND ANOTHER v. MONTEFIORE.

Marine policy of insurance—Port of loading.

Where it is stipulated in a marine policy of insurance that the ship and cargo are to be loaded at a particular port, such stipulation is complied with by a constructive loading.

This was a special case stated upon a verdict for the plt. in an action upon a marine policy of insurance. The facts stated were as follows:—

In Aug. 1857 the ship insured, then called the

James N. Cooper, arrived at Montevideo with tons of guano on board, which she had at Liones Island, Patagonia, destined for England. A small portion of the guano was wetted, remainder appeared to be in good condition. The part that was wet was removed and reloaded, the ship had been thoroughly repaired, and cargo were then put up for sale, and by Da Costa Brothers, of Montevideo, who the ship *Dos Hermanos*. They determined her to Cork or Falmouth, to call for orders at a port in the United Kingdom, and it was that Messrs. Jacobs and Co., of Montevideo, advanced 4000*l.* on the security of the ship at which were consigned to their London agent Carr, Josling and Co. (the plts.). This advance was carried out, and Da Costa Brothers requested to effect an insurance on the cargo. They accordingly did so with the defts., of which the deft. is chairman, but nothing as to the cargo having been partially wetted. The face of the policy the insurance was as "on the ship *Dos Hermanos* and her cargo at and from a port or ports in the river to the United Kingdom." The declaration averring the making of the policy, stated ship, with the goods on board, departed on voyage, and during the continuance of the voyage, she was obliged to put into a port of refuge, where found unfit to proceed on her voyage, thereon it became necessary to sell her cargo, and they were sold accordingly and wholly lost. The breach laid was the non-payment of the insurance money. The defts. pleaded to this declaration, of which the only material was that the goods were not shipped at any port or ports in the river Plate. The plts. joined issue upon the above plea, and demurred to it, on the ground that the not the whole of the goods in the river Plate answer to the action. The question for the court was, whether the plts. were entitled to recover the policy in respect of both ship and cargo, either and which of them.

E. James, Q. C. (Millward and Potter) appeared for the plts., and contended that the policy covered the cargo:

Rickman v. Carstairs, 5 B. & Ad. 651;

Robertson v. French, 4 East, 130;

Nowen v. Kettlewell, 16 East, 176;

Gladstone v. Clay, 1 M. & S. 418;

Bell v. Hobson, 16 East, 240.

Brett, Q. C. (T. Jones and Cohen) with him for the defts. that, to enable the plts. to recover the cargo must have been loaded at the port in the policy, and moreover that the insurer have been informed of the fact that the cargo had been wetted:

The William, 5 Chr. Rob. 385;

Murray v. The Columbian Insurance Co.
11 Johnson's Rep. 301 (United States).

E. James, Q. C. in reply:

Boyd v. Dubois, 3 Camp. 133.

COCKBURN, C. J.—I think our judgment be for the plts. Two points were made by the defts. in this case on which our opinion is reserved. First, it was said, the risk, according to the policy, being upon a cargo loaded at Montevideo, and the cargo having been, in fact, loaded at Liones Island, in Patagonia therefore, followed the rule laid down in the earlier cases on the terms of the policy had not been complied with. Secondly, it was said that material facts had been concealed from the underwriters. As to the first point, it is, no doubt, true that there was no actual loading at Montevideo; and if the actual

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establish the proposition that an actual loading must take place at the port named in the policy, then the defence raised here is a sufficient one. But the case of *Nonnen v. Kettlewell*, 16 East, 176, establishes the proposition that there may be a constructive loading. There the cargo had been loaded at one port, and then entered another, viz., that named in the policy, where a portion of it was removed, examined by the custom-house officers for excise purposes, the duty ascertained on it, and then it was replaced in the vessel. This reloading of part was held a sufficient loading of the whole cargo to satisfy the policy. A constructive loading therefore will be sufficient. Then arises the question, whether there has been such a constructive loading here. It seems that a part of the cargo was taken out in order to ascertain the condition of the ship. The ship was then repaired, and the cargo replaced. These circumstances make the case very similar to *Nonnen v. Kettlewell*, but I prefer rather to take the broader ground, that at Montevideo there was an entire change in the ownership of the goods and the vessel, and a partial change of destination. This made the voyage commenced from that port a new adventure. I also consider that the cargo was constructively loaded at Montevideo. I do not pronounce any opinion upon the cases to which *Nonnen v. Kettlewell* is an exception. It is, however, quite clear that Lord Ellenborough thought, in *Bel v. Hobson*, 16 East, 240, that they had been pushed quite far enough. To decide the second point, we need give no opinion upon the case of *Boyd v. Dubois*, 3 Camp. 133, though it certainly does seem to me a very strong thing to say that where articles containing the germs of their probable destruction, such for example as hemp, are placed in a damaged condition on board a vessel, the insurer need not be told of it. However, we need not positively decide whether that case is right or wrong. Here a part of the cargo was wetted, but that part was landed, and doubtless got dry before it was replaced in the ship. But, even assuming that some damage was done, it is very likely that neither Da Costa Brothers, nor Jacobs and Co., had any knowledge of the circumstances. On these grounds, therefore, I think our judgment should be for the plt.

WIGHTMAN and MELLOR, JJ. concurred.

Judgment for the plt.

Plts.' attorneys, Oliverson and Co.

Def'ts' attorneys, Pearce and Co.

Wednesday, May 11, 1864.

WILSON v. NELSON.

Marine policy—Valued or open—Construction.

A marine policy in the usual printed form with blanks for the particulars to be inserted in writing, contained, when filled up, after the words "the said ship and goods are and shall be valued at 1," the words in writing "as under." At the foot of the policy was written "1300L on freight warranted free from capture," &c.

Held, that the memorandum at the foot referred to the insurable interest and not to the value of the subject-matter of the insurance, and that therefore the policy was an open one.

Action upon a policy of insurance upon the ship *Genoa* from Quebec to Antwerp.

At the trial before Shee, J., in London, after last Hilary Term, various objections were raised by the def't., but it was now conceded that they were untenable unless it could be established that the policy was a valued one, and not an open one. The verdict passed for the plt.

The policy was in the ordinary printed form with

blanks left for the particulars to be inserted in ink. At the head of the policy in the margin was "1300L on freight." After the words, "the said ship, &c., goods and merchandise, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at," were interpolated in writing the words "as under." Then at the foot of the policy in the margin were the words "1300L on freight, warranted free from capture, seizure, piracy, detention, or the consequence of any attempt thereat."

A rule nisi having been obtained to enter the verdict for the def't.,

Bovill and Watkin Williams appeared to show cause, but were stopped by the Court.

Archibald in support of the rule (*E. James, Q.C.* with him).—The words "as under" being written in ink show that it was the intention to express the value on the face of the policy, and it is only reasonable to presume that the 1300L mentioned at the foot of the policy was the value at which the parties set the freight.

CROMPTON, J.—I am of opinion that this is not a valued policy. When the parties say 1300L on freight warranted free from capture, &c., they do not mean to say that the subject-matter of the freight is valued at that amount, but the object is only to specify the amount of the insurance, and the subject-matter of it, and if they meant that it should be a valued policy they should put in the words "freight valued at so much." Here I think it should be construed that the parties do mean to insure 1300L on freight, but that no value is put as applicable to that freight.

BLACKBURN, J.—I am of the same opinion that this is not a valued policy. The insurers bind themselves each in proportion to his subscription to make good the loss to the insured in proportion to the sum insured; and in order to ascertain what that proportion is, it is necessary to know the whole amount insured. Then it is necessary to see what the loss is. That depends in an open policy on what was the value of the subject-matter insured. But the parties may agree that the subject-matter shall be valued at a certain sum, so as to render proof of its real value unnecessary; and if they do this the policy is called a valued one. But then it must appear on the face of the policy that the subject-matter of the insurance is so valued, and that may be expressed in various ways. So that it becomes a question of construction of the policy, does it show that the parties have affixed the value to the subject-matter of the insurance? The policy here is in the ordinary printed form up to the words "valued at," and then follow the words "as under" in writing. Then looking below we find in the margin the words "1300L on freight warranted free from capture," &c. Construing those words in their grammatical sense, they mean that the insurance is 1300L on freight, and not that the freight is valued at 1300L. There was no evidence of any mercantile usage as governing this form of the document given at the trial, and I therefore give my judgment simply on the grammatical sense of the words.

MELLOR, J.—I am of the same opinion, for the reasons already given by my learned brothers. Mr. Archibald admits that the meaning of the words are ambiguous, and if so that seems fatal to his contention.

SHEE, J.—I am of the same opinion.

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LLOYD v. GUIBART.

Tuesday, May 31, 1864.

LLOYD v. GUIBART.

Ship—Bottomry bond—Liability of owner of foreign ship—Money paid by freighter to release cargo.

The master of a French ship undertook by charter-party to convey cargo belonging to plt. from West Indies to Liverpool. The vessel put into Fayal in distress, where the master hypothecated the vessel for repairs. On her arrival in this country proceedings were had in the Admiralty Court on the bottomry bond, and plt. obliged to pay money to release the cargo. To an action on an implied promise to indemnify the plt., the defts. pleaded that the ship was a French ship, and the defts. French subjects domiciled in France, and that by the law of France the owners of any French ship may in all cases free themselves from the acts and engagements of the master by the abandonment of the ship and freight, and that they had done so. The plt. demurred to this plea, and also replied (secondly), that the plt. had elected that his goods should be carried to England, and that the law of the country where the charter-party was made, and where the bottomry bond was given, was similar to the law of England, and not to that of France. To this replication the defts. demurred:

Held, that the deft. was entitled to judgment, for the authority of the master to bind the owner of a ship is governed by its flag, and therefore in this case by the law of France, which must be taken on demurrer to be as stated in the plea.

Declaration:

That the defts. were the owners, and interested in a ship called the *Olivier*, then in foreign parts, to wit, the West Indies, of which ship one J. F. Lemaire was the master; that the plt. at the West Indies caused to be shipped upon board the said ship a cargo, of the value, to wit, of 3000*l.*, to be carried and conveyed from there to Liverpool, and at Liverpool to be delivered by the defts. to the plt. for freight; that the said ship, on the 9th Oct. 1860, set sail on her said voyage to Liverpool, and whilst proceeding on her said voyage, in consequence of injuries sustained on her said voyage, caused by stormy weather, was, by the said master, necessarily taken to a foreign port, to wit, Fayal, to be repaired: that the said ship was there repaired by the authority of the said master, and expenses necessarily incurred by him in and about the said repairs and stores, and victuals for the crew of the said ship, and other necessary expenses incident to the premises. That the said master at Fayal, and neither the defts. or any person interested in the ship being resident there, or natives thereof, or having any agent there, in order to defray the said expenses, amounting to 300*l.*, and in order to enable him to prosecute and complete the said voyage, was compelled to hypothecate and borrow money on bottomry of the said ship; that he did hypothecate the said ship, to wit, by executing three bottomry bonds for three several sums, duly advanced to him in that behalf, and which, together with interest, amounted in the whole to 2400*l.* That by each of the said said bottomry bonds the said ship, freight and cargo was duly mortgaged, assigned and hypothecated so as to make the said ship, freight and cargo a good and valid security in the hands of the obligee thereof for the payment of the said sums therein mentioned, with interest, according to the tenor and effect thereof; and that by the conditions of each of the said bonds the obligee thereof was entitled, in the event of the said ship completing her said voyage, and of the said amount and interest not being paid to such obligee within the time therein mentioned, to wit, ten days after the completion of the said voyage, to seize and arrest the said ship, freight and cargo by way of security for payment of the amount and interest therein mentioned; that the defts. had notice of the premises, and in consideration thereof promised the plt. to indemnify and save him harmless against any loss or damage which might lawfully accrue to him the plt. as the owner of the said cargo by reason of the premises; that afterwards the said ship again set sail upon and duly completed her said voyage and safely arrived at Liverpool with the said cargo on the 25th March 1861; that none of the sums in the said bottomry bonds mentioned were paid, and in consequence of such nonpayment a suit was instituted in the Court of Admiralty in London against the said ship, freight and cargo, by one F. R. Camroux, to whom the said bonds had been indorsed by the obligee thereof, and as the agent and on behalf of the said obligee, for the purpose of obtaining payment of the said three sums with interest, according to the tenor and effect of the said three several bonds. And such proceedings were thereupon had in the said court, that the plt. as the owner of the said cargo, and in order to save and prevent the said

cargo from being sold by the said court, and in order to get possession of the same, was compelled to party to the said suit and proceedings, and was com the said court to pay and did pay, to wit, to the said F roux, as such agent and obligee as aforesaid, for and of his said claim and costs, a large sum, to wit, 15 less than the value of the said cargo, and being above the said freight payable in respect thereof. plt. was compelled to pay another sum, to wit, 200*l.*, of his own costs in the said Court of Admiralty. An says, that although all things had been done and had to entitle him as the owner of the said cargo to be in as aforesaid by the defts., and to have had the above two sums of money repaid to him by the defts., yet have not repaid to the plt. the said sums or any part

First plea:

That the contract under which the goods were carried was under a charter-party, and not otherwise the charter-party (in which the ship was descri French ship) was made between the plt. and the St. Thomas for a voyage from Hayti to a port in London or Liverpool, at the option of the ship the ship was French, the defts. were French domiciled and trading in France; and that accordi law of France "it is lawful for the owners of a Fr in all cases to free themselves from the acts and ments of the master thereof in all that concerns and voyage by the abandonment of the ship and The plea then negatives any express authority giv master, or any subsequent ratification of his acts and avers an abandonment of the ship and freight by the law of France would free them from the engagements of the master.

Second replication:

That the plt. had elected that his goods should to England, and that the law which governs St where the charter-party was made, and that whic Fayal where the goods were hypothecated, are that of England, and not to that of France.

Demurrers to the second plea and the replication.

The other pleadings are immaterial.

Jan. 15 and 19.—*Mellish (C. Hutton with l) the plt.*—Under the circumstances stated pleadings, the plt. was entitled to be nified by the owners of the ship. The borrowed on the bottomry bond as their ag makes no difference that the ship was a Fre The contract was not made, nor was it to formed in France. It will be said that a n a French vessel comes with a limited authori if French owners choose to compete with oth must abide by the general maritime law:

Benson v. Duncan, 3 Ex. 644;

The Gratitude, 3 C. Rob. 240;

The Hamburg, 32 L. J. 161, Adm.; 8 L. R. 8. 175;

The Olivier, 31 L. J. 137, Adm.; 6 L. T. R. 398.

The municipal law of the foreign country taken to be unknown; and any qualifica posed on the master's authority by the la own country must be taken to be in the r private instructions from the owner.

Lush (Hodgson with him) for the defts.—M contracts are governed by the flag of the s a foreign ship is part of the soil of the co which it belongs, in every part of the worl ship was known to be a French ship, and v with and chartered as such. And accordi French law, as set out in the plea, which on c must be taken as correct, a French shipow get rid of his liability arising from the ac master, by abandoning the ship and cargo:

Code de Commerce, Art. 216;

2 Emerigon, 482, 489;

The Nelson, 1 Hag. 169;

Story on Conflict of Laws, sect. 286 (b. c.);

Arago v. Currell, 1 Louisiana Rep. (Americ

Cur. ad

BLACKBURN, J.—After stating the subs the declaration and plea, his Lordship pr The principal question is, whether the plea

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[C. P.]

If the master of the ship had the same authority to bind his owners absolutely, as the master of an English ship would have had in similar circumstances, the facts stated on the record would, according to the decision of the Ex. Ch. in *Ducan v. Beeson*, 3 Ex. 644, have given rise to an implied contract on behalf of the owners absolutely, binding them personally, without any limit, to indemnify the plt. And this was not disputed on the argument. But on this demurrer the statement of the French law in the plea must be taken to be accurate, and, according to that, the authority given by a French owner to a French master is not an authority to bind him absolutely by any acts or engagements of his, but a limited authority only to bind him by such acts and engagements, subject (as far as the personal liability of the owner is concerned) to a defeasance on his abandoning the ship and freight. We think that the power of the master to bind his owners personally is but a branch of the general law of agency; and it seems clear that, if a principal gives a mandate to an agent containing a condition that all contracts which the agent makes on behalf of his principal shall be subject to a defeasance, those who contract through that agent with notice of that mandate (containing such a limit on his authority) cannot hold the principal bound absolutely; and we think that, as far as regards the implied authority of the master of a ship to bind his owners personally, the flag of the ship is notice to all the world that the master's authority is that conferred by the law of that flag; that his mandate is contained in the law of that country with which those who deal with him must make themselves acquainted at their peril. There is a singular absence of authority on this subject in our own courts, but the point has twice come before the courts in America, and the decisions there are opposed to each other. In *Arago v. Currell*, 1 Louisiana Reps. 528, the court in Louisiana held that the limit of the liability of the owner of the Louisiana ship was governed by the law of Mexico where the contract was made by the master, and not by the law of Louisiana, treating the question as one depending on the law of nations. In the more recent case of *Pope v. Nickerson*, 3 Story, 465, in a case very similar in its facts to the present case, the Court of Massachusetts dissented from *Arago v. Currell*. Story, J. delivered an elaborate judgment, in which he collects and examines the Continental authorities, as well as those of England and America, and he treats the question as depending on the law of agency, and comes to the conclusion that the limit of the liability of the owners for the acts of the master depended upon the law of Massachusetts, where the ship was owned, and not on the law of the country where she was chartered, or of that where the goods of the plts. were sold by the master. Neither of these decisions is binding on us, but we have derived great assistance from them. The very learned judgment of Story, J., just referred to, affords a complete answer to a plausible argument, in which it was suggested that the general Law Maritime clothed the master of a ship with power to bind his owners absolutely, and that the municipal law of the owners' country was analogous to secret restrictions on the ostensible authority of a partner and other agent clothed with a general power. The authorities cited by Story, J. show that the power given by the common law to the master to bind his owners personally, without any limit depending upon it, to the value of the ship and freight, is rather the exception than the rule in maritime law. Certainly they show that there is no such immemorial rule of maritime law as that contended for. Reason and convenience are certainly in favour of holding that the authority of the master to bind

his owners should be fixed and uniform according to the law of his flag which is known to both, rather than that it should vary according to the law of the port in which the ship may happen for the time to be. We think, therefore, that the plea is good. There are two other questions which we have to decide arising on the demurrers to the replication. The second replication to the plea is, that the plt. had elected that his goods should be carried to England, and that the law which governs St. Thomas, where the charter-party was made, and that which governs Fayal, where the goods were hypothecated, are similar to that of England, and not to that of France. On the demurrer to this replication we must assume that the foreign law in those countries is as asserted; but we think that the replication affords no answer to the plea. The law of the place where a contract was made, and that of the place where it was to be fulfilled, are very important on any question as to the validity or the effect of the contract; but, as we have already said, we think the question before us depends, not on the validity or effect of the contract, but on the authority of the agents who made the contract to bind the deft. to it. There is a third replication which was not relied on in the argument, and is clearly bad. The only question in the Admiralty Court was, whether the master had authority to bind the defts. by hypothecating them? That before us is, whether the master had power to bind the shipowners personally, without any defeasance?—two questions perfectly distinct in their nature. Judgment must therefore be for the defts. on all the demurrers.

COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.
Barristers-at-Law.

Friday, May 6, 1864.

MEYER AND OTHERS v. DRESSER.

Charter-party—Right of consignee to deduct from the sum payable by him for the freight the value of missing goods.

Where part of the goods mentioned in a bill of lading were missing upon the ship arriving at its port of destination, it was

Held, that the consignee had no right to set off against the freight, or to deduct from the sum due for the freight of the goods delivered, the value of the missing articles.

This was an action for balance of freight. The first count of the declaration alleged,

That after the 14th Aug. 1855 certain persons in parts beyond the seas, to wit, Messrs. Samuel Shultz and Co., at Memel, delivered to the plt. certain goods, to wit, certain timber and wood, to be by the plt. carried and conveyed in a certain ship of the plt.'s from Memel to London under a certain bill of lading, signed for the same by the plt., and there delivered (the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the sea, rivers and navigation of whatever nature and kind soever, save risk of boats, so far as ships are liable thereunto excepted) unto the order of the said persons, or to their assigns, he or they paying freight for the said goods and other conditions as per charter-party, with primago and customary average. And the plt. says that afterwards, and after the said 14th Aug. the said persons indorsed the said bill of lading to the deft. in order to pass the property in such goods to the deft., and that thereupon and by reason of such indorsement the property in the said goods passed to the deft., and the plt. says, that by the charter-party referred to in the said bill of lading freight is made payable at certain rates therein specified, and is made payable on the delivery of the cargo one-half in cash and the remainder by gone and approved bills on London at three months' date; and the plt. says, that before this suit all conditions were fulfilled and all things were done and have happened, and all times elapsed necessary to entitle the plt. to have the freight, primago and average paid by the deft. according to the terms of the said bill of lading and charter-party, and to sue the deft. for the nonpayment thereof hereinafter mentioned. Yet the deft. made default in paying

the freight, primage and average for the carriage of the said goods according to the said bill of lading and charter-party; and although he paid the plt. a portion of the freight, primage and average payable for the carriage of the said goods, yet the deft. made default in paying the plt. the residue of the said freight, primage and average amounting to a large sum, to wit, the sum of 85*l.* 1*s.* 3*d.*, whereby the plt. has not only lost the sum so due to him as aforesaid, but the use and interest of the money payable for the same.

There was also a count for money agreed to be paid in consideration of the plt. giving up the goods without demanding payment of freight, and for hire of a ship, for balance of freight and money paid.

The pleas were, to the first count, that by the charter-party the freight was not made payable as alleged.

Second plea to the first count, nondelivery of the goods.

There were also pleas of payment and never indebted.

The facts were as follows:

The plt. was a master mariner living at Memel, in Prussia; the deft. is a timber merchant in London. In July 1863 the plt. entered into a charter-party with Messrs. Schultz, at Memel, for a cargo of timber, to be carried from there to London. Messrs. Schultz prepared bills of lading of the timber, which were signed by the plt.; among the items was one of 600 pieces of oak bond staves. The plt. sailed on 16th Aug. and arrived in London on the 14th Sept. Upon the arrival of the vessel in London the cargo was claimed by the deft. and delivered to him. Upon discharge of the cargo it was found that the 600 staves were not on board the vessel, and it was admitted that they never could have been put on board. The deft. insisted on deducting the value, 41*l.* 1*s.* 6*d.*, from the freight.

The deft. at the trial set up a custom to deduct from freights the value of goods not delivered.

The jury found that the alleged custom did not extend to a case in which the goods were not shipped, and gave a verdict for the plt. for 37*l.*

Munisty, Q.C., having obtained a rule on a former day, pursuant to leave reserved, calling on the plt. to show cause why the verdict found for him should not be set aside and a verdict entered for the deft., on the ground that by undisputed usage in case of goods shipped but not delivered, coupled with the charter-party and bill of lading and the Act 18 & 19 Vict. c. 111, the deft. was entitled to have the value of the missing goods deducted from the freight payable by the deft. in respect of the goods delivered, and upon the ground that, according to the law of Prussia the plt. was bound to make that deduction and could not maintain any action for his freight without doing so.

Lush, Q.C. (Sir Geo. Honyman with him) showed cause against his rule, contending that there was no such custom as was set up by the deft., and that his remedy, if any, was by a cross-action. They cited

Berkley v. Watling, 7 A. & E. 29;

Bates v. Todd, 1 M. & R. 106;

Brown v. Hare, 1 H. & N. 882;

Dakin v. Ozley, 38 L. J. 115, C. P.; 10 L. T. Rep. N. S. 268;

Ritchie v. Atkinson, 10 E. 295;

Wigglesworth v. Dallas, 1 Sm. L.C. 530.

Munisty, Q.C. (J. Brown with him) contended that there was such a custom, and that the deft. had a right to deduct the value of the missing goods from the freight. They cited

Turner v. Liverpool Docks, 6 Ex. 543;

Gibson v. Winter, 5 B. & A. 96;

Cleworth v. Pickford, 7 M. & W. 314;

Cuthbert v. Cumming, 19 Ex. 809;

Meadell v. Steele, 8 M. & W. 858;

Cowanjee v. Thompson, 5 Moo. P. C. 165.

May 6.—ERLE, C.J.—I am of opinion that this rule should be discharged. The action was for freight according to contract under a charter-party and bill of lading, and upon the plt.'s case it was clear that the sum claimed was due according to the contract. The defence is, that part of the goods mentioned in the bill of lading were missing, and the deft. claimed to set off against the freight, or to deduct from the sum due for the freight of the goods delivered, the value of the missing articles. The question we have to decide is, whether the deft. has a right to deduct the value of the missing articles from the sum that is due for the freight of the articles that were delivered. I think that he has no right to do so. It is very clear that the general principles of law would not give the right, and in respect to this particular instance it was admitted between the parties that the goods mentioned in the bill of lading for which the claim had been made had never been put on board. There was no fraud alleged on either side, but by some mistake they had never been put on board, although they were mentioned in the bill of lading. The indorsement of the bill of lading demanded those goods of the captain, and the captain could not produce them, and by the ordinary rules of law and by the usage which I will advert to presently, there is no ground for saying that the deft. would have a right to deduct for the value of the missing articles. The deft. prayed in aid the Bill of Lading Act, the 18 & 19 Vict. c. 111, and that statute enacts that "every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same." The deft. says that this statute applies, and the plt. has alleged many reasons why it should not apply. I think most of the objections so made by the plt. have failed, and I think that Meyer, the master of the ship and part owner of one-third of the ship, is a person upon whom the statute operates, being the master who signed the bill of lading. The plt. contends that Meyer was the master, and was signing on behalf of the entire of the owners, he having one-third and two other persons having the other two-thirds, and therefore in this claim for freight it is to be taken that all the three persons interested were plt.s., and that there would be strong evidence against one of the three, if not against all. I think that is entirely untenable. It is an action on a contract, and the law allows the master making a contract by charter-party and bill of lading to sue on that contract. The master, as the owner, is made responsible as if he were the sole person interested. I believe the statute was passed for the purpose of creating a remedy against the masters of foreign ships, and to make them responsible in their capacity of master for the very grievance that has been alluded to in the argument. Because the captains of foreign ships against whom any party had a claim used to get out of port, and if they were out of port they were out of the reach of redress, and therefore the Act has made the master or party signing the bill of lading responsible; and the statute is said to be made in favour of the consignee or indorsee for valuable consideration of a bill of lading. The fact was that the deft. Dresser had purchased of Schultz and Co., of Memel, a cargo of timber, and directed Schultz and Co. to charter a vessel to bring it home. He did not send a vessel, and Schultz and Co., as his agents, chartered the vessel in question, and then the goods were put on board. It is contended that he was not merely and simply a consignee or indorsee for value, but that he was also in the nature of a consignor that he stood in a different relation from that which would be created by the mere purchase of the bill of lading, because the goods were to be shipped

[C. P.]

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[C. P.]

by his agent, and if the agent lived at Memel it was part of the case that it was his duty to ship, and any omission could be rectified by an action against the agent who failed to put them on board. Therefore he would have a direct remedy against some one who did not stand in the situation contemplated by this statute giving a right to the consignee or indorsee for valuable consideration, who, according to the contention, would be a person having no other remedy. If the plt. is a consignee for valuable consideration within the words of the statute, and the bill of lading was sent over to him representing the goods to be on board, and on the representation contained in the bill of lading he accepted the bills of exchange drawn against these very goods, he is a consignee for valuable consideration, and if Schultz and Co. indorsed the bill of lading to Dresser, he has a right to the goods under the indorsement of that bill. He is then consignee or indorsee for a valuable consideration of the bill of lading, and so far it would seem to me that the objection would not be tenable if it were necessary to decide the case upon that point. But I do not consider it is necessary to decide the case upon that point, for I will assume, for the purposes of the argument, that the deft. has the right, as consignee or indorsee, to claim that the representations in the bill of lading are conclusive against Meyer the plt. Assuming that he has a right by virtue of a bill of lading and the statute to say that the goods were put on board, though in point of fact they were not, I still think the deft. fails to make out that according to law he has the right to deduct from the freight due for the goods delivered the residue of the goods that were missing, and so for the purpose of the case taken to have been put on board. I consider it to be established by law, that in respect to a claim for freight, where the cargo delivered is damaged, and where money is due in respect of those damages from the shipowner, the freighter cannot set off the amount so due in respect of the payment of freight. The case of *Dakin v. Orley*, is replete with learned authorities upon that question, which say that the freighter cannot set off against the demand for freight, damages done to the goods. Neither could he, as I think it follows, deduct from the sum due for the freight of other goods the value of the goods that were missing. Misconduct on the part of the captain giving a right to the owner of the cargo is a right to be enforced by a cross-action and not a right to be enforced by a claim of deduction or set-off. The law of England I consider to be so established. But the deft. on the present occasion gave evidence that there was a usage pervading the mercantile world which gave him a right to deduct from the amount of freight the value of the missing goods; and the evidence of the deft. himself speaks of the universality of that usage. He says: "Speaking both as a merchant and a shipowner having vessels coming from all parts of the world, I deduct for short delivery in the wood trade. A vessel of mine was short of bacon from New York, and the deduction was made. I have had it done in every trade in every place." It is therefore the claim of a usage pervading universally the mercantile world, known amongst merchants and known amongst shipowners. Now, I should say that the observations made on behalf of the plt. as to the right according to law being controlled by this usage, is a claim that cannot be sustained. According to my view, the law is that such a right to deduct or to set off does not exist. Therefore it is a self-evident contradiction to my mind to say that the law does not give the right, and yet that there is an universally established usage to have that which the law does not give. If it were an universally established usage, it would be law. An universal

usage which is not according to law cannot be set up to control the law. That is a good objection to giving the party the right which is here contended for. I also think that this evidence of usage was not evidence of usage to create a right according to custom. I am of opinion that the deft. cannot maintain his right to deduct the value of the missing goods from the freight, and that the plt. is entitled to keep his verdict.

WILLES, J.—I am of the same opinion, that, but for the alleged usage and the Prussian law, unquestionably the plt. was entitled to recover the freight in respect of the goods which were actually carried, and that the deft. was not entitled to deduct or to set off the value of the goods which never were put on board. Then does the custom, or does the Prussian law help, the deft., and absolve him from the liability which, *prima facie*, he is under? First, with respect to the alleged custom, it is quite clear that, if there had been any particular usage affecting this case, it ought to have been read into the contract to ascertain what was the effect of the usage on the contract, and if you establish a usage and show that the effect of that is to extinguish the debt, you make a defence as to a portion of it, notwithstanding that the ordinary law would not give it. Then the usage which was proved in this case, assuming it to be valid, was to the effect that you may deduct the value of the goods, which have been put on board and lost by the default of the master during the voyage, from the freight. Now that will not answer for the deft., without his bringing in the 3rd section of the Bill of Lading Act, and without his insisting upon the effect of the third section making him as a consignee for value a person who may insist against the master that the goods were actually on board, and then add to that a contract which deals only with goods actually on board. I take leave to say both with respect to the application of the custom, and of the Prussian law, that if they were made out to be in favour of the deft., I very much doubt whether the framers of the 3rd section of the Bill of Lading Act ever had in their minds such matters as these, or that it ever was intended by the 3rd section that the consignee was to have anything more than his remedy against the master by the ordinary law for having signed a bill of lading for goods on board which he had not delivered. It is not necessary for me to express any opinion upon that. As to the usage, it appears to me not made out that there was any particular usage affecting this case. I apprehend that a usage to affect a case must be some practice of merchants laying down or creating a right between the parties to a contract in respect of some matter which is not provided for by the contract. It must be something more than a mere mode of carrying on business adopted with reference to the settlement of debts by payment or otherwise, something more than a usual mode of settling accounts by allowing a claim, and one not merely binding upon the parties only if they choose to agree to it. With respect to the evidence of alleged usage in this case, it appears to be nothing more than that in ordinary cases as between the shipowner and the consignee of goods, where the shipowner has an admitted given claim against the consignee in respect of freight, and the consignee has an admitted claim against the owner for loss of goods, or damage to goods actually put on board, people usually agree to set off the one against the other. It does not deal with cases of dispute or cases in which it is necessary to settle the rights of either of the parties—the rights of one and the other are ascertained by law; it is a mere mode of settling the account, it is a mere mode of payment in satisfaction

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of an admitted right, which is very often resorted to, because it is a convenient method of arranging such claims and to avoid disputes. But when a dispute does arise it is quite consistent with all that has been alleged that that dispute should be settled by the general law of the land. It appears to me that the usage is altogether out of the question.

BYLES, J.—I am of the same opinion. I am quite incompetent to say anything on the subject of the Prussian law. It is quite plain that it does not apply to this case, for two reasons. No doubt that *prima facie* the *lex loci contractus* governs; but in this case the contract, although made in Prussia, was for the delivery of a cargo in England, and for the payment of the cargo in England. This is a case in which the contract is to be interpreted by the law of the country where it was to be performed, not by the law of the country where it was made. Further than that, it seems to me, as has been already remarked by my Lord and my learned brother, that this is a matter of procedure. It has been decided over and over again in this country that the Statute of Limitations is a matter of procedure, and is to be governed by the law of the country where the remedy is sought, and that the *lex fori* prevails. I am not aware of any decision in this country as to the law of set-off. It has been held in America that the law of set-off is a portion of the procedure, and my Lord says in this country also. The case is precisely the same as if the contract had been made in England. If it were necessary to express an opinion, which it is not, whether the debts were indorsees for value or consignees for value of the bill of lading, I should be disposed to agree entirely with what has fallen from my Lord on that subject. It is not necessary to express any opinion whether the plts. are bound by the signature. Mr. Lush says all the plts. might have joined and might have sued. No doubt they might, but if they had chosen to sue in that way, and one of them had signed, I apprehend, as he would have been disqualified himself, so would all his companions as plts. in the suit have been disqualified likewise. As Lord Ellenborough said, in the case which has been alluded to, you cannot recover under such circumstances. If you want his strength to enable you to succeed, you must fail by his weakness when you join him. This is a stronger case than that—a case in which they have chosen to sue, to save all difficulties, in the name of the party who signs. If they take the benefit of his services as the plt. in the action, they must take the benefit with the burden that he has under the enactment of the statute, and that which affects the person actually signing affects him. Therefore, this is a case in which the words of the statute apply so far as the signature of the party is concerned. I think, notwithstanding the evidence which has been given of the custom, that the plt. is entitled to the full freight without any deduction. My Lord and my brother Willes have called attention to the authorities in which from *Mondel v. Steel* down to the case in this court in the last term, and also in the Admiralty Court, it has been in effect determined that neither damage to the goods nor loss can be set off against the freight. Then can custom change the law? I need say no more than this, that if this is to be considered as a general law for all mankind in all places, it is an attempt to prove the law by a usage, which cannot be done. If it is to be treated as a local custom it clearly is not a local custom. If it be a custom of a particular trade it seems to be only a mode of a settling accounts. Suppose it were anything else: has there been time for it to grow up, if I may so express myself, and to act as an estoppel? From

these difficulties the learned counsel ende escape by saying that it is a usage with to which the parties must be deemed to be attracted, and must therefore be considered as the contract. There is some loose evidence usage as to other parts of the world, but evidence at all it must be evidence of a place there. I do not suppose they contr Prussia with reference to a Prussian custom might or might not apply in the cases which arisen.

KEATING, J.—I am of the same opinion. this alleged usage, if it be taken to have practice or mode of settling accounts in undisputed claims, would be a highly reasonable and most convenient mode. But if it be beyond that, and set up as being a universal rule, which is to control all contracts, even case of disputed claims, it appears to me would be most objectionable, and would be directly contrary to that which has been held as the law with reference to the payment of and preventing parties making deductions freight in the shape of unliquidated damages the reasons given I think this usage cannot in the present case, and with reference statute, I would merely say that I entirely with the doubts which have been suggested than expressed, by my learned brother Willes very much doubt whether it ever was in contemplation of the Legislature, in passing it to enable parties to use the statute as created thereby for the purpose of carrying establishing such a usage as has been attended the present occasion to be set up. For reasons I think the plt. is entitled to the verdict.

Judgment for the

Attorneys for plts., Thomas and Hollans.
Attorney for deft., Linklater.

Thursday, May 26, 1864.

RONNEBERG AND OTHERS v. THE FALKLAND ISLANDS COMPANY.

Charter-party—Costs in defending action by the charter-party for non-delivery of goods lost by negligence parties.

The captain of a vessel belonging to the plaintiffs occasion to stop at the Falkland Islands on his way to Valparaiso, entrusted a quantity of gunpowder to the care of the defendants, which was lost through negligence. On the arrival of the vessel at its destination, the consignee demanded the gunpowder and upon its not being forthcoming, sued the defendants for its value, which claim he resisted, but he was compelled to pay:

Held, that the defendants were only liable for the value of the goods and not for the costs incurred by the charter-party in defending the suit at Valparaiso, as in so far as the charter-party was not acting as a reasonable man should have

Declaration.—That the plaintiffs entrusted to the defendants, received from the plaintiffs, certain goods, to wit, 44 gunpowder, to be by the defendants safely and securely stowed in a certain ship of the defendants, called the *Fa* certain terms then agreed upon between the plaintiffs, defendants; and the plaintiffs say that before the action was brought things had happened and all times had elapsed which entitled the plaintiffs to the performance by the defendants of the said bailment, and to sue the defendants for the breach hereinafter mentioned, yet the defendants did not securely keep or store the said gunpowder agreeal terms of the said bailment, but therein made default defendants, further disregarding their duty under the said while they had the said gunpowder in their care, and without the knowledge or consent of the plaintiffs, res said gunpowder from the said ship *Fa*, and placed in another and different vessel, and by reason thereof gunpowder became wholly lost to the plaintiffs. And the

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the defts., for that the pils. entrusted and delivered to the defts. certain gunpowder to be taken care of by the defts. for the pils. upon certain terms agreed upon between the pils. and the defts. in that behalf, and amongst others, upon the terms that the defts. should use due and proper care and diligence in the premises; and the pils. say that, although all things had happened and all times had elapsed necessary to entitle the pils. to sue the defts. for the breach of duty hereinafter mentioned, yet the defts. did not use due and proper care or diligence in the premises, but conducted themselves so contrary to the said terms, and so carelessly and negligently and improperly therein, that the said gunpowder was wholly lost; and the pils. say that, by reason of the said several premises the pils. have been entirely deprived of the said goods, and have incurred and become liable to pay and have paid large sums of money by way of damage to the owners of the said goods, and were compelled to pay the said parties their cost of obtaining the said damages, and have thereby incurred heavy costs themselves in and about defending themselves from the claim of the said parties, and by means of the premises the pils. have been and are otherwise damaged. (There were also the common counts for money paid and interest.)

The defts., by their pleas traversed all the pils.'s allegations, and pleaded a set-off to the common counts for use of a warehouse and store and for money paid.

The case was tried before Erle, C. J., at Guildhall, when the jury found a verdict for the pils. for 402l. 12s. leave being reserved to the defts. to move to reduce the verdict by the amount of the costs of the proceedings at Valparaiso.

The following were the material facts in the case: The pils., who were shipowners, were in March 1862 possessed of a ship called *Johanna Ohifu*, which was chartered by Messrs. Smith and Gregory for a voyage to Port Stanley in the Falkland Islands, and thence to Valparaiso with a general cargo consisting, amongst other things, of 400 kegs of gunpowder for Valparaiso. The ship sailed on the 25th April, and arrived at Port Stanley on the 25th July, but having gunpowder on board she was not allowed to enter the harbour; but the storekeeper of the defts. sent the *Fuicy* (a small schooner of which the captain approved) into which the powder was discharged. Three days after this the powder, without the consent of the captain, was transhipped into a lighter called the *Lilley* which on the 27th July sank in a gale of wind. Some of the powder was recovered in a damaged state, and the captain refused to take it on board and sailed for Valparaiso without it.

Messrs. Allsop, who were the consignees of the powder, applied for it on the arrival of the vessel, and upon being told the circumstances, arrested the ship. Legal proceedings were commenced and defended by the captain on behalf of the present pils. in the court at Valparaiso, and on the 18th Nov. judgment was given in favour of Messrs. Allsop for the value of the powder, together with the law expenses, amounting together to 402l. 12s.

A rule having been obtained on a former day,

Lush, Q. C. and Sir George Honyman showed cause, and contended that the captain in resisting the claim acted as a reasonable and prudent man should have done, and therefore that the defts. ought to pay the costs incurred by such resistance. They cited

Tindall v. Bell, 11 M. & W. 228;

Brown v. Hall, 7 C. B. N. S. 303.

Karlsruhe, Q. C. and C. Pollock contended that, unless the pils. could bring forward some circumstances to show that the captain was justified in defending the action, the damages ought to be reduced according to the terms of the rule. They cited

Mayne on Damages, 28, 29;

Lewis v. Peake, 7 Taunt. 153.

ERLE, C. J.—I am of opinion that this rule should be made absolute for reducing the verdict by the amount of the costs of the legal proceedings at Valparaiso. The jury found that there was a want of care on the part of the company as bailees of

the powder, and so the company were liable for the value of the powder, and would have been liable for any consequential damage for loss of powder there. But then the captain went on to Valparaiso, having refused to take any of the powder, saying he held the company responsible to his owners for all the powder. When he arrived at Valparaiso the consignees demanded the powder. It appears to me that any captain of a ship who allows goods to be taken out of his ship in the course of the voyage has no answer to give to the person who holds the bill of lading when he demands the goods from him. The captain denied his liability, and the ship was seized for the purpose of obtaining the value of the goods. The abstract of the proceedings which we have before us shows that there was great deliberation before the judge came to the conclusion he did. It seems to me the company are not at all responsible for the contract between the captain and the consignee. It is quite a separate question, and one which the company have nothing to do with.

WILLIAMS, J.—I am of the same opinion. The question here is, whether the captain has given any evidence that the expense which he incurred at Valparaiso has anything to do with the wrong inflicted upon him by the Falkland Islands Company. I am of opinion that he has not done so; on the contrary, I think it was an unreasonable expense, and that he did not adopt such a course as a prudent and reasonable man would have done.

WILLES, J.—I am of the same opinion. It was clearly for the plt. to establish his right to the costs of the special damage, and that the course he adopted was such as a prudent and reasonable man would have done. The proceedings show that his liability was not a doubtful question, for he was clearly liable. He does not show that he had any difficulty in procuring the amount of the value of the goods he failed to deliver; it may be that he had nothing to do but to draw on his owners for it, and therefore all the costs may have been unnecessary. It seems to me that the plt.'s right to incur those costs had not been established.

Rule absolute.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Jan. 29 and Feb. 1, 1864.

HILBERRY v. HATTON.

Trover—Principal adopting and ratifying acts of agent—Liability of principal for agent's wrongful act.

A ship at sea having gone on shore was abandoned. The persons called from the shore took possession, brought her up to the harbour, and there sold her. Defts.' agent bought her, and wrote informing defts. of the purchase, and asked for their instructions, but did not inform them of the circumstances. Defts. wrote to their agent, suggesting the making of a bulk of the vessel, but adding, "You do not say from whom you bought her."

Held, that this was evidence to go to the jury of an adoption of the bargain, so as to make the principal responsible for the act of his agent, and that trover would lie against the principal for the conversion by the agent.

This was an action of trover for a ship. It appeared that the ship had gone on shore off the Breakers of Bonny, and she was abandoned. The persons called from the shore took possession of her, and brought her up to the harbour of Bonny and there sold her. The person who bought her was a man named Thompson; he was the manager of

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agent for the defts., who lived at Liverpool or London, and it was proved that they were merchants doing business at Bonny river. It was not disputed that the sale of the ship under the circumstances was an illegal act; the question was, whether the defts. had adopted the contract of Thompson, their agent, and ratified his acts, knowing the facts of the case, so as to render them liable to the plts. in this action of trover for the conversion. The cause was tried in London, before Bramwell, B., when a verdict was found for the plt. A rule nisi was afterwards obtained to set aside that verdict and enter a nonsuit on the ground of there being no evidence of a conversion, or for a new trial on the ground of misdirection in the learned judge's telling the jury, that if the defts. ratified the act of Thompson in purchasing the ship, they were liable although they had no knowledge of the circumstances which made the sale illegal.

Vernon Lushington showed cause, but the Court stopped him, and called upon the defts. to support the rule.

Cohen (Mellish, Q. C. with him).—First, there was no sufficient demand and refusal to maintain trover for the defts. Secondly, Thompson did not communicate all the facts to the defts. about the purchase of the vessel by him, and there could be no adoption of his contract, or ratification of his acts, unless they knew all the circumstances of the case. The transaction was voidable, and the owners had the right, after knowing the facts, to exercise their option about it:

McCombie v. Davis, 6 East, 538;

Burroughs v. Bayne, 5 H. & N. 296; 2 L. T.

Rep. N. 8. 16;

Metcalf v. Lumden, 1 C. & K.;

Pilot v. Wilkinson, 32 L. J. 201, Ex.; 8 L. T.

Rep. N. 8. 361;

Nixon v. Jenkins, 2 H. Bl. 136;

Freeman v. Roscher, 13 Q. B. 780;

Parsons on Contracts, 47;

2 Greenleaf on Evidence, sect. 642, p. 695.

Feb. 1.—MARTIN, B. said:—It was admitted at the trial of this case, and no question was made before us upon it, that the sale was an illegal act; that the men had no business with the ship or to sell her. When a person takes possession of the chattel of another without justifiable cause, and sells it without justifiable cause, there can be no doubt that he is guilty of an act of conversion. Upon the 1st Jan. 1863 Mr. Thompson wrote to his employers the defts.: "I have purchased the brig *John Brooks* for you at a very cheap rate, and I shall act according to your instructions with respect to her." Therefore Mr. Thompson purchased this vessel and took possession of her, and proposed to act according to the instructions of the defts. with regard to her. There can be no doubt that he would be liable to an action. The question is, whether or not the defts. are so. They answer the letter of the 1st Jan. on the 24th Feb., and that answer was to the following effect: "We duly received your letter of the 1st Jan., informing us of your having purchased the brig *John Brooks*, but you do not say from whom you bought her," &c., &c. (reads the letter down to the words) "make a hulk of her." The question is, whether there was evidence to go to the jury that Messrs. Hatton had adopted the act of their agent Mr. Thompson with respect to the ship. I cannot see how any difficulty can arise in the matter. When an agent writes saying he has bought a ship for his principal, and thereupon the principal, instead of repudiating the bargain, says that he had better make a hulk of her on the coast of Africa; if that is not an adoption of the bargain so as to make the principal responsible for the act of his agent, I do not under-

stand the law of this country. If he adopted the act of Mr. Thompson in buying the ship and using her, he is responsible. The argument which was addressed to us was to this effect, that there was no adoption of this contract, and no ratification of Thompson's (the agent's) act, because the defts. did not know all the circumstances. If they knew all the circumstances which made this act dealing with another man's chattel a conversion I apprehend that the only adoption necessary was a ratification of that which was the wrongful act. Reference was made to the case of *Burroughs v. Bayne*, in which the matter was very much considered, and Alderson, B., in giving judgment in that case, says (and I adopt his view of the matter as to what constitutes a conversion): "Any appropriation of a chattel for the use of the deft., or a third person, amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel either for the use of himself, or for another it is a conversion. So, if a man has possession of any chattel, inconsistent with my general dominion over it, and the use which at all times and in all places I am entitled to make of it that consequently amounts to an act of conversion." I am of opinion that in this case this rule ought to be discharged. I am authorised by Bramwell, B. to say that in his opinion the rule ought to be discharged.

Rule discharged.

Monday, May 30, 1864.

LLOYD v. THE GENERAL IRON SCREW COLLIER COMPANY (LIMITED).

Liability of shipowner—Damage of the sea—Accident
The plt. shipped goods on board defts.' vessel to be safely and securely carried from Genoa to London, and there delivered, "barratry of master or mariner," "accidents," "damage of the sea," &c. excepted. Defts. vessel when at sea, by the gross carelessness, negligence, mismanagement and improper conduct of defts. servants and mariners, ran foul of and struck against another vessel, whereby plt.'s goods on board were sun and lost:

Held, that defts. were liable to the plt. for such loss.

This was a demurrer to a replication in an action brought for not safely conveying goods from Genoa to London, in a vessel called the *Black Prince*, under a bill of lading which excepted the act of God and other perils, including all accidents and damage of the seas and navigation of whatsoever nature or kind. It was alleged that, through the gross negligence of the defts.' servants, the *Black Prince* ran against the ship *Araxes*, whereby the vessel was damaged and the goods lost.

Declaration stated that

Defts. were owners of the *Black Prince*, lying at anchor at Genoa, and bound on a voyage from that port to London; the plt. caused to be delivered to the defts. and they received certain goods of the plt. to be by them shipped on board the said steam-vessel and safely and securely carried therefrom from the said port of Genoa to the said port of London, and there to be delivered to the plt. or his assigns (the act of God, the Queen's enemies, pirates, robbers, thieves, barratry of master or mariners, restraint of princes and rulers, fire accident, or damage from machinery, boilers, steam, or from other goods by contact, sweating, leaking, or otherwise accidents or damage of the seas, rivers, and steam navigation of what nature or kind soever excepted), by or they paying freight for the said goods in cash on ship's arrival, free of interest, at the rate of 50s. per ton of twenty hundred weights gross weight, with 15 per cent. prime and average accustomed. The defts. did not safely and securely carry and deliver the said goods, but took such bad and improper care of their said steam-vessel, and navigated directed and managed it in so careless, negligent and im-

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proper manner, that by and through the gross carelessness, negligence, mismanagement and improper conduct of the defendants by their servants and mariners in that behalf, and not otherwise, the steam-vessel with great force and violence ran foul of and struck against a certain other vessel, to wit, the *Aurora*, whereby the plaintiff's goods on board the defendant's vessel were sunk and the goods became wholly lost to the plaintiff.

Plea:

That the defendants were prevented from carrying and delivering the goods agreeably to the terms upon which they received the same by the excepted perils.

Replication:

That the supposed excepted perils in the third plea mentioned, consisted wholly of the collision in the declaration mentioned; that the collision arose and was wholly caused, and the said supposed perils were incurred by and through the gross carelessness, negligence, mismanagement and improper conduct of the defendants by their servants and mariners in that behalf and not otherwise, and that the defendants were not prevented from carrying and delivering the said goods by the said excepted perils, or any of them, further or otherwise than in this replication mentioned.

Demurrer and joinder.

Brett, Q. C. (*Hannen and Cohen* with him).—There is no material difference between this bill of lading and the ordinary common form; the same construction is not to be put on these words in a bill of lading as in a policy of insurance. The object of a policy of insurance is to indemnify against perils of the sea; that of a bill of lading is safe carriage. In insurance cases you look to the proximate cause; in bills of lading to the real cause, and the real cause here was the defendants' negligence; their servants' negligence is their negligence. The terms of the bill of lading, as stated in the declaration, do not exempt the defendants from liability for loss which was occasioned by their negligence. Independently of any special contract, they were liable for the consequences of their negligence in and about the carrying of the goods, although those consequences may be a loss by the perils of the seas within the meaning of a policy of insurance. Collision is only a peril of the sea when it is without fault or negligence:

Maclean's Law of Merchant Shipping 458;

Adler v. Fisher, 3 Esp. 67;

Story on the Law of Bailments, sects. 512, 514, 515;

3 Kent's Com. 216, 278;

Parsons on Maritime Law, 224; and

Meredith's Translation of Emerigon on Insurance, 285.

Sir Geo. Honyman (*Lush*, Q. C. with him), for the defendants, argued that they were protected by the exception in the bill of lading; by the terms of the bill of lading they were exonerated from responsibility for collisions at sea, of whatever character they may be. The terms of the bill of lading exonerate shipowners from responsibility for damage arising from perils covered by insurance; and underwriters would be responsible for the collision in question. The insertion in the excepted parts of barratry shows that the defendants were to be protected from liability for the wrongful acts of the master and crew. The allegation of negligence in the defendants' servants was wholly immaterial and surplusage. Neither the declaration nor the replication charge the defendants themselves with any negligence. Under this bill of lading the shipowner was protected from liability from collision at sea, however caused, whether by negligence of his own servants or not, and the plaintiff's remedy was against the underwriters, if insured; and if not, then he must be considered to have taken upon himself all the risk. In Story on Bailments, sect. 515, it is said, "If a carrier-ship should be struck with lightning and thereby her cargo should be totally destroyed, although there may have been some negligence or misconduct of the master and crew in the voyage, there it seems that the whole loss will or may be attributed to the perils of the sea as *causa proxima*, notwithstanding any such negligence or misconduct:

Smith v. Scott, 4 Taunt. 126;

Biccard v. Sheppard, 14 Moo. P. C. C. 471.

POLLOCK, C. B.—We are all agreed that the plaintiff in this case is entitled to the judgment of the court. The declaration distinctly discloses the terms of the contract under which the defendants were to carry the plaintiff's goods safely and securely from Genoa to London, there to be delivered to the plaintiff. It sets out the bill of lading, in which there are certain exceptions: barratry of the master or mariners, leaking or otherwise, and accidents or damage of the seas, &c., of what nature or kind soever. The declaration goes on to say, that the defendants did not safely and securely carry and deliver the plaintiff's goods, but took such bad and improper care of their vessel, and navigated it in so negligent and improper a manner that, in consequence of such gross carelessness and mismanagement and improper conduct of the defendants by their servants in that behalf, and not otherwise, the defendants' vessel ran foul of another vessel, whereby the plaintiff's goods on board the defendants' vessel became wholly lost. The defendants' plea, as applicable to this matter, is, that they were prevented from carrying and delivering the goods agreeably to the terms on which they received them by the excepted perils. The plaintiff, by his replication, says that the collision before referred to arose, and was wholly caused, by and through the gross carelessness, negligence, mismanagement and improper conduct of the defendants by their servants and mariners in that behalf, and not otherwise; and upon these pleadings we are now to assume that this was the fact. The question, then, is, whether, under these circumstances, the plaintiff or the defendant is entitled to the judgment of the court. It appears to me clear, from the authorities, that the plaintiff is entitled to it. In these cases the general rule is, that you look not to the *causa proxima*, but to the immediate or to the real cause. There is a well known distinction between a marine policy and an insurance on a man's own life; as, for instance, if in the latter case a man goes home in such a state of intoxication that he knows not what he is about, and an accident happens to him in consequence, the parties claiming are as much entitled to the demand as if he were as sober as a judge; but here the admitted cause of the loss of the plaintiff's goods by the defendants is the gross negligence on the part of the master and crew of the vessel. It has been before decided, and it is now settled, that, under such circumstances, the owner is liable in consequence of such gross negligence. I think, therefore, the plaintiff is entitled to recover.

MARTIN, B.—I am of the same opinion. It strikes me this is not quite the correct course the cause should have taken, and that this is an inconvenient mode at present of raising such a question. If the matter had come before me to say whether the issues in fact should not be decided first, I should certainly have directed the issues of fact to have been tried first, and before the argument of the demurrer.

BRAMWELL, B.—I also think the plaintiff is entitled to judgment. This is an important case only with reference to the amount between the parties, but not otherwise. The question is, what is the contract? Here the bill of lading says [the learned Baron referred to its terms and stated the exceptions in it]. The defendants' vessel running foul of another vessel by the gross negligence and carelessness of those who were managing it, is certainly not an accident within the meaning of either of those exceptions. Looking at the word "accident" in connection with the other terms used as exceptions in the bill of lading, it is clear to my mind that the defendants are not protected by it; neither was the loss

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occasioned by damage of the seas, nor by barratry, and the authorities to which we have been referred by Mr. Brett make the present case free from doubt.

CHANNELL, B.—The plt.'s replication, which is demurred to, expressly alleges that the collision referred to which was the cause of the plt.'s loss, was occasioned wholly by the gross carelessness, negligence, mismanagement and improper conduct of defts. by their servants, and not otherwise, and we must now take that to be true, and admitted by the deft. to be true. The question then before us is, I think, decided by authority, and the plt. entitled to our judgment.

Judgment for the plt.

Plt.'s attorney, *Pritchard.*

Defts.' attorneys, *Thomas and Hollans.*

EXCHEQUER CHAMBER.

Reported by W. MATO, Esq., Barrister-at-Law.

June 14 and 18, 1864.

(Before POLLOCK, C. B., CROMPTON, BLACKBURN and SHEE, JJ., and BRAMWELL and CHANNELL, BB.)

TOBIN v. HARFORD.

Time policy on ship and goods.

Where a policy of insurance upon a ship engaged in the African trade contained the words, "outward cargo to be considered homeward interest twenty-four hours after arrival at the first port or place of trade," and was indorsed "on ship 2000l., cargo 8000l., with liberty to extend the valuation of the homeward cargo;" and the ship, after having discharged a portion of her cargo at the first place of trade, and after remaining more than twenty-four hours, sailed with the remainder and was totally lost:

Held, that the owners were only entitled to recover upon the portion of the cargo actually lost, and not for a total loss of the whole.

This was an appeal against a decision of the Court of C. P. making absolute a rule to enter a verdict for the deft. and reported in 8 L. T. Rep. N. S. 21, C. P.

The action was brought against the underwriters on a policy of insurance, which was a time policy on the ship *Shark* and her cargo for twelve months, beginning from the day of the vessel sailing from Liverpool. In addition to the usual clauses the policy contained the words, "outward cargo to be considered homeward interest twenty-four hours after arrival at the first port or place of trade," and the indorsement was as follows: "for ship value 2000l., cargo 8000l., with liberty to extend the valuation of the homeward cargo."

The vessel left Liverpool on the 24th June, the value of her invoiced cargo being 6226l. 5s. 10d., and arrived at Kinsembo, on the African coast, on the 14th Aug., where she discharged cargo to the value of 2952l. 8s. 3d., and on the 17th of the same month she sailed for the Congo, and was totally lost on the 19th. It was proved that she had not taken any fresh cargo on board at Kinsembo, and it was admitted that she was proceeding to the Congo for homeward cargo, and would have obtained some there.

The defts. before action paid for a total loss of the ship, and also paid 43 per cent. into court to cover the loss of that portion of the cargo which was on board. The plt. however claimed for the loss of the whole. The court below held that the owners were only entitled to recover upon the portion of the cargo actually lost, and not for a

total loss of the whole, and it was against this decision that the plt. now appealed.

Bovill, Q.C. (J. Brown with him) appeared for the plt., and cited

Hill v. Patten, 8 East, 373;

Shaw v. Felton, 2 East, 109;

Forbes v. Aspinall, 13 East, 323;

Rickman v. Carstairs, 5 B. & Ad. 651.

Mellish, Q.C. (Lush, Q.C. and Sir Geo. Hongue with him) appeared for deft., and referred to

1 *Art. on Ins.* s. 184, p. 365, 2nd edit.

Cur. adv. vult.

June 18.—POLLOCK, C. B.—I believe, with the exception of my brother Bramwell, who entertains some doubt upon the matter, but does not differ from our judgment, we are all of opinion that the judgment of the court below ought to be affirmed for the reasons stated in the judgment of that court. I will merely add for my own part, the rest of the court not being responsible for what I say, that the question, as stated by Mr. Mellish, seems clearly to be, "What is the meaning of the word 'cargo'?" Whether it means such goods as may accidentally be on board the vessel at a particular moment, or whether it must not have reference to the anticipation of that which the vessel is really afterwards to carry, I think there cannot be much doubt. Applying to the word the ordinary rule of construction, I think there cannot be a question that it must mean not the accidental goods, which no doubt may be called the vessel's "cargo" in one sense, but that must have reference to something more, to be derived from the known employment of the vessel and not to that which is really a matter of accident.

CROMPTON, J.—I am of the same opinion, for the reasons given by my brother Williams in the court below, and now given by the Lord Chief Baron, also expressed in the course of the argument.

BRAMWELL, B.—I am sorry to say, although my Lord thinks there is not much doubt about it, in my mind there is considerable doubt, and I think that my own unassisted judgment would not have come to the same conclusion. This is a valued policy of ships and goods, and it is upon a voyage where the ship is to sail with more or less cargo in her, and come back with more or less cargo in her. The character of the trade is such that it is impossible for the assured to say at any time what is the quantity of cargo on board, and what its nature or value. Probably he can tell when she goes out what she carries; probably he can tell when she is final on her voyage home what she has got—but as to the intermediate ports, he cannot tell even beforehand or by advice, what is to be given to him. In order to guard against that he says, "I will effect a policy for 8000l.," whereby it is to be assumed that the ship has always on board 8000l. worth of goods. It is said that it is a reproach to the policy. No doubt it is; but the justification of it is, that it is the least gamine speculation that the assured can enter into. If I had had no policy at all, his voyage would have been of a more wagering and speculative character, and in no other possible way, according to his account, can he insure himself. Therefore, although this is wagering, it has the merit of being the least wagering transaction that can be entered into in relation to the matter in hand. Then it is said that it is a fallacious view. I do not mean to say that it altogether fallacious, because we are considering what construction is to be put on this document and when doing so it is said we may as well consider the worst condition of things that may happen, as then it is within the mischief. But it is not to

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supposed that the parties have entered into an agreement to bring about that state of things, and therefore it is not altogether a fallacious argument. On the other hand people ought to construe documents not only in relation to extreme impossibilities, but also with reference to what is likely to happen, that although it might happen that there might be a couple of guns on board of the vessel when she went to the bottom, and the man would be a gainer by that transaction, yet that was not a matter that was very likely to occur. She would probably always have on board a substantial cargo, as in this particular case. At one place she might put out goods to a considerable amount, at another place she might take in probably what was worthless, but the probability is that she would always have on board a substantial and valuable cargo. But inasmuch as we have not delegated to us the power to make agreements for parties, but merely to construe the agreement for them, I think the best thing we can do is to consider what construction these parties have put on the agreement. I do not see that there is anything unreasonable in that. Then what construction ought it to receive? It is a policy on "ship and goods," and, manifestly, but for the statement of value, it is a policy upon whatever goods are on board at the time, because she is at liberty to put some out and take some in, and put them out again, and so forth. Therefore, it would be a policy on whatever goods are on board at the time, the ship being valued at 2000*l.*, and the cargo valued at 8000*l.* It seems a strange thing that it is so, making every allowance as I do for the unmethodical way in which the policy is drawn, that the body of the policy is on whatever goods are on board from time to time—that the introduction of the word "cargo," which I sincerely believe means no more than goods in the meaning of the parties, means that it is not to be a valued policy upon the goods, but that it is to be a valued policy on a sort of entity, or thing, which is called a cargo, and that you are afterwards to find what proportion the actual goods on board bore to the cargo. Then avowedly there is not only considerable difficulty in applying that when you come to construe this instrument; but it is an impossibility, because it certainly was conceded by Mr. Mellish that it does not mean a full cargo. If she took an incomplete cargo—that is a word I ought not to use, because it may give rise to a mistake; but, if she took a partial or not a full cargo out with her, and was totally lost, it is conceded, as I understand, that the 8000*l.* would be recovered. So if lost on her final voyage home with not a full cargo, the 8000*l.* would have been recovered. Therefore, the word "cargo" here does not mean a full cargo. Then what does it mean; what other meaning shall I say can be given to it? I wish to do the parties justice, but I have some difficulty in doing so. It is said it is an intended cargo, or a destined cargo, or the cargo which it was right she should have at the time, and not an incomplete cargo. Why so? It possibly may be that if they got to a port and a quantity of cargo was there, and she had got some on board, but was afterwards blown out to sea and lost before she had got the residue, for aught I know you might then say there was not; the intended cargo in that sense was not lost. Therefore, you must apply the expression here used to such a case as that. Supposing that is so, why, in this particular case, had she not got on board her cargo? She had got on board everything that it was intended she should have there; she was not in a state of incompleteness in any sense; she had got on board all that she was intended to have. She goes out with a great quantity of goods and lands some of them at this place, Kinsembo, and then she is lost with the

residue. Suppose she had started with the residue and landed none at Kinsembo, if I understand Mr. Mellish's concession right, the plt. would have been entitled to recover the whole amount. She would then have had on board her destined and intended cargo, and having put none of it out it would have been a cargo lost within the meaning of the policy and the assured have a right to recover the 8000*l.* Does it not seem strange that, because besides what she takes out something more is landed at this place, they cannot recover the 8000*l.* Suppose she had taken something on board at Kinsembo; suppose she had filled up with a variety of goods of small value, or had taken some on board, would she not have had her destined cargo on board? I suppose it is admitted that she would. It seems to me to be a little strange that taking out these few comparatively worthless goods at Kinsembo should make her have her cargo on board. Putting this construction on the policy and on the words of the body of it, as I have mentioned before, no one can say that it is an insurance of the goods that are on board. All these circumstances would have made me think—of course I cannot think so now, after the unanimous judgment of the Court of C. P. and of my learned brethren here—but all these considerations would have made me think but for that, that this word "cargo" was simply identical with the goods; and consequently that the true construction of the policy would have been in conformity with what Mr. Bovill contended. It is not denied to a certain extent that the agreement between these two parties meant, "We cannot tell from time to time what may be on board, therefore we will take it, from time to time, the goods that are on board are worth 8000*l.*" That is the conclusion which I should have come to. Then, with respect to the authorities, I think they are in favour of Mr. Bovill's contention. I do not wish to go through them at any length. There is the case in *East*, of *Shawe v. Felton*, about the slaves who consumed the provisions. It is said there, that if the assured does not lose it in meal he loses it in malt; that if the slaves had gone to the bottom the parties would have had the benefit of the stores that had been taken out. But the court do not put it upon such a ground as that. Suppose it had happened that the slaves had been saved and the ship had gone to the bottom? [*Bovill*.—They were saved.] Mr. Mellish distinguished it upon that ground; then that ground fails him. The reasoning of the court there is very much to my mind in confirmation of Mr. Bovill's contention. In *Forbes v. Aspinall*, the case about the freight, there the court expressly say, that because the intended cargo is not on board, the whole of the freight is not the subject of the loss: they must take such a proportion as the cargo put on board bore to the intended cargo. I think that also is in Mr. Bovill's favour, because here the whole of the intended cargo was on board. Then a similar remark applies to the case of *Curstairs v. Rickman*. I think, if I had been left to myself, upon the authorities I should have decided this case in favour of Mr. Bovill. It is said, if a construction were put on those words adverse to him, that would have made nonsense of the policy, because confessedly it cannot now be said that this is a valued policy. It is not a valued policy in reference to the matter that has happened. I am at a loss to understand the meaning of the Court of C. P. confessedly acknowledging that this being a valid policy, must be left out of consideration. In what way they may suppose the 8000*l.* is to be paid I am at a loss to understand. However, I must of course concur with the judgment of the court.

BLACKBURN, J.—I would say a very few words, agreeing, as I do, with the majority of this court,

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that the Court of C. P. were right in their decision, and right also in what I understand to be their reasons. With regard to the real point to be decided, in my mind the fact that this is a valued policy is a mere accident, and has nothing to do with the question. I think, if this was an open policy, the question of whether it was a total or a partial loss is independent in this case, as, in my mind, it ought to be in every case, of the question whether the policy is valued or not valued. The question in all cases is, what is the subject-matter that is covered by the insurance? Let us see whether the whole of the subject-matter is lost, in which case it would be a total loss; or whether only a part is lost, in which case it would be a partial loss, the amount of which would depend on the proportion which the part that was lost bore to the subject-matter of the insurance. Then, if that is a valued policy, the value being admitted, the sum when reduced to figures is proved. If it be an open policy you must prove the value of the whole subject-matter. Then it would come to the same result after it is proved, and it being a valued policy only dispenses with the proof. However, in my mind the question comes to be, what is the subject-matter of insurance in this policy? The policy itself is made up, as every policy ought to be, of a printed form originally intended for an ordinary voyage policy altered to meet this peculiar African trade, and further altered into a time policy for six months. They get the old form of policy, and then some manuscript is left untouched and unaltered, and it is not very surprising that the document should be a little difficult to construe. Thus much appears clear enough, that this is a policy partly on the ship, with which we are not now concerned, and partly on the cargo. I think to my mind it is immaterial whether it said on cargo or goods; goods, I think, would mean cargo; cargo would mean goods. I do not think there is any great difficulty in them. It is the goods which on such a voyage would be all that are to be carried by the vessel as her cargo, and if it had been the word "goods" it would have meant that. The fact appears to be this, that this ship sailed on this time policy from Liverpool, and that it attached on this cargo which she had on board. The nature of the adventure on which she was bound to the coast of Africa was, that the cargo taken on board at Liverpool was intended to be substituted and exchanged by barter for cargo the produce of the coast of Africa. They have words in the body of the policy intended to meet that state of things, and which no doubt were framed in those terms when originally the natives were in the habit of carrying on the barter from their canoes alongside the ship, and as you parted with the European goods which they wanted to receive you obtained from the natives the produce of their country in exchange. The effect of that is, to say that if it had not been for the policy that would have applied to the goods put on board when the ship sailed, and is to continue to attach to what is substituted for it. There is the leave to barter, exchange and trade for goods, property and so on, and a variety of other words, the meaning of which is to say that this policy on the cargo that went out is to be also on the cargo that came in the place of it afterwards. In this case it appears that the cargo that went out from Liverpool to Africa arrived on the coast of Africa, and that 57 per cent. was safely landed, and the ship was lost with the other 43 per cent. on board. Nothing being substituted for the 57 per cent. which was left, it seems very clear that, as nothing had been put on board to take the place of that which was safely landed, the portion on which the risk had originally attached was only 43 per cent., and that in this case 43 per cent., and 43 per cent. only, was lost. That is in effect what

was decided in the court below. There comes a further matter, had other produce been partially put on board, which would come, to my mind, to a question to be decided, and it might be a troublesome one, whether that which was partially put on board was the whole of what was intended to be substituted, or only a part of it; and that would be a very difficult question, not of law, but of fact. When the question arises it will be time enough to consider it. But the court below had it evidently present to their mind. They expressly point to that by saying that it was sufficient to ascertain the *datum* of what was the full cargo put on board. So it would be in this case if some other produce had been put on board, and the ship was lost. That would be a puzzling question. I hardly know how to get at this *datum* except by a compromise or agreement between the parties. That does not affect the present case. It seems to me to be clear enough that what was lost was 43 per cent. of the cargo and no more. That being so, I think the decision of the court below was perfectly right, for the reasons I have stated. I think that a difficulty may arise hereafter, but it will be a difficulty as to the facts, which does not arise in the present case.

Judgment affirmed.

ADMIRALTY COURT.

Reported by ROBERT A. PRITCHARD, D.C.L., Barrister-at-Law.

May 31 and June 14, 1864.

(Before the Right Hon. Dr. LUSHINGTON.)

THE EDWIN.

Master—Appointment of—Wages—Disbursements—Liability of ship.

A master appointed by a person fraudulently in possession of the ship, has, nevertheless, if innocent of the fraud, a claim against the ship for his wages and disbursements actually made by him on behalf of the ship.

But he has no claim for ship's disbursements, for which he has only rendered himself liable, and which he has not actually paid.

The Chieftain, 8 L. T. Rep. N. S. 120, followed.

This case came before the court upon a motion to direct the answer to be amended in a claim for wages brought on behalf of James Smith, the late master of the *Edwin*, against the said vessel, her tackle apparel, and furniture, and against Matthew Isaac Wilson, of Liverpool, shipowner, intervening.

The petition for the *plt.* set forth that, in Sept. 1863, the *Edwin*, belonging to the port of Liverpool was lying there under the sole control and management of Jacob Michael, of London, shipowner, a owner thereof, the said Jacob Michael having then as the *plt.* was informed, recently purchased her from Edwin Holford, her former owner, who subsequently, in the same month, and at the request of Michael, executed a bill of sale according to the provisions of the Merchant Shipping Act 1854 thereby transferring to John William Michael, his son, the entirety of the ship, for the valuable considerations therein expressed to have been paid to Mr. Holford; that while the ship was so lying at Liverpool, Jacob Michael appointed the *plt.* as master, with wages at 15*l.* per month, for a voyage from Liverpool to Quebec, and thence to some port in the United Kingdom, and accordingly, on the 4th Sept., Smith took command as master; that the ship was laden with a general cargo at Liverpool under Michael's superintendence, and sailed on her voyage for Quebec, which she reached about the 2nd Nov.; that at Quebec, the master having, by order of J. Michael, discharged the cargo shipped:

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Liverpool, took in a cargo of wood goods, and sailed from thence to Queenstown (Ireland), where he called for orders; and that, shortly after his arrival there with the ship, a person from the office of Messrs. James Scott and Co. came alongside the vessel, and claimed to take the control thereof on behalf of M. I. Wilson, as her then owner; that the master thereupon communicated the alleged claim to Jacob Michael, who informed him that Wilson had no interest in the ship, and instructed him not to allow any person to take possession of her unless by force of some legal process; that the master then left Queenstown for Hull, where he arrived in Feb. 1864, and then engaged several hands to assist his crew in discharging the cargo there; that on the 7th of that month he was forcibly dispossessed of the ship by eighty men, acting in pursuance of an alleged power of attorney from M. I. Wilson, and that 76*l.* 10*s.* or thereabouts, being the balance of wages earned by him as master of the ship on the said voyage, is now due, and he has been unable to obtain payment of it, or any part of it, from either J. Michael or M. I. Wilson, or any other person on their behalf; that in Nov. 1863, at Quebec, he made certain necessary disbursements on account of the ship, including insurances of the freight to be earned on the homeward voyage, the said disbursements amounting altogether to 480*l.*, in payment of which he drew a bill on Jacob Michael, who refused to accept it, and he (the master) has been sued for, and is advised that he is now personally liable to pay the same; and that he also made divers necessary disbursements on the ship's account at Queenstown, and at the Isles of Scilly, and at Deal, on his voyage from Queenstown to Hull.

The answer on behalf of Matthew Isaac Wilson pleaded that in the month of Sept. 1863 one Edwin Holford was the true and registered owner of the *Edwin*, then lying at Liverpool; that in that month Jacob Michael, by fraud, obtained possession of the ship from Holford; that the fraud consisted, among other things, in the said Jacob Michael giving, as purchase-money for the ship, certain bills drawn by and in the name of John Wilson on and accepted by W. N. De Mattos, the payment whereof would become due in Jan. and Feb. 1864, and was further guaranteed by Jacob Michael, he well knowing that neither himself, nor John Wilson, nor De Mattos, would be able to pay the said bills at maturity; that the said bills were all dishonoured at maturity, and neither J. Michael, nor I. Wilson, nor De Mattos are able to pay the same, and Holford has received no money whatever for the ship; that the bill of sale was never registered, and was, by reason of the fraud, wholly void in law, and the possession of the ship by J. Michael was without the authority of the true owner, and wholly illegal; that in September Jacob Michael, being so illegally possessed of the ship, hired Smith to act as master, and that, on or about the 12th of that month, she sailed from Liverpool for Quebec; that whilst there the deft.'s house there acted as agents for the ship, and a cargo of timber on ship's account was there purchased, by order of Jacob Michael, of the deft.'s house, under an arrangement between the deft. and Jacob Michael that payment for the said timber should be made by certain acceptances of De Mattos; that the ship sailed with a cargo of timber from Quebec about the 27th Nov. 1863, and that about the 7th Dec. De Mattos stopped payment, and the fraud of Jacob Michael was then, or shortly afterwards, discovered; that Holford was then under large liabilities to the deft., and on being pressed by the deft. for security, he, in the firm belief that the possession of the ship and the bill of sale had been fraudulently obtained from him by Jacob Michael, on the 11th or 12th

Dec., executed a bill of sale of the ship to the deft., which was duly registered on the 12th Dec. 1863; that the deft. thus became the true and lawful owner of the ship, and the said Holford has since failed; that, before the arrival of the ship, Jacob Michael, J. W. Michael, and one Thomas Early Smith, obtained an injunction from the High Court of Chancery to prevent the deft. taking possession of her and the cargo, but that injunction was afterwards dissolved; and upon the arrival of the ship at Queenstown, the deft., as he lawfully might, endeavoured to take possession of the ship, but was prevented by the act of the master; and, on her arrival at Hull, he, on the 7th Feb. in this year, lawfully took possession of her and the cargo, and thereupon discharged the present plt.; and in the last article of the answer it was contended that neither the deft. nor the ship could be made liable in law either for the wages of the plt. or the disbursements (if any) made by him on ship's account, or in respect of any bill of exchange drawn by the plt. on Jacob Michael, and by him dishonoured.

Tristram appeared in objection to the answer.

V. Lushington in support.

Dr. LUSHINGTON.—The question for the consideration of the court is, whether, assuming, as I must, all these facts to be true, the claim of the master to his wages is barred? The argument necessarily assumes that Michael, being in fraudulent possession of the ship, could not by any contract of his bind the ship or make the real owner responsible; and it goes the whole length of contending that the master, appointed by a fraudulent possessor, could not recover wages or disbursements. It is not alleged that the master was party to this fraud, and, of course, I must conclude that he was perfectly innocent of it. Now, can it be true, as a legal position, that a master so appointed could neither lawfully hire seamen or execute a bottomry bond, or do any other act necessary for the navigation of the vessel? I cannot assent to the truth of that proposition. No authority has been cited which appears to me to apply to this case; and, independent of authority, it appears to me that great injustice would arise from the maintenance of such a proposition. I cannot conceive anything more unjust than to subject a master utterly ignorant of the fraud to a forfeiture of his wages; and when the argument is pressed, as it has been, to a similar extent with regard to the seamen, it almost amounts to an absurdity. I shall not decide that by virtue of contract the master can recover his wages, but I shall refer to the immemorial custom of the Court of Admiralty, to look to the service done, and hold that, as the claim of the seamen is founded upon that service, and the summary petition in such cases always alleged service performed as the ground of the claim against the ship, so, by statute, the master has the same remedy as the seamen. The claim of the master therefore depends upon the service performed, wholly independent of contract, and the performance of the service, without fraud, constitutes a lien against the ship. For these reasons I shall direct so much of this answer as goes to the extent of alleging a forfeiture of wages to be expunged. With regard to disbursements, I must follow the same opinion which I expressed in the *Chieftain* (*supra*). By the 10th section of the Admiralty Court Act 1861, the court has jurisdiction to give a remedy for "disbursements" made by a master on account of the ship; but with regard to the liability of a master beyond that, however hard my decision may be, or with whatever severity it may operate upon him, I have no jurisdiction to give a remedy. With respect therefore to those arguments in the last article of the answer which

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deny the plt.'s right to recover for his wages and disbursements actually made by him, the answer must be amended, but the rest of the averments in that article must remain, viz., those which assert that the deft. is not liable for bills of exchange drawn by the plt. and subsequently dishonoured, for money for the ship's use.

June 11 and 14, 1864.

(Before Dr. LUSHINGTON and TRINITY MASTERS.)

H. M. S. THE TOPAZE.

Collision—New sailing regulations—H. M. ships—Notice of particular customs.

Neither the sailing regulations issued in pursuance of the Merchant Shipping Act 1854, nor those published under the authority of the Merchant Shipping Act 1862, are applicable to Her Majesty's vessels.

Questions of navigation as between ships belonging to Her Majesty and those of private persons must be tried by the general rules of the sea.

The powers, if any, of the Lords of the Admiralty under 54 Geo. 3. c. 159, s. 2, to vary by notice the general sailing regulations, must, to have any effect whatever, be exercised in strict conformity with the Act.

This was an action of damage and was brought by the owners of the three-masted brigantine *Promise* 180 tons, from Newcastle (coal laden), for Devonport, against the Hon. J. W. Spencer, captain of H. M. S. *Topaze*, 2659 tons burden, which had arrived from the Pacific, and was about 1 p.m. on the 19th Dec. last, in Plymouth Sound, proceeding for Devonport-harbour. The brigantine stated the wind as N.W., the steamer as N.N.W., and the weather was represented as fine and clear, and it was almost slack water. The *Promise* alleged, that she was proceeding under all plain sail, close-hauled on the starboard tack, heading W. by S., and making about one knot, when the steamer was seen bearing about S. by E., distant half a mile, whereupon the brigantine kept her course till the steamer approached, rendering a collision imminent, when her helm was put hard a-port, and the steamer with her starboard side, between the main and mizen rigging, struck the jibboom of the *Promise* and carried it away, doing other considerable damage. The case for the Queen's ship was, that she was making about five knots, entering the Deep Water Channel between Winter Rock and Asia Shoal, and was in charge of Commander Aylen, Queen's Harbour Master, appointed pursuant to the provisions of the 54 Geo. 3, c. 159, to bring such vessels into harbour, that whilst the steamer was so proceeding, the brigantine *Promise* was seen near the south side of the Winter Rock, standing to the westward, right into and across the Deep Water or Man of War Channel, heading about W. by S. and making about two knots; that the Deep Water Channel is only 240 yards in width, and there was abundance of water over every part of the sound and on the shoals for vessels of the burthen of the *Promise* to pass over the same; that the *Promise* is a Plymouth trader, and it was well known to her master and those on board her that the *Topaze* was standing right into the Deep Water or Man of War Channel, and that there was plenty of water over every shoal in the Sound for the *Promise* to pass over; that Commander Aylen, on approaching the *Promise*, waved her to pass astern of the *Topaze*, but no attention was paid thereto; on the contrary, the *Promise* continued her course across the Deep Water Channel; that there was not room at such time for the *Topaze* to port her

helm to pass under the stern of the *Promise* without going over the Winter Rock, and thereby endangering the safety of Her Majesty's said ship; the said Commander Aylen thereupon starboarded the *Topaze's* helm, keeping as close as possible to the Asia Shoal; that the *Promise* improperly ported her helm, which brought her jibboom in contact with the *Topaze's* starboard quarter davits; that in order to prevent obstruction to Her Majesty's ships of war when coming into or going out of harbour at Devonport, it is customary for all Her Majesty's ships in the Hamoaze and Sound to have the pilot jack displayed at the foretop-gallant masthead whenever a ship of war belonging to Her Majesty is proceeding to enter into or go out of harbour, in order to notify such fact to all merchant ships and private ships moving, and thereby to warn them to leave the Deep Water Channel open for the navigation of Her Majesty's ship of war, and such custom was well known to the master of the *Promise* and those on board her; that at the time of the said harbour master bringing the *Topaze* into the Deep Water Channel, the pilot jack was displayed, according to the said custom, at the foretop-gallant masthead of all Her Majesty's ships in commission in the Hamoaze and Sound.

The witnesses on both sides were examined ~~and~~ *in* voice, and in support of the custom as to Her Majesty's ships as above, evidence of the following notice was given:

"*Notice.*—The Lords Commissioners of the Admiralty have directed, in order to prevent the harbour channels at Devonport from being obstructed by vessels in motion when ships of war are entering or proceeding out of the harbour, that the union jack be hoisted on board any vessel moving as heretofore, and in future the pilot jack will be displayed at the same time at the foretop-gallant masthead of all Her Majesty's ships in commission in the Hamoaze and Sound whenever a vessel is proceeding into or out of the harbour. And their Lordships have also directed me to cause a notice of this arrangement to be promulgated at the Custom-house of this port &c., to warn any merchant vessel moving at the time to be careful on the approach of a ship of war and that they steer as close to the shore as practicable, so as to keep the Deep Water Channel for the navigation of Her Majesty's ships. Which is hereby signified to all whom it may concern.

"THOS. SABINE PARLEY,

"Admiralty Superintendent.

"Devonport, 30th July 1860."

The following is the clause of the Act of Parliament under which the notice was given.

54 Geo. 3, c. 159, s. 2:

It shall be lawful for the Lord High Admiral, or three or more of the commissioners for executing the office of lord high admiral of the United Kingdom of Great Britain and Ireland for the time being, and he and they is and are hereby authorised and empowered from time to time as occasion shall require, to make such rules, orders and regulations, in writing under his or their respective hand or hands, or the hand of him or their secretary, as he or they shall think proper, for the preservation of His Majesty's moorings, and for the mooring anchoring and placing of all private ships of war, transport and all other private and merchant ships and vessels, lighters, barges, boats and other craft whatsoever, in all ports, harbours, havens, roads, roadsteads, sounds, channels, creeks, bays and navigable rivers of the United Kingdom so far as the tide flows and refloes, where or near to which His Majesty now hath, or where His Majesty, his heirs or successors, may at any time or times hereafter have any docks, dockyards, arsenals, wharfs, or moorings; and harbour masters to be appointed as hereinafter mentioned, for superintending the same for the purpose of insuring free and safe ingress, egress and regress unto, into, to and from the said ports, harbours, havens, roads, roadsteads, sounds, channels, creeks, bays and navigable rivers, and to and from His Majesty's said docks, dockyards, arsenals, wharfs and moorings therein; and for that purpose to order and direct such spaces along the sides of, over, against, or near each dock, dockyard, arsenal, wharf and mooring as they shall judge necessary to be kept open and free, and to cause the same to be marked out by piles, buoys, or other sufficient marks

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and to order and direct what spaces and distances shall be appropriated to and for the sole use and purpose of moorings for His Majesty's ships and vessels of war and armed ships or vessels in His Majesty's service; and also to specify the distances from His Majesty's docks, dock-yards, arsenals, wharfs, moorings, ships and hulks, within which no private ship of war, transport, or any other private or merchant ship or vessel, lighter, barge, boat, or other craft whatever, shall be moored, anchored, or placed, and for all and every or any other the purposes aforesaid; and also from time to time to vary and alter such rules, orders and regulations as occasion shall require for the purposes aforesaid; and also from time to time to appoint proper persons, to be called the King's harbour masters, to superintend such ports, harbours, havens, roads, roadsteads, sounds, channels, creeks, bays and navigable rivers, for the purposes aforesaid, and to enforce obedience to all such rules, orders and regulations, all which said rules, orders and regulations shall, upon the making thereof, and also from time to time whenever the same shall in any manner be varied or altered, be forthwith printed and published in the *London Gazette*, and being also printed and put upon pasteboard shall be constantly kept hanging up in some open and conspicuous part of the Custom House or other place of public resort for business in the port, harbour, or haven, for which the same shall be made, or where the same shall be directed to be in force, to the intent that the same may be seen and read, and copies or extracts taken therefrom by all persons interested therein.

Deane (Clarkson with him) for the *Promise*.—The *Topaze* was to blame. She is bound by Art. 15 of the new sailing regulations issued in pursuance of the Merchant Shipping Act Amendment Act 1862: (*The Inflexible*, Swa. 32.) Even if Her Majesty's ships are not bound by the regulations, the rule of sea applies, and the steamer should have given way. There is no valid custom requiring a vessel to keep out of the Deep Water Channel, when Her Majesty's ships are entering or leaving harbour. As to the rule, of which notice is said to have been given, the 54 Geo. 3, c. 159, s. 2, requires the signature of the Lords of the Admiralty or their secretary, but the notice is signed by neither one nor the other. Again, there was no publication in the *London Gazette*, as required by the Act. But, in point of fact, the section in question gives no power to issue such a rule; it has reference to mooring, &c., and not to sailing.

The *Queen's Advocate* (the *Admiralty Advocate* with him) for the defts.—Capt. Aylen was duly appointed under 54 Geo. 3, c. 159, and proper instructions (*supra*) were given him. It is not necessary to publish those instructions in the *Gazette*. The new sailing regulations published under the provisions of the Merchant Shipping Act Amendment Act 1862 do not apply to ships of war. Under the Merchant Shipping Act 1854, s. 4, Her Majesty's ships are expressly excluded, except in certain cases, as salvage, &c., and the Amendment Act 1862 does not alter this. Even if the regulations do apply to Her Majesty's ships, they are only applicable at sea and not in harbour. At all events, the present deft. the Hon. W. S. Spencer, captain of the *Topaze*, is not liable; but commander Aylen, who was in charge of the *Topaze*. The *Promise* ought, at all events, to have altered her course when Capt. Aylen waved her to do so. But she evidently had no look-out at all. At least, the notice is evidence of a custom for vessels to keep out of the Deep Water Channel when the Queen's ships are going in or out. Publication in the *London Gazette* is not made indispensable by the Act—not a condition precedent to the validity of the rule.

Deane, Q.C. in reply.

Dr. LUSHINGTON, in his address to the Trinity Masters, directed them that, neither the sailing regulations made in pursuance of the Merchant Shipping Act 1854, nor those in pursuance of the Merchant Shipping Act Amendment Act 1862, applied to Her Majesty's ships of war; that the custom contended for by the defts. had not been made out by the evidence, and that the rule attempted to be set up

was utterly invalid. It was very doubtful whether there was any power given by the Act to make such a rule; and if there were, it was perfectly clear that almost everything which the Act required to make a rule issued under its authority binding had been omitted in the present instance. His Lordship, however, observed that, in holding that no such rule as the one set up existed, he by no means meant to question the propriety of some regulation to the same effect, supposing it issued in pursuance of an authority clearly given and with the prescribed formalities. Having disposed of these points, the learned Judge then went on to observe that the only rule which remained to guide the court in the decision of this case was the general rule of the sea as applicable to the facts proved in evidence.

Ultimately, the Trinity Masters found that the *Topaze* was solely to blame for the collision—an opinion with which Dr. Lushington entirely concurred.

June 8 and 14, 1864.

(Before the Right Hon. Dr. LUSHINGTON).

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Salvage of life—Jurisdiction—Contribution by owners of cargo.

The payment of salvage is not governed by the ordinary rules which prevail in mercantile transactions on shore, but by a due consideration of the benefit received, combined with a just regard also for the general interests of commerce. It is a political as well as a commercial transaction.

The words "persons belonging to such ship," in the Merchant Shipping Act 1854, include the passengers on board the ship as well as the master and crew, and therefore salvors are also entitled to remuneration for saving the lives of the passengers.

Seemly, that under the provisions of the Merchant Shipping Act 1854, the owners of cargo may be liable to contribute in respect of salvage of life, even though the salvors have rendered no direct benefit to the cargo.

The old law as to remuneration for life salvage considered.

This was a salvage suit brought by the steam-tug *Aid*, the Ramsgate lifeboat *Northumberland*, and the luggers *Champion* and *Lotus*, and their respective owners, against the ship *Fusilier* and her owners. On the 3rd Dec. last it was blowing a most violent gale from the north-west, and at about 6.30 p.m. signals of distress were seen by the chief officer of the coastguard at Margate to be fired from the Girdler, Tongue, and Prince's Channel lightships. Information was telegraphed to the harbour master at Ramsgate, who despatched the steam-tug *Aid* with the lifeboat about 9 p.m., and upon rounding the North Foreland they were exposed to the violence of the gale, the seas washing over the tug's funnel, and her bows being frequently under water; the lifeboat also experiencing great danger from the very heavy seas, and although the tug's engines were worked to their highest power, her utmost speed attained was only three knots per hour. After unsuccessful attempts, until one a.m. of the next day to find the vessel, it was ascertained from those on board the Prince's lightship, that there was a large ship aground on the Girdler Sand, towards which the tug and lifeboat then went, and when within half-a-mile of the vessel (which proved to be the *Fusilier*, from London, with a general cargo and ninety-five passengers) for Australia, the lifeboat was cast off from the tug and proceeded to the ship; two of the lifeboat's crew then boarded the ship, incurring risk in so doing, and were requested by

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the master and pilot to take the passengers out of the ship and place them in safety, and then to take the crew off if necessary. Accordingly, twenty-four persons (women and children) were conveyed from the ship by the lifeboat to the tug, and in three trips more all the ninety-five passengers were placed on board the *Aid*, the lifeboat returning to the ship to save the crew, if required. The *Aid* then made for Ramsgate with the passengers, and also with an order for an anchor and chain, sent by the captain of the *Fusilier*. When the *Aid* was near the Prince's Channel lightship, a wrecked vessel was seen on the Shingles Sand, the crew of which was clinging to the mast. The lifeboat was then signalled, and she succeeded in getting alongside and rescuing the crew, which were put on board the tug, the vessel turning out to be the *Demerara*, from London for Greenock. The lifeboat was then taken in tow by the *Aid*, and they arrived at Ramsgate at about noon, when the weather had slightly moderated, and the *Fusilier's* passengers and the *Demerara's* crew were then safely landed. Upon the required anchor and chain (weighing together thirteen tons) being obtained, the employment of two luggers became necessary to take them off, which was accomplished by the *Champion*, thirty-four tons, and the *Lotus*, eighteen tons, in tow of the *Aid*. They left Ramsgate with their own crew and the crew of the lifeboat, fifteen hands in all, about six p.m., and at about midnight anchored near the *Fusilier*; and as the wind had increased and it was dangerous to attempt to put the anchor and chain on board, they remained there all night. Two other tugs were then attempting to tow the *Fusilier*, and the *Aid's* hawser was, at the request of those in charge of the ship, sent on board, and the three tugs then went ahead, and continued towing until after high water, when, finding the ship could not be moved, the hawser was cast off, and soon afterwards the tug's master being told her services were no longer required, she made for Ramsgate, which she reached about midday of the 5th. About four p.m. the gale, which had been from the west, having changed to the south, and increased, the luggers were ordered by the pilot of the *Fusilier* to proceed to the Nore and remain there until the weather should get finer. They reached the Nore on the 6th about six p.m., and two men who had remained on board the *Fusilier*—one from the lifeboat and the other from one of the luggers—assisted on the 6th in getting up the passengers' luggage and portions of the cargo. The luggers remained at anchor till the morning of the 10th, when by orders from the *Fusilier* they proceeded to her, but returned again to their former position, as the anchor and chain were not required. The luggers were afterwards about two p.m. of the 11th taken in tow, and about six p.m. they came up with the *Fusilier*, which had no anchors at her bows, and was in tow of two tugs off Northfleet, and the luggers by direction then proceeded to Blackwall-docks and arrived there on the afternoon of the 12th, the anchor and chain were placed on shore, and the luggers reached Ramsgate on the afternoon of the 14th.

Deane, Q. C. and E. C. Clarkson appeared for the salvors.

Manisty, Q. C. and V. Lushington, on behalf of the owners of the *Fusilier*, contended that neither the ship nor her owners were liable in law to pay compensation for services in the nature of life-salvage rendered to passengers. That passengers were not "persons belonging to any such ship or boat" within the meaning of the 459th section of the Merchant Shipping Act 1854. That the principal risk incurred by the *Aid* and the *Northumberland* was so incurred before they were aware that the *Fusilier* required any assistance, and

not with any view to the benefit or advantage of the *Fusilier*. That at the time when the said vessel reached the *Fusilier*, the gale had very considerably abated, and that in rendering the said services to the passengers on board the *Fusilier*, no risk was incurred by the said vessels or their crews, nor was the *Fusilier* or her cargo at that time in any great danger; and that as to the claim of the *Champion* and *Lotus*, no salvage services were rendered by either of them. The value of the property was 54,500*l*.

The *Queen's Advocate* and *Potter* on behalf of the owners of the cargo.—Previous to the passing of the Merchant Shipping Act 1854, the court had no power to award remuneration where life alone had been saved, and it is only where property also has been rescued from destruction that the court can take the salvation of life into its consideration according to the construction of sect. 459 of the Merchant Shipping Act 1854, the owners of the ship only are liable to pay for life salvage, and if the fund is insufficient recourse must be had to the Mercantile Marine Fund; and in construing sects 458 and 459, a distinction must fairly be drawn between saving the lives of passengers and those of the crew of a vessel.

The following are the sections of the Merchant Shipping Act 1854 referred to:—

Sect. 458:

In the following cases (that is to say), whenever any ship or boat is stranded, or otherwise in distress on the shore or any sea or tidal water, situate within the limits of the United Kingdom, and services are rendered by any person: (1) in assisting such ship or boat; (2) in saving the lives of the persons belonging to such ship or boat; (3) in saving the cargo or apparel of such ship or boat, or any portion thereof; and whenever any wreck is saved by any person other than the receiver within the United Kingdom; there shall be payable by the owners of such ship or boat, cargo, apparel, or wreck to the person by whom such services or any of them are rendered, or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services, or the saving of such wreck.

Sect. 459:

Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship or boat as aforesaid shall be payable by the owners of the ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives the Board of Trade may, in its discretion, award to the salvor of such life or lives, out of the Mercantile Marine Fund such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives.

Dr. LUSHINGTON.—It is alleged in this case that salvage services have been rendered by the asserted salvors with respect to ship and cargo, and particularly in saving the lives of ninety-five persons including women and children, passengers on board the vessel. Several questions of law have arisen respecting what is called life salvage, and to the questions I will address my attention before considering the particular facts of the case. The ancient law respecting salvage of life, when not connected with the salvage of property, was, that where no ship or cargo had been saved, no property rescued from destruction, and life alone preserved no suit for salvage reward could be maintained. On reason for this state of the law was, that no property could be arrested applicable to the purpose and therefore there could be no proceeding *in re* the ancient foundation of a salvage suit. It is true that an anomalous case might arise, and indeed has arisen, where one set of persons exclusively saved life, and another wholly distinct set saved the ship and cargo; but, even in this state of things, the salvors of life alone could not render the property amenable to their claims. When both life and property had been saved, it was the practice of the

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court to make a corresponding increase in the amount of salvage; and this doctrine does, I think, rest on too high authority to be doubted. The practice, too, was, that all the property saved, in proportion to its amount, should be liable to pay such increased rate of salvage, the ship, the freight and the cargo each in proportion to its value. Such being the state of the law and practice of the court, it sometimes happened that persons who had risked their own lives, perhaps, and saved life only, or so little property as not to afford the payment of an adequate reward, could not be justly compensated. In remedying this grievance no doubt the leading motive for a legislative enactment was to encourage the saving of life; but there was a subsidiary ground—the encouragement of salvors generally, for such reward operates as a further incentive to salvage exertions. This being so, it would be reasonable to suppose, *a priori*, that the remedy given by the Legislature would be commensurate to the evil, and effect no further change; but of course any such inference must ultimately depend on the words of the statute. As to the 458th section of the Merchant Shipping Act 1854 (for the effect of the 459th section I will consider presently), I think that the object of that section was to define what should constitute a salvage service; and then three special circumstances are stated, each of which, when occurring separately, would constitute a salvage service, and would also do so if in any way combined. The Act then proceeds to declare, that payment shall be made by the owner of any ship or cargo of a reasonable amount of salvage. Now, if the statute ended here, I should say that the effect of it was simply to constitute the saving of life to be *per se* a salvage service, and to leave the mode of payment to be according to former practice; for I cannot find any words in this section adequate to effect so serious a change in the law as to abrogate all former authorities and practice, and introduce an entirely new system of payment, and in effect require the court to depart from the ancient law, which incidentally, and only where life and property were saved, threw upon the cargo a part of the proportionate increase of the salvage reward by reason of the salvage of life. The existing grievance was not the mode of payment in charging the cargo in part, but the absence of all payment for life salvage. I think that the old law was only altered by this section to the extent of making salvage of life alone a salvage service to be paid as heretofore. It has been said that the words “in saving the lives of the persons belonging to the ship or boat” do not include passengers. If this argument be well founded, then it follows that the saving the lives of passengers is not to be paid for at all either by the ship or cargo or otherwise; or, in other words, that it does not constitute a salvage service, and that the Legislature, in defining what constitutes a salvage service, has omitted it. The contention upon the words of the statute is, that the master and crew alone are meant, but if this were so, why did not the Legislature express the intention in plain terms? as nothing could have been more easy. With reference to the words, “belonging to such a ship”—“belonging” is certainly a word *accipitis usus* with reference to the subject-matter; but one of the rules of construing statutes, and a wise rule too, is, that they shall be construed according to the common understanding and acceptance of the terms; and I think that nothing is more common than to say of passengers by a ship that they are passengers belonging to the ship, and would be included under the expression “persons.” But the lives of passengers are surely as valuable as those of the master and crew, and it does seem, *prima facie*, somewhat strange that the Legislature, in providing for salvage for saving life, should exclude this class of persons, for the object of the

Legislature must be, surely, to save all, and not only a particular designation of persons. The more extensive the construction, the greater is the reward, and the greater the encouragement to encounter difficulty and danger; but a contrary construction would be, in effect, an inducement to abandon life instead of to save it—to recover property instead, and this in direct opposition to all moral obligations, which I must consider, and am bound by law to consider, as the foundation of all legislation. I have no doubt, therefore, that passengers are included in this section. As to the question of payment, I do not hesitate to say that I have experienced doubt and difficulty in my endeavours to ascertain the true meaning of sect. 459. The word “cargo” is not to be found in this section. It is by inference only that the law relating to the payment of salvage by the cargo can be affected. That law must remain as it was, unless I can fairly arrive at the conclusion that the Legislature has intended to alter it, and has done so. This section requires that the owner of the ship shall pay salvage for life in priority to all other claims, and, in case the ship has been lost, or is of too small a value, the Board of Trade may pay what is needful from the Mercantile Marine Fund. This enactment proves the anxiety of the Legislature that salvage for saving life shall always be paid, but it leaves it doubtful whether it was intended to alter the old law, or to supply what was wanting under the old law only—whether it was intended to throw the whole burden in all cases on the ship, or only to give priority of payment when the ship was the only fund to which recourse could be had. If the latter be the true construction, there would not be much difficulty in applying the statute to the circumstances contemplated—viz., where, besides life, the ship alone was saved, and not the cargo. But if the true construction is that the cargo, though saved, should not contribute to life salvage, then the old law would be wholly altered, and the court would have to consider, when life and ship and cargo had been saved, first, what is due for life salvage, and throw that burden exclusively on the ship, and then to assess the salvage on the ship and cargo. This construction would work a great change in the law, and go much beyond the grievance which existed—the want of reward for life salvage alone. For what reason should I put upon the statute a construction which would, in its operation, exclude all cargoes from contribution to life salvage? Not upon precedent, certainly; for the practice has been to increase the amount of remuneration for the salvage of life when ship and cargo have been saved, and of that increase, in a large proportion of cases, the cargo has borne the larger share; and, be it remembered, such precedents have the sanction of Lord Stowell. Then, if the cargo is not to be relieved from bearing its proportionate burden on precedent, how stands the case upon reason and principle? The claim, of course, can be preferred only against so much of the cargo as is saved; and it may be said, what interest have the owners of the cargo in the saving of the lives of the master and crew, and it may be the passengers; and it may be asked, why should they be taxed for the saving of life; is it not sufficient for them to pay for the salvage of their own property? But is the payment of life salvage always founded upon the benefit reaped by the party who is called upon to pay? Both by this statute, and by the law before the statute, the owner of the ship might pay for life salvage when he reaped little or no benefit therefrom. By this statute the owner of the ship must pay to the utmost extent of the little which may be saved. The salvors of life must be paid in priority, even where the salvors of the ship were different persons, and that, too, in cases where it might be very difficult to affirm that the owner of the ship was

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benefited by the saving the lives of the master and crew, and much more difficult to assert the same as to passengers. The sole ground, therefore, for charging the ship with the payment of salvage for life is not the actual benefit received in each individual case. As to the cargo, it may assuredly be truly said, that when the master and crew are taken from the ship because of imminent danger, and the ship left without men to man her, such a proceeding cannot be held to be a direct benefit to the cargo. And only in some very exceptional cases may the removal of the passengers be an advantage incidentally. It is not then from any direct benefit to the cargo that it should contribute in case of life salvage? But the payment of salvage depends upon much higher and more general principles; and I think I am supported both by Lord Stowell and Mr. Justice Story. Salvage is not governed by the ordinary rules which prevail in mercantile transactions on shore, but by a due consideration of the benefit received, combined with a just regard also to the general interests of ships and commerce. It is a political as well as a mercantile transaction—so says Lord Stowell, so says Mr. Justice Story—as, for instance, when a larger reward is given because of the greater value of the property saved. The ship, the master, the crew, the passengers and cargo ought to be considered as one component firm, though each may differ in their respective conditions. I consider that all are interested in maintaining the great principle of adequate remuneration for salvors, though it may and must happen that sometimes the benefit conferred will be the saving of life only, sometimes of the ship, sometimes of the cargo; and I think that none are more interested in the maintenance of this great principle than the owners and underwriters of the cargo, who must have the greatest pecuniary interest at stake. For these reasons I shall decree the salvage payable to be borne by the ship and cargo, as heretofore accustomed in similar cases. The learned Judge then stated the facts of the case, and said: The violence of the gale of Dec. 3 is a matter of notoriety, and the courage and exertions of the men in the lifeboat deserve the highest praise. The principal salvors, no doubt, considering for the moment that the services were all distinct, were the *Aid*, the lifeboat *Northumberland*, and the persons on board them. I shall give the sum of 700*l.* to the *Aid*, and the same to the lifeboat. The services of the luggers were not attended with the same danger, but were of very long duration. The luggers themselves and the crews were detained from the 4th to the 14th Dec., and I shall give to those two luggers 800*l.*, especially on the ground of their long detention.

—
Tuesday, May 31, 1864.

(Before the Right Hon. Dr. LUSHINGTON.)

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Examination before a receiver of wreck—Evidence—Costs—The Merchant Shipping Act 1854, s. 449—The C. L. P. A. 1854, s. 24.

In a cause of damage, though it may be intended to contradict a witness as to statements made by him before a receiver of wreck, it is not necessary to subpoena the receiver of wreck to produce the original deposition, as a certified copy will be sufficient for the purpose.

This was a motion to review the taxation of costs in a cause of damage. On the trial the defts. had subpoenaed the receiver of wreck at Leith to produce an examination taken by him of the master of the *plt.'s vessel*. The deputy-registrar, on taxation, refused to allow the defts. the costs of the attendance of the receiver of wreck, on the ground that

the expense might have been saved by the use of a certified copy of the examination, under the authority of the 449th section of the Merchant Shipping Act 1854. That section provides as follows:

Any examination so taken in writing as aforesaid, or thereof, purporting to be certified under the hand of the receiver or justice before whom such examination was taken, shall be admitted in evidence in any court of justice, or by any person having by law or by consent of parties authority to hear, receive and examine evidence, as *prima facie* proof of the matters contained in such written examination.

E. C. Clarkson, for the defts., contended that although a certified copy of the examination was produced, no doubt, have been available, they merely wished to put it in as part of the evidence, yet, inasmuch as they wanted to make use of the examination for the purpose of contradicting the *plt.'s* witnesses, pursuant to the 24th section of the C. L. P. A. 1854, it was necessary to produce the original in court on the trial. This could be done by bringing the person in whose custody the original was up to London to produce it. They then submitted that the expenses of such a production should be allowed as part of the costs in the case. The 24th section of the C. L. P. A. 1854 provides that,

A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, respecting the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradiction can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always that it shall be competent for the judge at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make use of it for the purposes of the trial as he shall think fit.

V. Lushington appeared for the *plts.*

Dr. LUSHINGTON, after observing that the *plts.* would not interfere with the discretion exercised by the registrar unless it were clearly shown that an error had been committed by that officer, said that to allow the present motion would be to render the attendance of the receiver of wreck necessary in almost every cause of damage; and to entail upon suitors the very expense which the object of the 449th section of the Merchant Shipping Act to avoid. That a certified copy of the examination might have been used for the purposes mentioned in the 24th section of the C. L. P. A. 1854; and that, although it might be true to say that the use of a certified copy would not in every case be so satisfactory as the production of the original, nevertheless, answer the purpose in the present cases.

Application refused, with costs.

—
Thursday, June 2, 1864.

(Before the Right Hon. Dr. LUSHINGTON,
TRINITY MASTERS.)

THE E. Z.

Collision—Inevitable accident—Pleading

In a cause of damage, when the evidence is taken by an examiner appointed by the court, the de facto inevitable accident must, if it is to be relied on, be distinctly pleaded.

This was an action brought by the owner of the late schooner *John Gaynor*, to recover damages from the owner of the American ship *E. Z.*, on the ground of a collision between the two vessels on the 25th Sept. 1862, whereby the *John Gaynor* was sunk.

The material portions of the answer of the *defts.* were as follows:

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1. 'They deny the several allegations in the plts.' petition contained.

2. On the 24th Sept. 1862 the said ship *E. Z.* left Liverpool for New York, having on board a full crew, and being in all other respects well fitted and equipped for the voyage, Richard Chandler being master. When the said ship left Liverpool the weather was very thick and hazy, and continued so to be almost without intermission until after the happening of the collision hereinafter mentioned.

3. The said Richard Chandler hove the lead from time to time on board the *E. Z.*, and about noon on the 25th Sept. made out Ardglass Point, in Ireland, as the nearest land, whereupon the said ship bore up for the North Channel Passage, the wind being then a fresh breeze from southward.

4. The proper Admiralty lights were kept duly fitted and burning on board the *E. Z.*, at all proper hours, and proper look-out kept, the said Richard Chandler being on the deck of the said ship. The *E. Z.* was then making at the rate of about seven knots the hour, under easy sail.

5. About ten o'clock on the said night of the 25th Sept. (the weather then being very foggy and thick, and the night very dark), the look-out of the *E. Z.* reported a light nearly right ahead of, and at a very short distance from the said ship. The helm of the *E. Z.* was immediately put hard aport, but before the ship could sufficiently answer her helm, the *E. Z.* came into collision with a schooner, which proved to be the *John Gaynor*.

The evidence had been taken before an examiner.

Triss, Q.C. and *Clarkson* appeared for the plts.

Brett, Q.C. and *Charles Russell*, for the defence, contended at the hearing, that though inevitable accident had not been pleaded in terms, it was nevertheless competent to them to raise such a defence if it clearly appeared upon the plts.' evidence:

The East Lothian, 1 Lush. 241.

Dr. LUSHINGTON, in addressing the Trinity Masters, observed that the strictness of the rule requiring inevitable accident, when relied upon as a defence, to be pleaded, originated in the old practice of having the evidence taken, as in the present case, before an examiner, and the depositions read at the trial—a system under which it was necessary that the examiner should be able to ascertain at once from the pleadings what the precise issues were. His Lordship added: "If you mean to charge the other party with any specific offence, it should generally be stated in your pleading. In some cases it is of course impossible for one party to say precisely in what the fault of the other consisted. But if inevitable accident be relied on, it should be pleaded."

On the merits, the COURT pronounced the *E. Z.* solely to blame, and decreed accordingly.

UNITED STATES DISTRICT COURT OF ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate in Admiralty.

(Before Hon. W. D. SHIPMAN.)

THE THOMAS A. SCOTT.

Jurisdiction—National vessel—Salvage.

Where a libel was filed to recover compensation for salvage services rendered to a vessel, which, though not commissioned in the navy of the United States, was owned, manned, supplied and armed by the United States, and used in the transport service:

Held, that the judicial tribunals of a country cannot entertain suits in which the sovereign power of that country is sought to be made a party resp.:

That the property of a state or nation cannot, as a general rule, be proceeded against in its courts:

That the court has no jurisdiction over the vessel in question, although she is merely a transport.

The libel in this case was filed by Charles Hargitt, master of the British steamer *Labuan*, on behalf of himself and the owners and crew of the vessel, against the propeller *Thomas A. Scott*, in rem, to recover salvage for services rendered to her on the 14th April 1864. The *Labuan* was bound from New York to Liverpool, but by stress of weather was compelled to put back to New York. On the way back, when about eight miles east of Barnegat light, she fell in with the *Thomas A. Scott* bound from New Orleans to New York in distress, having lost her rudder and propeller, and being out of provisions. The *Labuan* went down to her and took her in tow, and towed her for about eighteen hours, till she was taken in tow by a steam-tug, about four miles below Sandy Hook, and brought into port. The propeller was valued at 200,000 dollars, and the libellant prayed for an award of salvage to the amount of 20,000 dollars.

Process was issued against the vessel, and thereupon the district attorney of the United States appeared in the suit, and filed a claim on the part of the United States, and interposed a plea to the jurisdiction of the court.

The plea alleged that the *Thomas A. Scott* belonged to the United States, and was in their exclusive possession; that she was bought by the War Department of the United States, and paid for out of the appropriation for the support of the army; that she was not commissioned in the navy, but belonged to a class of vessels owned, manned, supplied and armed by the United States, and employed for purposes connected with the operations of the army; that the *Scott* was, at the time she was fallen in with, returning from New Orleans, whither she had carried a load of powder, shot and shell, for the use of the army, and that she had been, while owned by the United States, employed in transporting troops, commissary, quartermaster and ordnance supplies; that she was armed with two thirty-two pound brass guns and one thirty pound Parrott gun, and was a public armed vessel of the United States; therefore the plea denied the jurisdiction of the court.

For the libellant were *Da Costa* and Judge *Marvin*; for resp., *Andrews*, Assistant District Attorney.

By the COURT.—It is a well-known rule of law that the judicial tribunals of a country cannot entertain suits in which the sovereign power of that country is sought to be made a party resp. Neither can the property of the state or nation, as a general rule, be proceeded against in its courts. In conformity with this rule it was held in the Court of Admiralty in England, in 1816, in the case of the *Comus*, cited on the discussion in the case of the *Prins Frederick*, 2 Dods. 464, that a libel for salvage would not lie against public armed ships of that nation. After a somewhat diligent search, no case has been found where a public armed vessel, or any other public property, the title and possession of which was exclusively vested in the Sovereign, has been held amenable to judicial process, unless, indeed, cases of prize may be said to partake of such a character. It has, indeed, been held that in cases of general average the masters or owners may retain all goods in their possession until their share of the contribution is either paid or secured: (*The United States v. James Wilder*, 3 Sum. Rep. 308.) The discussion, in the opinion of this case delivered by Story, J., takes a wide range, and it is perhaps inferable from parts of it that in cases of the salvage

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of private ships the goods of the United States on board should be held equally subject to the Admiralty process *in rem* for their proportion of the salvage due. But I do not understand the point decided to go beyond the case of general average, where goods of the Government form part of the cargo on board of a private vessel. Still, it must be admitted that a case of salvage of a private ship, where part of the cargo belonged to the sovereign power, could not be very well distinguished from the one decided by Judge Story. In cases of general average and salvage, the master or owners have a lien on the *res* salvaged; but the learned judge, in the case just cited, remarks that "in such cases the nature and use of the articles, as the means of military and naval operations, may repel any motion of any lien whatever grounded on the obvious intention of the parties." These remarks were made with reference to arms, artillery, camp equipage, and such like materials of war belonging to the Government as might be shipped with other cargo of a merely private nature, for transportation in a private ship. This court is informed that the Government has invariably acquiesced in the rule laid down in the case of the *United States v. Wilder*, by paying general average on its own goods shipped as a part of the cargo of private vessels. Whether this acquiescence has extended to military stores in time of war, and designed for use in active military operations, the court has no means of determining. Certainly the argument *ab inconvenienti* against the sovereign power submitting its military materials designed for active hostilities to the unavoidable delays of judicial tribunals, is very formidable. This argument applies with as much force to the case of judicial proceedings against transport ships as to their cargoes, consisting of supplies and munitions of war. Indeed, both the transport ship and cargo would often be involved in the delay consequent upon any proceeding in the court against either. A number of cases have been cited on the argument by the counsel for the libellants in support of the jurisdiction of the court, which I will now notice. The first is the case of the *Betsey*, 1 Marriott R. 80. This case was determined by the English Court of Admiralty in 1777, and related to the recapture, by one of the King's ships, of a vessel which had fallen into the hands of the Americans. The Navy Board contended that the demand of the officers of the King's ship of one-eighth salvage was not within the Act of Parliament, as that extended only to ships and goods of His Majesty's subjects retaken from the enemy. But the Court held that of common right salvage is always due for recapture, and therefore, it would be illiberal to construe the Act of Parliament narrowly. The case is not very fully reported, but I infer from it that, prior to the prize Acts of Parliament, it had been, under some form of proceeding, customary for the Admiralty Courts to decree salvage to the naval officers of the King's ships instrumental in the recapture of vessels taken by the enemy, and that the custom in 1777 was expressly recognised and implicitly sanctioned by Acts of Parliament then in force. The next case cited was that of the *Marquis of Huntley* (decided in 1835, and reported in 3 Hagg. 246), chartered by the Government and having Government naval and ordnance stores, together with a lieutenant and several invalid soldiers, on board. On her voyage from Leith to London she got on to the Middle hand off Essex, where she experienced very bad weather, and finally was relieved from very great peril by several private vessels. An action for salvage was entered against the ship, cargo and freight, and an appearance entered and bail given for the ship and freight only. When the case was ready for hearing, the court, having ascertained that no salvage had been paid on the stores, nor

any account furnished of their value, expressed its opinion that in a case of such great merit, and where three lives had been lost, there ought to be a remuneration in respect to the stores, and directed the case to stand over, that the matter might be represented to the Admiralty. This was done. The King's Advocate appeared, and after stating the value of the stores, and that the Government was anxious that the salvors should be rewarded liberally, left the amount of that reward to the judgment of the court. The case then proceeded. The case of the *Athol*, 1 W. Rob. Rep. 37, decided by Dr. Lushington in 1842, was instituted for damages caused by a collision. The facts were these: A brig was run down in the Channel, by Her Majesty's troop ship *Athol*, and was totally lost. A memorial having been presented to the Lords of the Admiralty praying compensation, or otherwise that the Admiralty proctor might be instructed to appear to answer to a suit to be commenced in the court, a letter was addressed to the proctor and owners of the lost brig by the Secretary of the Admiralty, stating that the Lords Commissioners declined to interfere. A motion was then made before Dr. Lushington for a monition against the Lords of the Admiralty, calling upon them to show cause why the damage should not be pronounced for and compensation awarded to the owners of the ship and cargo, and to the master and crew for the loss of their effects. The Judge declined to grant the motion, for the very good reason that he had no power to enforce an appearance, or the payment of damages as against them. In the course of his opinion he says: "In cases of king's ships, loaded with cargo or treasure, salvage has been awarded; but no case has occurred within my recollection in which the Crown alone was concerned." The motion having been refused, on application by the proctor for the *Athol*, the Court directed that a communication should be made by the registrar to the Lords of the Admiralty, stating that the motion for a monition had been made to the court, and the Lords of the Admiralty subsequently directed that an appearance should be given by the Admiralty proctor for the *Athol*, in order that the court might adjudicate upon the question. Two other cases were cited on the argument—that of the *Swallow* and the *Inflexible*, both Her Majesty's ships (1 Swab. 30 & 32.) These, however, were suits against the commanders of these vessels, and not *in rem* against the ships. It was sought only to subject the officers personally, though the Lords of the Admiralty, in one case at least, directed an appearance in behalf of the officer. In none of the cases referred to, all of which I have noticed, has the English court attempted to deal adversely with the public property of the Sovereign, except where there has been a voluntary appearance on its behalf and a submission of the case to the judgment of the court, unless it be the case of the *Betsy*, in which I think the action of the court must have rested upon some Act of Parliament. It is unnecessary to remark that there is no Act of Congress conferring special jurisdiction upon our courts in cases like the present. On the whole, therefore, I conclude that the court has no jurisdiction over the *Thomas A. Scott*, even assuming her to be merely a transport. She is exclusively owned by the sovereign power, and therefore is not amenable to the judicial tribunals at the suit of private parties. The libel must, therefore, be dismissed as the cause now stands. But, inasmuch as the Government may be desirous of making compensation to the salvors in case they are able to prove a meritorious claim for salvage, I will withhold the decree for the present, until the attorney can advise with the proper department and take its direction in the matter.

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COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

Jan. 27 and April 22 and 30, 1864.

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Petition of right—Claim against the Crown for unliquidated damages for wrongful seizure and destruction of suppliants' ship—Slave trade—5 Geo. 4, c. 113; and 2 & 3 Vict. c. 73.

Where a captain of one of Her Majesty's ships seized a vessel belonging to the suppliant, believing her to be engaged in the slave trade, and, without taking her to the nearest port where there was a Vice-Admiralty Court, destroyed her, whereas she was not engaged in such trade, upon a petition against the Crown by the owners of the vessel for unliquidated damages, it was

Held, that the statement did not show a complaint in respect of which a petition of right could be maintained against the Queen, upon three grounds: first, that the captain, in seizing the vessel, was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament; secondly, that, assuming he was an agent employed by the Queen to seize vessels engaged in the slave trade, he was not acting within the scope of this authority in seizing a ship not engaged in the slave trade, and therefore did not make his principal liable for a seizure made without authority from that principal; and, thirdly, that a petition of right could not be maintained to recover unliquidated damages for a trespass.

This was a petition of right, the suppliants being Thomas Tobin and James Aspinall Tobin. The suppliants were shipowners and merchants at Liverpool, and for several years had been engaged in the African trade. In 1860 they purchased at Loando St. Paul, on the coast of Africa, the *Mary and Isabel*, a packet boat, since called the *Britannia*, for the conveyance of their merchandise to and from their storehouses and factories on the said coast. It was not registered when purchased as a British ship, neither was it intended to be brought, and never was brought by them, after they so purchased it, to any British port or place where it could be registered as a British ship, and never was so registered, and, consequently, after the time of its being so seized and destroyed as thereafter mentioned, it was not registered, and had no right to a national flag. It was then alleged, that this vessel, laden with a cargo of palm oil and red African planks, which were not spare planks fitted for being laid down as a second or slave deck within the meaning of the Act for the Suppression of the Slave Trade, arrived at a place called Cabendo, on the said coast, in Aug. 1862, and while there, on the 20th Sept. 1862, she was seized at a vessel engaged in the slave trade by and under the orders of Capt. Douglas, then being commander of Her Majesty's ship *Eupoir*, and employed under the authority of Her Majesty for the suppression of the slave trade, and on the alleged ground that she was not in a fit state for a voyage to St. Helena, being the place within Her Majesty's dominions to which she ought to have been taken for the purpose of being brought to adjudication in the Vice-Admiralty Court there touching the said seizure as aforesaid. She was afterwards, together with the oil and other property of the suppliants, burnt and destroyed by the said Capt. Douglas. That the said vessel was not at that time in any way engaged in the slave trade, or liable to be condemned.

This petition having been demurred to on behalf of the Crown,

The Attorney-General (the Solicitor-General, Phinn, Q.C., and West with him) now appeared in support

of the demurrer, and contended that torts were not within the law as to petitions of right; the petition was the proper remedy where the Crown had property in its hands belonging to the suppliant, and had the ship been brought home and kept in dock, then the suppliants might have been within the authorities and the principle; secondly, that there was nothing in the statutes that empowered the captain to seize any other ships than such as are found equipped for the slave trade; and thirdly, that the Crown could not be prejudiced by the negligence of its officers. They cited

Stamford on the Prerogative, 73-76;
Lecaux v. Eden, 2 Dougl. 594;
Faith v. Pearson, 4 Camp. 357;
The Mentor, 1 C. Rob. 179;
The Acton, 2 Dod. Adm. Rep. 48;
Madrazo v. Willes, 3 B. & A. 353;
Buron v. Denman, 2 Ex. 167;
The Rajah of Coorg v. The East India Company, 29 Beav. 300;
Moety v. Fabrigas, 1 Cowp. 161;
Sutherland v. Murray, 1 T. R. 538;
Bac. Abr. tit. "Prerog.";
Locke on Govern. bk. 2, par. 206;
Reg. v. Renton, 2 Ex. 220.

Sir Hugh Cairns (Bovill, Q.C., and Kemplay with him), for the suppliants, contended that the Crown had a right to seize the goods of a subject forfeited under certain conditions, and to appoint persons to look out for and seize such goods, and that if such person seizes such goods believing that he has a right to do so, and deals with them in such a way that they cannot be restored. They cited

Exbank v. Nutting, 7 C. B. 797;
Coleman v. Riches, 16 C. B. 104;

Cur. adv. vult.

April 30.—ERLE, C.J. now delivered the judgment of the court.—In this case the suppliant has petitioned for the amount of damages sustained by him from the loss of his vessel, and by the demurrer to the petition, the following facts are admitted:—That the vessel was seized, as being engaged in the slave trade, by Captain Douglas; that he commanded a ship of Her Majesty, and was employed for the suppression of the slave trade, according to the statutes relating thereto; that the vessel of the suppliant was afterwards destroyed by him in the supposed performance of his said duties, and that the said vessel was not, at the time it was so seized and destroyed, in any way engaged in the slave trade, or liable to any proceedings as if it had been so engaged. This statement shows a wrong for which an action might lie by the suppliant against Captain Douglas; but we are of opinion that it does not show a complaint in respect of which a petition of right can be maintained against the Queen, and for this opinion we rely on three grounds: Firstly, that Captain Douglas, in seizing the vessel, was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament; secondly, if it be assumed that he was an agent employed by the Queen to seize vessels engaged in the slave trade, that he was not acting within the scope of this authority in seizing a ship not engaged in the slave trade, and for that reason did not make his principal liable for a seizure made without authority from that principal; and thirdly, that a petition of right cannot be maintained to recover unliquidated damages for a trespass. As to the first ground, if the vessel of the suppliants had been lawfully seized, Captain Douglas would have performed a duty imposed upon him by the statute 5 Geo. 4, c. 113, s. 43, enacting that vessels engaged in the slave trade shall be seized by the commanders of ships of Her Majesty; and although it is taken in law that he was appointed to the ship and

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ordered to the station and employed by the Queen, still we think that the duty which he had to perform in relation to the slave trade was not created by command of the Queen, nor would he have been doing an act which the Queen had commanded if the seizure had been made lawfully under the statute. The allegations on the record show that the seizure, although intended to be in accordance with the provisions of the statute, was unlawful, because not authorised thereby. They further show that the vessel was not seized for the purpose of making it the property of Her Majesty, and if lawfully seized it would not have been in the possession of Her Majesty. But under sect. 44 the captors had the duty of taking it to the Vice-Admiralty Court for condemnation, and if condemned, the captors were bound to sell and divide the proceeds of the sale; and it could not be till after these contingencies had happened and the sale had taken place, that the interest of the Crown in a share of the proceeds of the sale, according to the statute, would commence, and under sect. 55 the captors would have been liable to a judgment against them in that court for damages and costs, if they had been found to be in the wrong. Thus, as Capt. Douglas would not have been an agent of the Crown if he had lawfully seized and kept the vessel, under the statute, still less ought he to be held to be such agent in seizing and destroying it unlawfully. Secondly, if it be assumed that Capt. Douglas had authority from the Crown to seize all ships engaged in the slave trade, so that the seizure, if lawful, would have been made by him in the capacity of agent for the Crown, still, if he seized a ship not engaged in the slave trade, he would not act within the scope of that authority, and would not make his principal liable for that wrong. Thus, where a warrant was granted by the Secretary of State to apprehend the author of the *North Briton*, and the deft., upon good ground of suspicion, apprehended the plt., who proved that he was not the author; the deft. was held not to have acted in obedience to that warrant, and to be responsible without a justification therefrom: (*Money v. Leach*, 3 Bur. 1742.) It is unnecessary to cite authorities to show that the agent cannot make the principal liable for an act done beyond the scope of his authority. The general rule is not disputed. But, the claim of the suppliant to hold the Queen liable for the act of a captain in Her Majesty's navy was rested upon a supposed analogy between the relation of servants to masters and of bailiffs to sheriffs on the one hand, and the relation of persons in Her Majesty's service to the Queen on the other hand; so that, as a master is liable for any wrong done by his servants in the course of their employment in his service, and a sheriff is responsible for any wrong done by his under-sheriff or his bailiffs in the course of performing the duties of the shrievalty, so the Queen ought to be held responsible for any wrong done by a captain of the navy in the course of his employment. It is unnecessary to cite authorities for the purpose of showing that masters and sheriffs are so liable; the law on the subject is in constant application. But, the argument for the suppliant fails, because, in our judgment, there is no analogy between the relation of the captain of a Queen's ship to the Queen, and the relation of servant to master or bailiff to sheriff, so as to create the liability here in question. The liability of a master for the act of his servant attaches in the case where the will of the master directs both the act to be done and the agent who is to do it. The act of the servant is then held to be the act of the master, and the servant acting in the course of his employment is a general agent on that employment, and makes his principal liable for all that he does within the scope of his authority as such general

agent; and further, in respect of all his act within the scope of that authority, they are the acts of the principal, notwithstanding any private arrangement to the contrary between the principal and such agent. This doctrine is frequently exemplified in cases of collision either on land or water. The master is liable for the act of the coachman employed by him to drive his horses whether he was so employed for a single drive, or in constant service, and, notwithstanding the order were to drive slowly and on the proper side, and the coachman drove fast or on the wrong side, the master is held responsible upon the ground that he has put the servant in his place to perform a service ordered by himself, and over which he has absolute control at all times. It is needless to cite the cases showing where the liability attaches but we refer to some classes of decisions in which the limits of the liability are defined in order to show that the analogy supposed by the suppliant does not exist. When the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. On this principle it has been declared that "superior public officers such as the Postmaster-General, the Lords Commissioners of the Treasury, the Commissioners of Customs and Excise, the Auditors of the Exchequer and the like, are not responsible for the negligence or misconduct of inferior officers in their several departments, though the superior officers appointed them and had the power of dismissing them." See *Whitfield v. Lord L'Esperance*, 754. So also unpaid trustees appointed under Acts of Parliament for local purposes employing men to perform a public duty are exempt from some of the responsibility which is incurred by the employer of men to work for his own interest. (*Sutton v. Clark*, 6 Taunt. 29; *Baker v. Harris*, 4 M. & S. 26; and *Duncan v. Findlater*, 6 C. & F. 903.) So also the captain of a ship employing a pilot is not responsible for damage caused by the ship when under the control of the pilot, for the pilot performs a duty imposed by Act of Parliament, and is not under the control of the captain. (*Lucey v. Ingram*, 6 M. & W. 302.) So the employer of a licensed drover whose helper caused damage is not responsible, because the drover has a distinct calling and a duty imposed by law, and the helper was the servant of the driver: (*Milligan v. Wedge*, 12 A. & E. 737.) Furthermore, where the agent is not appointed by the will of the employer, such employer is not responsible for the wrong done by the agent. Thus the employer of a contractor to perform a contract for work by himself and his workmen is not responsible for the contractor's workmen as he did not choose them: (*Rendle v. London and North-Western Railway Company*, 4 Ex. 244.) So the hirer of horses to be driven by the coachman of the horse letter is not responsible for that coachman for the same reason: (*Laugher v. Pointer*, 5 B. & C. 547; *Quarman v. Burnett*, 6 M. & W. 499.) Furthermore, where the wrong is done in the performance of an act by the servant which the master has not directed, the master is not responsible. Thus, where the coachman had driven his master's carriage to the stable, and then drove out again for a purpose of his own without his master's order, and contrary to his duty, and in so driving caused damage, the master was not responsible. The drive was not by his order, and he therefore was not driving by the hand of his servant: (*Mitchell v. Crassweller*, 13 C. B. 237.) Upon this review of the cases we think that the supposed analogy between the relation of the Queen to a captain in Her Majesty's navy, and the relation of a master to a servant fails in the following respects: First, that the Queen does not appoint a captain to a ship by

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her own mere will as a master chooses a servant, but through an officer of state, responsible for appointing a man properly qualified; and, secondly, that the will of the Queen alone does not control the conduct of the captain in his movements, but a sense of professional duty; and, thirdly, because the act complained of was not done by order of the Queen, but by reason of a mistake in the path of duty. Then, with respect to the supposed analogy to the responsibility of the sheriff for his under-sheriffs and bailiffs, we think we need not distinguish it further than by saying that the sheriff is under responsibility which is peculiar to that office. The under-sheriff is a general agent for the sheriff in respect of the duties of the shrievalty in the fullest extent, with the unusual power for a deputy to appoint a deputy, and make the principal responsible for every act of a bailiff done under a warrant issued by the under-sheriff; and as we do not suppose that the suppliant would place any real reliance on the responsibility of the sheriff for his bailiff, as of itself establishing the responsibility of the Queen for every party employed in the administration of Government, we do not say more on the point than that on these two narrower grounds our judgment is for the Crown. On the third ground above mentioned, namely, that a petition of right cannot be maintained to recover unliquidated damages for a trespass, our judgment is also for the Crown. The complaint is of a wrong done in destroying a ship, and the claim is for damages, the same as might have been awarded if, instead of a petition of right, an action of trespass had been brought against the trespasser. For the purpose of showing that a petition of right cannot be maintained for this complaint, we propose to refer, first, to the principle that the Sovereign cannot be guilty of a wrong, and so cannot be made liable to pay damages for a wrong of which he cannot be guilty; and then to the authorities which show where a petition of right will and will not lie, premising that the statute 23 & 24 Vict. c. 35 alters only the form of procedure to be adopted by suppliants resorting to a petition of right, and does not alter the law relating to the subjects for which the petition can be maintained, it being declared by sect. 7 that no remedy is thereby given which was not before existing. The maxim, that "the King can do no wrong" is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong: that which the Sovereign does personally the law presumes will not be wrong; that which the Sovereign does by command to his servants cannot be a wrong in the Sovereign, because if the command is unlawful it is in the law no command, and the servant is responsible for the unlawful act, the same as if there had been no command. Lord Hale says: "The law presumes the King will do no wrong, neither, indeed, can do any wrong, and, therefore, if the King command an unlawful act to be done, the offence of the instrument is not therefore indemnified. But, though the King is not under the coercive power of the law, yet in many cases his commands are under the directive control of the law, which consequently makes the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law." Lord Coke also says to the same effect, in commenting on the *pro ceptum Regis* in the statute Westminster 2nd (2nd Inst. 186): "The King being a body politick cannot command, but by matter of record, *rex præcipit* and *lex præcipit* are all one; for the King must command by matter of record, according to the law;" and he adds: "Markham said to King Edw. IV. that the King could not arrest any man for suspicion of felony as any of his subjects might, because if the King did wrong the party could not have his action. If the King command me to arrest

a man, and I do arrest, he shall have his action for false imprisonment against me, albeit he was in the King's presence;" and he adds Bracon says: "*Nihil aliud Rex potest quam quod de jure potest.*" To the same effect is 3rd BL 246: "The King can do no wrong, which ancient and fundamental maxim is not to be understood as if every transaction by the Government was of course just and lawful, but means only two things: first, whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to his people; for this doctrine would destroy the constitutional independence of the Crown; and, secondly, that the prerogative of the Crown extends not to do any injury." This maxim has been constantly recognised, and the notion of making the King responsible in damages for a supposed wrong tends to consequences that are clearly inconsistent with the duty of the Sovereign. We come now to the authorities showing where the petition of right will and will not lie. We pass the class of claims founded on contracts and grants made on behalf of the Crown with brief notice, because they are within a class legally distinct from wrongs. In the *Bankers' case*, 14 State Trials, 83, Lord Somers so treats them, giving various instances of petitions for money on account of wages, and work, and debts, and goods, founded on contract, and he makes no allusion to a claim against the King for damages for a wrong. We pass from the class of claims on contract in all systems of law distinguished from claims found on wrong, and proceed to the more numerous class of claims where petitions of right have been brought in respect of property either wrongfully taken on behalf of the Crown or wrongfully withheld. As a general principle, property does not pass from the subject to the Crown without matter of record. In the time of feudal tenures rights in property accrued to the Crown on very many occasions, and officers had the duty of enforcing the rights of the Crown. The right accrued on some of the occasions by matter of record, and on other occasions powers existed for making the right matter of record by office found. The officer seized or justified seizure under these records, and their right to seize was a subject of frequent contest, tried either by petition of right, or *monstrans de droit*, or traverse of the office found. It has been said that the petition of right took its origin under Edw. I, and was substituted for a *precept* against the King; and it has been suggested that, if the fact were so, it would indicate that an action lay against the King where it would lie against a subject, that is, where a *precept* might issue. But, in our opinion, the point relates to procedure only, and not to the law of right, and therefore is not material on the present inquiry. The authority for the notion is found in Fitz. placit. 8, in the 22 Edw. 3. A petition of right had been referred to Parliament, and the Parliament ended, and it was decided that the petition of right was thereby brought to an end also. At the end of the placitum containing this decision, Fitzherbert adds: "Et fuit dit qu'en temps le Roi Henry et devant le Roi fuit implede come tous autres homines, Edward Roi son Fitz ordeign que homines sue voit versus Roi per petition mes unques Roi ne seroit adjudge sinon per eux memes et leur justiciaries." I had better read it in English, though I have set it out in French: "And it was said that in the time of King Henry 6, the King was impleded as every other common man, but Edward King his son ordained that men should sue against the King by petition, yet the Kings should not be adjudged but by them and this justicia." To this we subjoin a counter authority from Brostali Petition, placitum 12, c. 24, Edw. 3, where Wilby, speaking of a petition in some cases, and a traverse of office, in others, "dixit qu'il

anera tel brief precipe Henric regi Angliæ in lieu of that which is now given by the prerogative." To this dictum of Wilby, Brooke, C. J. adds: "Quare de tiel brief car videtur quod unquam fuit car le Roi nepoit escrire ne countermaund lui mesme." If it was necessary to decide whether the subject had a right to proceed by a settled form of writ called a "processe" against the King before the petition of right was introduced by Edw. I., we should incline to the negative for the reason given by Brooke, C.J., and because before and in the time of Edward I. the rights of the people were deriving their origin after the conquest from grants by Royal Charters, and were in the course of gradual extension, by confirmations of charters and by such statutes as the following, namely, "*articuli super cartas*," for enforcing such charters, and the Statute of Petitions of Edward I., which reciting "the grievance to the folks who come to the King in Parliament by the theory of the petitions whereof the most part might have been despatched by the Chancellor and the justices, provides that all petitions which touch the seal do come first to the Chancellor; and those which touch the Exchequer do come to the Exchequer; and those which touch justices or law of the land do come to justices; and those which touch Jewry do come to the Jewry's justices;" and the Ordinance of Petitions, 21 Edw. 1., whereby "the King ordained that all the petitions which shall be delivered to them whom he has assigned to receive them, shall be all at once well examined, and that those which touch in Chancery be set in one; and those that touch the Exchequer in another place; and so with those that touch the justices; and those which be before the King and his council severally in another place." From these statutes and ordinances it is clear that many complaints were disposed of by personal application to the King in Council, and it is not probable that the subject should have a defined right to a writ against the King when the rights between subject and subject and the writs for enforcing them were in an unsettled state. But whatever was the form of procedure, the substance seems always to have been the trial of the right of the subject, as against the right of the Crown, to property, or an interest in property, which had been seized for the Crown, and if the subject succeeded, the judgment only enabled him to recover possession of that specific property, or the value thereof, if it had been converted to the King's use. The form for trying this question has gone through several changes: Traverse of Office found, *Monstrance de Droit*, and Petition of Right were the forms in most frequent use. Amendments of the procedure were made by the statutes 34 Edw. 3 and 36 Edw. 3, and 2 Edw. 4, allowing many questions to be raised by traverse in cases where theretofore a petition of right was necessary, and much learned discussion is to be found in the books relating to the use of these different forms. Lord Coke has much learning thereon, both in his commentary on these statutes, for substituting "traverse" for "petition," 2nd Inst. 68, and in his judgment in the case of the *Saddlers' Company*, 4 Rep. 58. In *Coningsly v. Mallons*, Cas. temp. Hen. 8, Keilway 184, all the judges give separate judgments of much research, to the effect that a *monstrance de droit* was wrong in that case, and that the plts. ought to have had a petition. The form of proceeding was much considered, for the reporter adds that the Chancellor gave judgment for an *amoveas manus* without the advice of any justice or King's Counsel: "et hoc contra legem ut dicitur et fuit dit qu'il ces que l'office fuit trovè par le faux subtilite de Sir Richard Empson et Dudeley, en le temps de l'auter Roy les queux fueront les hauts et cruels approvers, &c." In the *Bankers' case*, 14 State Trials 60, Lord

Somers has made an elaborate collection of learning relating to the form of proceeding against the Crown, and adjudged that a petition of right was the proper form for recovering payment of an annuity granted by the Crown. The subject, therefore, has been amply considered: the authorities are abundant, and we refer to them as establishing strongly the negative proposition that a petition of right does not lie to recover damages from the King for a mere wrong supposed to have been done by him. Not a single instance of a recovery of such damages from the King has been cited. The force of this negative evidence is increased by many considerations. The occasions for using the remedy, if it existed, were frequent. The right to seize the property of men either outlawed or attainted, or heirless, would be certain to lead to contested claims from its unlimited extent. It is probable that wrong would be done by the King's officer enforcing such a right from its undefined limits, and it is clear that wrongs were so done from the provisions made for giving redress. As early as Edward I. in the statute Westminster, 2nd *articuli super cartas*, c. 18, is an enactment making escheators liable for any wrongs they may do in seizing for the Crown, and in case of their inability to pay, giving recourse to the superior escheator; and in chapter 19 is an enactment that, after a judgment of restitution in case of a wrongful seizure, all the issues and profits between the seizure and the restitution should be fully restored. Lord Coke, in his comment on this chapter, says: "Issues meant profits not paid over; but money once in the King's coffers shall not be restored." It is likely that such a rule would not prevail if the question arose now, but we refer to it as showing an improbability of paying unliquidated damages for a wrongful seizure, when the restitution of the profits made by the wrong-doer is so imperfectly enforced." Throughout these enactments no mention is made of a remedy against the King for compensation in damages. Against him the redress to be obtained is restitution only. If damages are sought they are to be obtained, if at all, from the officer who did the wrong. Where the question raised by a demurrer to a petition of right was whether the Crown was responsible for negligence in servants employed under the Crown, whereby damage was caused, Lord Lyndhurst decided in the negative: (*Lord Canterbury v. The Attorney-General*, 1 Phil. 321.) His words are: "For the personal negligence of the Sovereign, neither this nor any other proceeding can be obtained. Upon what grounds, then, can it be supported for acts of the agent? If the master is answerable on the principle *qui facit per alium facit per se*, this does not apply to the Sovereign, who cannot be required to answer for his personal acts. If the master is responsible by reason of his negligence in retaining a careless servant, this principle does not apply to the Sovereign, to whom negligence cannot be imputed. As to damages done by ships of war, the commander is not responsible for damage done by one of the crew without his participation. But, if the principle now to be contended for be correct, the negligence of the seaman in the service of the Crown would raise a liability in the Crown to make good the damage which might be enforced by a petition of right." He then refers to the authorities and discusses *Gerveis de Clifton's case* after mentioned, and decides that the petition of right could not be maintained. So also where the chief officer of the marine at Calcutta made an order against employing the steam-tug of the plt., and thereby caused loss, it was held upon appeal that no suit could be maintained, for reasons not here relevant; but in disposing of the question, whether the deft. below could justify a wrong under

the order of the Supreme Government, the Court says, p. 237: "If the act which he did was in itself wrongful as against the plts. in the court below, and produced damage to them, they must have the same remedy, by action, against the doer, whether the act was his own spontaneous and unauthorised, or whether it were done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice if its agents were not personally liable for them:" (*Rogers v. Rajendro Dutt*, 13 Moo. P. C. 236.) For an example of the liability of the officer in the employ of the Crown for damage caused by him, we refer to the case of *Medraza v. Wiles*, 3 B. & Ald. 353, where the captain of a man-of-war destroying a Spanish slave-ship wrongfully, but, as he believed, in performance of his duty, was held to be liable to the Spanish owner for damage to the amount of 20,000*l*. When the claim was for a sum of money alleged to have been specifically appropriated to the suppliant, and the objection was made that a petition of right was not maintainable for such a claim, the court did not decide against the suppliant on this point, because it had many clear grounds of judgment against him on other points. On this point the Court says: "Considering the length of time that has expired since anything has been practically done in a petition of right, the imperfection of all the authorities and the obscurity that hangs over this portion of law, the course that has been taken (in hearing the case to the end upon the merits and upon form) can hardly excite surprise, much less should it provoke censure:" (*Baron de Bode's case*, 8 Q. B. 210.) If the court entertained so much doubt about allowing the suppliant to proceed when claiming a sum of money said to be specifically appropriated, it probably would have decided without hesitation against a claim for damages for trespass. We have said that the suppliant adduced no case in which damages had been recovered against the King for a wrong. He pressed on our attention the case of *Conrad of Colerne* to prove the contrary; but, as we understand it, the case has not that effect. There the suppliant had joined a Dutchman in sending a cargo of oats to London. They were shipped from Cornwall in the Dutchman's ship, and when it arrived in London war had been declared between England and Holland, and the ship and cargo were seized as the property of an enemy; but, as half the cargo belonged to an Englishman, his petition for a restitution of his moiety of the oats would be normal. His claim would be for a specific chattel, not for damage. On the argument much reliance was placed on the case of *Gerveis de Clifton*, p. 22, *Edw. 3*, 12, and we therefore examine it at length. There the suppliant suggested that dikes trenches and gutters were made in "*l'eau de Trent*" by the wardens of the Castle of Nottingham, whereby his lands were "*surondis*" (surrounded or inundated) to his damage. This petition was sent to the Chancellor, and by him to an inquisition in due course. By the inquest it was found that the suggestion was true "*et outre que trenches furent faits en soil*" by the wardens, whereby the King had built four mills; whereupon the suppliant presented a second petition, "*prieant restitution de ses damages et que ces soit redresse*." This petition was indorsed to be sent to the Chancellor that he should send it and the verdict on the inquest to the King's Bench, and that the justices there should cause to come before them the wardens, "*qui ou son et les serjants du Roi*" and "*qu'ils fassaient droit*." The Chancellor sent the tenour of the verdict and an objection was made that he should have sent the verdict; the plt. was directed to bring it if he wished to proceed, and the wardens were

discharged from further attendance. So the proceeding seems to have ended. The brevity of the report makes it obscure; but, as we understand it, the statement shows a dispute between the owner of a dominant and a servient tenement in respect of the easement of bringing water to a mill. The petition seems to admit a right to the tenement, but complains of an excess in the exercise of the right whereby the lands of the suppliant had been surrounded or inundated, and prays a restitution of his damages, and that this should be redressed. The indorsement that the petition should be sent to the King's Bench, and that the wardens for the time being and the serjeants of the King should attend as parties to the case, shows that an important question of right was in issue, for the attendance of such person would be incongruous if the question was the value of the crop damaged by the water. The report as it stands is not, as we read it, a precedent for a claim of damages for a wrong, but a suit to try a right, and whatever was the claim nothing was decided in relation thereto. This view of the effect of the report is confirmed by referring to *Robert de Clifton's case*, forty-nine years before, see *Rott Parliament*, 18 *Edw. 2*, No. 3, as in *Baron de Bode's case*, by *Anstey*, p. 59. We gather from this record that weirs in the Trent and watercourses thereupon to the Castle mills, through the lands of the Clifton family, in Wyleford, had been made by Robert de Tiptoft, some time warden of the castle, probably in the time of one Gerveis de Clifton, to whom Robert succeeded as kinsman and heir, and that turves had been taken from the same lands from time to time to repair and maintain the weir and watercourse. The petition does not deny the right of the wardens thus to act, but claims compensation, because in the exercise of the right damage was done to the land. In this case also nothing appears to have been decided, but the question to have been tried, if the case had gone on, was whether the suppliant should have some compensation given him. The first petition of right by Robert on his first coming to the property is not found, but the commission and requisition founded thereon shows its nature. The commission was to Whatter and Willoughby on the plaint of Robert, kinsman and heir of Gerveis de Clifton, showing that the wardens had made weirs and trenches through the meadows "which were of Gervaise, and unto Robert after his death descended as in one hand they now exist," and the Trent water out of its right and ancient course had led whereby the lands circumjacent had oftentimes been overflowed, and have dug and from day to day come to dig from the said meadow turves for the reparation of the weirs and trenches, so that he Robert the profit of his meadows in ready will doth lose, whereupon he hath prayed relief; whereupon the King in order that right should be done wills to be certified how many trenches and weirs had been made, and in what places the water of the Trent had been diverted, and what damages to the said Robert have chanced and do chance, yearly, and what profits unto the King and his castle from the trenches and weirs do yearly chance, and by what wardens and out of what cause the trenches and weirs were made; and so directs an inquest to be held. The return to the inquisition shows that two weirs had been made in the Trent, and two trenches had been made through the lands of the said meadows, and the Trent water thereby turned out of its right course, whereby the meadows have been inundated, and the wardens have dug turves in the lands for reparation, whereby profits have been lost, and the damages which have already chanced to Robert are 15*l*., and damages do yearly chance to the value of 10*l*.; and they say that the trenches and weirs are to the profit of the

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King and his castle to the value yearly of 20*l*, for without that watercourse four of the mills to grind are unable, and that Robert de Tiptoff made the trenches and weirs. The said petition of right, grounded on this commission and inquisition, prayed that allowance may be made unto the said Robert of the damages aforesaid; and prayed the said Robert, if it please the King and his council, that the bailiwick of the house of Peveril may be assigned to him in recompence for his aforesaid damages. The indorsement on this petition is special, and shows that an "important" interest was in dispute. "For that this thing doth touch the King so highly, and the said inquest is but of office, let there be some great men of the King's council assigned to survey, inquire and certify the King." We consider that the right is not disputed either to the watercourse or the turbary, because there is no complaint of trespass in digging the trenches or the turves, but there is a hardship or grievance resulting, either from an excessive or neglectful exercise of the right, whereby an overflow with damage was caused, for which the suppliants seek compensation. In Robert's case the bailiwick of the House of Peveril is the recompence proposed. In Gervas' case the restitution of his damages, and that the overflow may be redressed, is the subject of the prayer. In each case the petition is for relief from the exaction of servitude in excess beyond the right of the dominant tenant. So each is, in effect, a petition that the King would remove his hand from the property of the servant tenant to the extent of the excess. These cases should be read with the remembrance that neither of them advanced beyond the first stage, and in neither was there a trial of the contested facts, or of the law applicable thereto. There may have been a local custom relating to Trent water within the liberty of Nottingham, or the house of Peveril. We find in Domesday, under the head of "Nottingham Boro," a trace of a local custom relating to the Trent, "Aqua Trentæ et via versus Eboracum custodiuntur ita et si quis impederit transitum navium et si quis araverit vel fossam fecerit in via Regia, intra duas perticas, emendare habet, per VII. libros." There may have been a grant by those from whom the property was derived to the suppliants. We see in Domesday Book, under the head of "Terre Wilhelmi Peverell, in Nottinghamshire," that he held Wyleford and Clifden, and a part of Nottingham Boro. There may have been moiety of possession severed when the Crown became possessed of the house of Peveril, of which Robert de Clifton desired to obtain the bailiwick, and the right to take the water and the turves may have been subject to the duty of making compensation for any damage caused by the exercise of the right. We refer to these matters of conjecture consistent with the facts as they are stated in the cases, and on the review, we come to the conclusion that principle and authority coincide in showing that a petition of right lies not to recover unliquidated damages for a mere wrong, and that neither of the cases of the Clifton's are an authority for a contrary conclusion, and we adopt Lord Lyndhurst's remarks as confirmatory of this conclusion. In *Lord Canterbury's* case, 1 Phil. 32, he remarks that *Gervas'* case went off because the tenour of the verdict, and not the verdict itself, had been returned to the Q. B., a defect easily cured if the claim could be supported, but it does not appear to have been renewed; and that the complaint of a similar grievance to the same property, by the wardens of Nottingham Castle, in the 18 Edw. 2, and a prayer for the favour of an appointment to be steward, indicated that the wardens had a right to bring the water to the castle mills, and did what was complained of in exercise of a right, and that the complainant was

not demanding a right, but begging some account of a hardship suffered by him. The reasons and authorities we would add our opinion that there is good ground for maintaining which we find to be the law on this subject each of the Queen's subjects who believed been at any time, in any reign, wronged administration of civil or military affairs, could the Queen for the time being for the amount which he might estimate his damage, the pernicious result would be great. And we add an abstract of the petition of right, adduced in *Irwin v. Sir Geo. Grey*, 3 Fos. & Fin. an example of the mischief that might arise was the law. By that petition, the suppliant, in 1861, sought compensation for a series of wrongs in the course of legal proceedings begun in 1834, wherein he was convicted of a misdemeanor in representing that an assistant-barrister signed, and a Mr. Johnson was acquitted in a prosecution for perjury, instituted by Mr. Irwin, wrongs imputed were the withholding from certain letters, and the guilt of those was imputed to Mr. Lyttleton, Lord Morpeth, Lord John Russell, Secretaries for Ireland, an Attorney-General and the Crown Solicitor in at the time respectively. The question to be decided would have been, whether the wrongs were committed so as to damage the suppliant; the effect, to try, in 1861, whether some verdict returned in 1834-5 were right, and if not, whether present Majesty should compensate Mr. Irwin for the damage sustained in paying costs, being imprisoned and fined, and also in being inherited by his father, by paying to him 100,000 so much thereof as the jury might deem it proper to give. Upon each of the three grounds above mentioned our judgment is for the Crown. I only say that this judgment, in the result, has the concurrence of all my brethren. We adduce a number of reasons, but some of them have the concurrence of my respected brother Willes.

Judgment for the Crown.

Friday, May 27, 1864.

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Ship and shipping—Power of shipowners to take where the owners of the goods have failed to do so. Merchant Shipping Act Amendment Act 1862 (26 Vict. c. 67), s. 67.

By sect. 67 of 25 & 26 Vict. c. 63, which relates to shipowners, under certain circumstances, to take land goods which they have imported from parts, it is enacted that if at any time before the goods are landed or unshipped, the owner thereof has not given notice of entry for the landing and warehousing thereof at a particular wharf or warehouse other than that at which the ship is discharging, and has offered and been refused to take delivery thereof, and the shipowner has not made such delivery, and has also failed to do so of such offer to give the owner of the goods a certificate of the time at which such goods were delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given, give to the owner of such goods, or of such warehouse as last aforesaid, twenty-four hours notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice, do so at his own risk and expense.

Held, that the owner of goods does not, by offering to take delivery of the goods, entitle himself to refuse to take delivery under this enactment, unless he is in a position to take the goods if his offer is accepted:

Held, also, that a shipowner who fails to make

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of goods when the owner of the goods offers to take them, and gives no information of the time at which they can be delivered, is not excused from giving notice under this enactment because no such information was asked for.

The first count of the declaration stated:

That before and at the time of the grievances hereinafter mentioned the plts. were owners of goods, to wit, of hides, within the meaning of the Merchant Shipping Amendment Act 1862, and were entitled as agents for the owners thereof to the possession of the same. That the defts. were shipowners within the said Act, and were authorised to act as agents for the owners of a certain ship called the *City of Edinburgh*, and were entitled to receive the freight, demurrage and other charges in respect of the said ship. That the said goods were imported in the said ship from foreign parts into the United Kingdom in the said ship, and that before the said goods were landed or unshipped they made entry of the said goods within the meaning of the said Act for the landing and warehousing thereof at their wharf called Pickle Herring Upper Wharf, which said wharf was not the wharf at which the said ship was discharging, and were entitled and ready and offered to take delivery of the said goods, of all which premises the defts. had notice. That all things were done, and had happened and existed, and all times had elapsed to entitle them to take such delivery, and to land the said goods, yet the defts. did not allow them to do so. That the defts. and all persons whose duty it was so to do failed to make such delivery, and failed at the time of such offer to give the pit. correct information of the time at which the said goods could be delivered. That without the consent of the plts. the defts. landed and unshipped the said goods at a wharf or place (to wit) at the London Docks, other than the plts. wharf, which had been named in the entry as aforesaid, and without giving to them, being the owners of the said goods and wharf as aforesaid, twenty-four hours' notice of their readiness to deliver the said goods, and did not bear or pay the expenses of landing and unshipping the same; and that, by reason of the premises, the plts. were compelled and obliged, in order to obtain possession of the said goods, to pay divers large sums of money and the expenses which had been incurred by reason of such landing and unshipping as aforesaid, and also lost the use of, and had to pay large sums for the demurrage of divers barges and lighters which they had employed to take delivery of the said goods, delivery of which the defts. failed to make, and did not allow the plts. to take as in that count mentioned.

The second count was in trover, for bales of hides; and the third count was on account stated.

The defts. pleaded the general issue, and traversed the allegations that the plts. had made entry of the goods within the meaning of the Act; that they were ready and willing and had offered to take delivery of the goods; and that they did not have twenty-four hours' notice as alleged. The fifth plea to the count in trover denied that the goods were the plts.'

The facts proved at the trial, before Byles, J., in London, at the sittings after Hilary Term last, were as follows:—The *City of Edinburgh*, on board of which were the goods mentioned in the declaration, being 50 bales of hides, arrived at the London Docks on the 24th March, and reported herself inwards on that day. In the afternoon of the 26th March, the consignees of the goods entered them inwards at the Custom-house, and obtained an order for their delivery over the side for landing at the plts.' wharf, called Pickle Herring Wharf. This order was at once sent to the plts. with bills of lading for the goods indorsed to the plts. The plts. sent the order and bills of lading to their lighter-man, and his apprentice Kaney, a lad of about eighteen years of age, was sent by him to the ship to ask if the goods were ready for delivery. He arrived at the ship at or about four o'clock in the afternoon, and applied to the second mate for the goods. The mate was the only person on board at the hatches were down, and no unloading was going on at the time. The mate told him that the goods were not ready for delivery. Kaney had a lighter alongside, but there was a lighter of his master in the dock at the time about 100 yards distant from the *City of Edinburgh*, and he could have removed the goods by it if they had been ready for delivery. The usual working hours in the docks are from 8 a.m. to 4 p.m., though on occasions work is done after the latter hour. Kaney

left the order with the mate and went away. On the 28th March the hides were reached, and part of them unloaded at the London Docks. The mate then remembered that he had received the order for landing at the plts.' wharf, and he produced it. The Custom-house officer who was on board told him that, after receiving such a notice, he had no business to land them at the London Docks without giving notice to the owners of the goods. The mate applied to the superintendent of the docks for directions, and was told to unload the remainder. The whole of the hides were then landed, and the dock company refused to give them up to the plts. without payment of the sum of 10*l.* 2*s.* 6*d.* for their warehouse charges. The plts. paid this sum under protest and brought the present action to recover it back.

Sect. 67 of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), enacts as follows:

Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof to land the same or take delivery thereof and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of, and land, or unship the said goods at the times, in the manner, and subject to the conditions following (that is to say):

If at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered, and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods, or of such wharf or warehouse as last aforesaid, twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice, do so at his own risk and expense.

The verdict was entered by consent for the plts. for the amount claimed, the defts. having leave to move to enter it for them, the court having power to draw inferences of fact. A rule *nisi* having been obtained accordingly,

F. M. White showed cause.—The plts. had offered and been ready to receive the goods, and had been told that they were not ready for delivery, and no correct information had been given them of the time at which they could be delivered. The plts. were not bound to ask for such information, and they were entitled to twenty-four hours' notice from the defts. before the defts. were justified in unloading the goods at the London Docks.

Giffard and *Murphy* supported the rule.—The plts. had only colourably complied with the statute. They had applied for the goods, but were not in a condition to receive them if they had been ready for delivery, for they had only sent one boy and had not provided him with a lighter. No information had been given of the time when delivery could be made, because none had been asked for.

The following authorities were referred to:

Gatliffe v. Bourne, 4 Bing. N. C. 314; 7 M. & G. 850, Ex. Ch.; and 11 Cl. & F. 45, H. of L.
Howard v. Shepherd, 9 C. B. 297;
Sydes v. Hay, 4 T. R. 260;
Startup v. Macdonald, 6 M. & G. 593.

ERLE, C.J.—On considering the evidence which was given at the trial of this case, I think that our judgment ought to be in favour of the plts. The shipowners had a right to land the goods unless the merchant had brought himself within the seventh condition of sect. 67 of the Merchant Shipping Act Amendment Act 1862. Now the facts show that the merchant did offer to take the goods, and did, in fact, intend to take them

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if they were ready. He gave the bills of lading and delivery order to a lighterman, the regular channel for the conveyance of goods from a ship to a wharf, and sent him on board to get the goods. How can this be called a colourable compliance with the statute? If what was done had been done in the middle of the day, and two lightermen had gone instead of one boy, and the lighter had been alongside, nothing more could have been done. But the question is, what was the intention with which the delivery order was given to Kaney and Kaney sent on board. If the demand was made within working hours, a lad of eighteen, with a lighter lying a few yards off in the docks, was quite able to receive the goods. Great stress was laid on the fact that Kaney went on board at four o'clock, while for many purposes the working hours in the docks cease at four. If the goods had been at the top, the mate might have said, "I accept your order, but work is broken off, and you shall have them when work begins again." But the goods were not ready, and the boy was told that they were not ready. I think that there was a good compliance by the plts. with the statute. If there is an offer and readiness on the part of the owner of the goods to take delivery, and the shipowner fails to deliver them, and fails to give correct information of the time when the goods can be unloaded, then twenty-four hours' notice must be given to the owner of the goods or the owner of the wharf for landing at which they have been entered. The owners of the goods had, in my opinion, complied with the conditions of the statute, and therefore the defts. had no right to unload them without giving notice of their readiness to deliver them.

WILLIAMS, J.—I have felt some difficulty, not about the law, but about the conclusion of fact at which we ought to arrive. The first controverted fact is, whether the owner of the goods did offer, and was ready, to take delivery of the goods, and the shipowner failed to make delivery. In point of law, I think that Mr. Giffard is right, and it is not sufficient for the shipowner to have failed to deliver, but the owner of the goods must have been in a condition to receive the goods if his offer had been accepted. Was the owner of the goods ready to receive them? My Lord and my brother think that he was, and I must be wrong in coming to a contrary conclusion, but it is a question of fact only. As to the remaining point of law, whether there was a failure on the part of the shipowner to give correct information of the time at which the goods could be delivered, it was argued for the defts. that the shipowner must not only have given no information, but must have declined to give any information when asked. I think that that is not the proper construction of the passage in the statute which is inserted in ease of the shipowner. The seventh condition puts him under terms of giving twenty-four hours' notice, if he does not give, when the goods are applied for, correct information of the time at which they can be delivered. If he fails to take advantage of this opportunity, he must give the twenty-four hours' notice.

BYLES, J. stated that he and Willes, J., who had left the court, concurred as to the points of law; and as to the questions of fact, they came to the same conclusions as the Lord Chief Justice.

Rule discharged.

Attorneys for the plts., Jones and Arkoll.

Attorneys for the defts., Humphreys and Morgan.

May 28, 30 and 31, 1864.

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17 & 18 Vict. c. 104, ss. 448, 449—*Examination by receiver of wreck—Admissibility of evidence.*

In an action for a collision between two ships, the deft.'s counsel, in order to show that the plt.'s ship was in fault, proposed to put in evidence the statement of the plt.'s captain made on oath, under sect. 448 of 17 & 18 Vict. c. 104, before a receiver of wreck:

Held, that such evidence was inadmissible, notwithstanding sect. 449 of the above-mentioned Act enacts that such examination shall be admitted in evidence in any court as prima facie proof of all matters contained therein, as the question as to which ship caused the damage to the other was not a matter which the receiver had power to examine into under the 448th section.

This was an action for a collision between two ships, tried before Byles, J., at Guildhall, when a verdict was found for the plt., leave being reserved to move to set that verdict aside and have a new trial, on the ground of the improper rejection of evidence, and also on the ground that the verdict was against the weight of evidence.

It appeared that during the trial it became important to the deft. to prove in support of his case that the damage to the plt.'s ship was on her starboard bow, as this would have shown that it was the plt.' and not the deft.'s ship which was in fault. In order to prove this the learned counsel for the deft., in his cross-examination of the captain of the plt.'s ship proposed to put in evidence his statement on oath taken before a receiver of wreck, under 17 & 18 Vict. c. 104, s. 448, both for the purpose of contradicting the witness, and as substantive evidence but the learned judge refused to admit it.

A rule having been obtained on a former day,

Edward James, Q. C. (Warton with him) not showed cause.

Brett, Q. C. appearing in support of the rule.

Cur. adv. vult.

May 31.—ERLE, C. J. now read his judgment.—In an action for collision was the examination of the captain of the plt.'s ship, taken by the receiver of wreck at Grimsby, under the 17 & 18 Vict. c. 104, s. 448, admissible for the deft. under sect. 449 for the purpose of proving the fact that the damage to the plt.'s ship from the collision was on her starboard bow, such fact being offered for the purpose of showing that the plt.'s ship was in fault? I think not, because the question, which ship caused the damage to the other, was not a matter which the receiver had power to examine into under sect. 448. The jurisdiction here in question, "to examine," is given to the receiver when any ship is or has been in distress on our coast in respect of seven matters. First, the name and description of the ship. Secondly, the name of the master and owners. Thirdly, the names of the owners of the cargo. Fourthly, the ports or places from and to which the ship was bound. Fifthly, the occasion of the distress of the ship. Sixthly, the services rendered. Seventhly, such other matters or circumstances, relating to the ship or cargo, as the receiver thinks necessary. The question whether the colliding part of the plt.'s ship was the starboard or the port bow, appears to me irrelevant to each and all of these matters. An enactment altering the law as to evidence and creating statutory evidence whereby the rights of parties may be defeated, must be construed strictly. The law of evidence, as it stands, is intended to maintain truth and any alteration of that law for a particular purpose

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is intended to maintain the truth in a better manner as far as that particular purpose is concerned, and no further; otherwise the alteration would have been carried further. The Merchant Shipping Act is a code of many laws relating to ships, and is divided into eleven parts, and each part is subdivided into portions. Each part and portion is appropriated to a specific purpose; in several parts there are alterations of the law of evidence, and each alteration is adapted to the specific purpose of that portion where it occurs. For example, by sect. 7 the seal of the Board of Trade is evidence of the making of all documents issued by the Board of Trade; this facilitates proof of the authenticity of the documents. By sect. 14 inspectors may hold inquiries and report to the Board of Trade upon the matters therein specified; on these reports the Board of Trade may act in respect of matters under their superintendence. By sect. 282 a provision is made against the loss of evidence from the evanescence of seafaring witnesses; thereby an official log is required to contain not only matters relating to the crew, but also every death, marriage and birth on board, and every collision; and by sect. 285 all entries in any official log-book shall be received in evidence in any court, saving all just exceptions. The admissibility of each of these entries must be regulated by the value of the subject of the entry. Part 8 contains the section now to be construed. By its title it relates to wrecks, casualties and salvage; and I gather from sect. 432 that "casualties" here means casualties resulting in a death; therefore, as far as the present question is concerned, the part may be taken to relate only to wrecks and salvage. This section in the first place creates a power in the inspecting officer to make inquiry (*inter alia*) whenever any ship causes damage to any other ship, and the result of this inquiry is to be sent in a report to the Board of Trade, and is not made admissible in evidence in any peculiar manner created by statute. Then follow the sections in question, 448 and 449 above mentioned. It seems clear that sect. 448 did not authorise the receiver to inquire into the blame due to either party in a collision, because it had been before specifically provided for and assigned to the inspector's office as last mentioned. Under sect. 448 the inquiry by the receiver of wreck into the seven matters above specified is for his guidance in performing the duties of his office connected with the wreck. If that inquiry is confined strictly to these seven matters in their relation to ship and cargo, the result thereof would not be likely to affect materially the rights of litigants by admissibility in all courts. It perpetuates *prima facie* evidence in relation to the identity of the ship and the voyage and the occasion of distress. Under head 5 he may inquire into the cause of the distress; for instance, whether there is damage to the hull, or the loss of a mast or of an anchor, and whether such damage was caused by stranding or collision, or the like. But for the purpose of the receiver of wreck, the part of the ship where the damage was received is as immaterial as the quarter from which the wind was blowing at the time the damage was done. I think his report is only evidence as to the matters into which it was his duty to inquire, and that the part of the hull supposed to be struck in the collision is not one of those matters. Hearsay evidence is admissible for pedigree; but where the deceased parent told the child who were his father and mother, adding the place of his birth, the declaration was admissible only for the pedigree and not for the locality of the birth. In the portion of part 8, relating to salvage, provision is made for deciding on claims of salvage before justices of the peace by sect. 461 and the following sections; and, by sect. 464, an appeal is given; and, by sect. 465,

the justices may send a copy of the proceedings before them, and such copy is made evidence, but only for the Court of Appeal. Upon this review of the statute, I think the rules of law relating to evidence are altered only for a specified purpose, and that the sections are drawn with great legal knowledge, confining each alteration to its appropriate purpose; and on this construction of the Act the examination of the captain was not admissible as substantive evidence that in the collision the starboard bow of the plt.'s ship was struck. I do not advert to the other grounds of rejection; but, as this was a point made by the deft.'s counsel, it suffices to decide it against him.

WILLIAMS, J.—I am of the same opinion. I do not say anything to depart from what my Lord has said. It was argued by Mr. Brett that the evidence was improperly rejected, and that the language of the 449th section is given without any restriction whatever, that "the examinations taken in writing in pursuance of the 448th section shall be admitted in evidence in any court of justice, as *prima facie* proof, as proof of all matters contained in such written examination." Now it is clear that these general words must necessarily to some extent be controlled. It never was meant that the matters contained in the examination were matters spoken to by a witness without having power to speak of his own knowledge; in other words, that this matter received in evidence is not to mean any matter contained in such examination. I think it necessary to put some limit upon the generality of the words, and it seems to me contrary to the good sense and meaning of the words to impose any other limit than that the matters contained in such written examination must be taken to mean matters contained in such written examination into which the receiver might inquire. According to the ordinary rules of law that would be so, otherwise he might inquire into matters which it was no part of his duty to make an inquiry into. Having taken this view of the subject, it seems quite unnecessary to give any opinion upon the point, as to which I have formed no opinion, namely, whether, looking at the history of this part of the statute in question, the true meaning of the statute is not that the evidence and the examination is admissible where the inquiry is limited to an inquiry into the wreck.

WILLES, J.—I am of the same opinion. It appears to me that the jurisdiction of the receiver is confined to inquiry into matters relating to the vessel, or the cargo or stores. That is expressly stated in the introductory part of the section, and the words in the section are to be read as though the inquiry was to be limited to that which is stated in the early part of the section, because the receiver is to examine any person with regard to any part thereof; that is, of the ship or of the cargo, or any part thereof. This inquiry is to be limited to circumstances affecting the property which has been brought into port by reason of the stress of weather, and that will appear still more clearly by reference to sect. 14, which provides, in certain cases, for an inquiry into the nature and causes of any accident or damage which any ship has sustained or caused, or has appeared to have sustained or caused. There such an inquiry as it is imagined or alleged the receiver could have entered into is expressly provided for in apt words, and specifically in words which leave no doubt that the language of the 448th section was not intended to apply to or include the case of an inquiry into who was in fault in a collision which had caused distress, which distress brought the vessel under the jurisdiction of the receiver. I therefore take it to be clear that the receiver had no jurisdiction to inquire into a

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question as to who is in fault. Well, then, it is true that the receiver may have jurisdiction. Though he has not jurisdiction to inquire into that question, he may have it to receive evidence of facts which may be relevant and material with reference not only to the inquiry before the receiver himself, but also to inquire who was in fault in causing the collision, and that is the ground upon which Mr. Brett insisted, with greater apparent justice, upon the admissibility of the fact of the injury having arisen on the starboard side, and a moment's consideration will show that evidence and a deposition of a fact which may be known, assuming it to be material to the question of wreck, is admissible, and that deposition is evidence of the same fact, because it is also relevant to the first question that arises in this case, the question of who was in fault in the collision—a moment's consideration will show that that would be a most unjust, and I was going to say absurd, construction of the statute; for though it may be very true that the fact was material to be inquired into before the receiver, and that he had authority to inquire into it for the purpose of wreck, yet it would appear that the very witness who proved the fact would also, if the receiver had authority to inquire into it, have stated other facts which would have shown that, notwithstanding his first statement, the blame was upon different shoulders from those to which it might be imputed if his first statement was taken alone; as, for instance, if a witness were to say, as in this case, that the damage was upon the starboard side. But supposing the receiver had jurisdiction to inquire into that, could he go on to show that by reason of the state of the wind or of the currents, or by reason of the conduct of the persons on board the defendants' vessel, the defendants were to blame and not the plaintiffs; or, that the plaintiffs were to blame and not the defendants? Now the notion of limiting the examination of a witness to a fact, because it was relevant to the inquiry before the receiver, he having no jurisdiction to investigate the whole matter, or as to who was in fault, is exceedingly startling, and as it is inconsistent with any reasonable construction of the Act of Parliament, I must seek for another, and adopt it if it can be found, as I think it can be found, because the examination is to be received "of all matters contained therein;" and the nature of the case limits the matters contained in the examination to matters which could have been completely investigated before the receiver. Was the present a matter which could not have been completely investigated before the receiver? It is impossible to impute to the Legislature that they could have intended garbled evidence to be admitted, and therefore one must read the Act as it appears to me to be "admissible on an issue which could have been completely investigated before the receiver." This construction is consistent with the whole of the Act of Parliament. There are various sections, 107, 182, 175, 244, 269, 250, 265, 270, 285, 328, 527, all sections which relate to the admissibility of evidence, and they are limited to the admissibility of evidence of certified documents, to the admission of statements contained in documents certified by official persons. When the Act of Parliament comes to deal with the acts of other persons, as in the case of the log, you find the limitation "subject to all just exceptions" introduced. When the Act of Parliament comes to deal, in sect. 270, with depositions of witnesses, such depositions are only allowed to be admitted under safeguards which are not provided by the section under consideration. It would be therefore not only inconsistent with the ordinary notions of law, but inconsistent with the whole frame of the Act of Parliament, if these sections be read in a fair sense.

ByLES, J.—I agree with the rest of the court notwithstanding the universality and apparent comprehensiveness of these enactments, there are limitations which must be implied for the reason by the other members of the court, and I agree with them. I only wish to say, that I do not myself preclude by what I now say, if the court should arise from considering whether there are other limitations even within those. But matter it is quite unnecessary to consider agree that the rule should be absolute on this ground.

Rule discharged upon the point of improper evidence, and made absolute on the ground that the verdict was against the weight of evidence.

EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Tuesday, June 14, 1864.

(Before ERLE, C. J., POLLOCK, C. B., WILLIAMS, JJ., and BRAMWELL, CHANNING, PIGOTT, BB.)

CLAPHAM v. LANGTON.

Marine insurance—Seaworthiness—Vessel not fit for river navigation.

A newly built vessel was insured for a voyage from Tyne to Odessa, including her trial trip. The condition and dimensions of the vessel were particularized in the policy, and it was proved that they were to convey to persons acquainted with shipping that the vessel was not built for ocean navigation, and was an ordinary sea-going vessel. The vessel was chartered, after accomplishing the voyage, for a return voyage only. Strengthening appliances were to render the vessel as seaworthy for the voyage. It was held, that, if the insurer was informed of the condition and description of the vessel, and the greater risk of the voyage, and if the vessel was strengthened appliances were rendered as such a vessel could reasonably be made, not object that the vessel was not seaworthy in an ordinary sense of that term.

Held, that, if the insurer was informed of the condition and description of the vessel, and the greater risk of the voyage, and if the vessel was strengthened appliances were rendered as such a vessel could reasonably be made, not object that the vessel was not seaworthy in an ordinary sense of that term.

Bill of exceptions to the ruling of Cockburn, J. at Nisi Prius.

Declaration on a policy of marine insurance risk was at and from the Tyne to Odessa, or port in the Black Sea, with leave to call at intermediate ports and places, for any purpose; and to load, discharge, stow, trim, lash, dunnage, and all kinds of goods and merchandise, and also body, tackle, apparel, ordnance, munition, boat and other furniture of and in the goods vessel called the *Kniaz Boratinsky*, the breadth, draught and tonnage whereof were specified in a memorandum made on the face of the policy at the time of making the said policy, and upon the adventure upon the goods loading, and upon the ship, &c., including the trip during her abode there, and until she had arrived at as above, and been moored four hours. The said ship, &c., goods, agreement in the policy, to be valued at the policy was underwritten by the defendants, and the claim was for a general average loss.

Plea, that at the time of the commencement of the said voyage from the Tyne, the said vessel was not seaworthy for the said voyage.

Issue thereon.

At the trial before Cockburn, C.J., at the sittings after Trinity Term 1862, the plaintiffs

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evidence that before the making of the policy on the 27th June 1859 he wrote to the deft. :

Please hand the quotation for covering a new iron steamer hmo to Odessa or another port in the Black Sea, including collision clause. She is of the following dimensions: 200 feet long, 30 feet beam, 34 feet deep, engines of 100 horse power (with paddles), built by Messrs. Robert Stevenson and Co. She will have two masts, with fore and aft sails, and yard with a square sail. Her gross registered tonnage will be about 400 tons, will have a British crew to take her out, takes no cargo, and only coals enough for ship's use to Gibraltar, where she will coal again. Value 13,000*l*. Steams out.

On the 1st July 1859 the plt. again wrote to the deft., stating that the steamer would not get away till after the 15th July :

Therefore, please send me a quotation for all July. Her net beam is 32.25 feet, depth 6 feet 2 inches, tonnage 404 tons gross register. I allude of course to the boat mentioned in my letter of the 27th.

On July 5, 1859, plt. again wrote :

I expect the steamer will sail about the 17th, or it may be a few days sooner or a few days later, but you can put in the policy "warranted to sail before the 1st Aug." She will make a trial trip to sea for a few hours before that time, and I wish to have that covered also. In valuing her at 13,000*l*, we are not putting an excessive value upon her, and only a moderate percentage upon what she has cost her owner, including of course her coals and her outfit, and the insurance and advances. One reason of her costing more than usual is, that she is partly made of homogeneous metal or steel. Will you therefore insure that sum upon her so valued, including a trial trip, and we describe her in the policy by name as the *Reine Borvick*, Captain Elliott, and put into the policy that she is of the following dimensions: Length 200 feet, breadth 32.25 feet, draught of water about 3 feet, tonnage 404 tons. My friends do not think the policy is complete without this detailed description. If you have to pay 5*l*. per cent. extra on account of her trial trip you can do so without communicating with me, but it should not be much more.

On the 6th July 1859 the deft. subscribed the policy in the declaration mentioned, which was set out in the bill of exceptions.

By a memorandum in the margin on the face of the policy, which memorandum was made at the time of the making of the policy, and formed part of it, it was expressed that the length of the said vessel was 200 feet; her breadth, 32.25 feet; draught, about 3 feet; tonnage, 404 tons; and that she was warranted to sail for Odessa on or before the 1st Aug. 1859.

Further evidence was given, that she corresponded with the description contained in the policy and letters, and that she was intended, after accomplishing the voyage, to be employed in river navigation only, and was, as to the hull, built and adapted for such navigation exclusively, and could not by any strengthening appliances to the hull be rendered fit to encounter the ordinary perils of the voyage insured.

The description and dimensions of the vessel contained in the policy were sufficient to convey to the knowledge of any competent person acquainted with shipping, that the vessel was not built for ocean navigation, and was not an ordinary sea-going vessel.

Before commencing the voyage, and whilst the vessel was in the Tyne, strengthening appliances were put into and upon the hull to assist the vessel in encountering the perils of the voyage, and such appliances were reasonably proper and sufficient according to the then knowledge and practice of naval architects, and by that means she was rendered as seaworthy as a vessel of such build, construction and capacity was capable of being made.

She commenced the voyage on the 29th July 1859, with her hull so strengthened, but nevertheless not being then in respect of her hull fit to encounter the ordinary perils of the voyage. In the course of the voyage she suffered damage from perils of the seas, and on the 6th Aug. put into Falmouth, where she was repaired and further strengthened.

The deft. adduced evidence to prove that the strengthening appliances above referred to were not reasonably proper or sufficient, but that other and

better might have been used, and that she was not by such appliances rendered as seaworthy for the said voyage as a vessel of such build and capacity was capable of being made.

The Lord Chief Justice directed to the jury as to the above issue, that if in their opinion the plt. had before the execution of the policy brought to the knowledge of the deft. the nature and description of the vessel intended to be insured, and the more than ordinary risk that such a vessel would necessarily encounter on the voyage insured, and if in their opinion the said vessel, at the time of commencing the said voyage, had been and was by the strengthening appliances put into and upon the hull of the said vessel as aforesaid, made as seaworthy for the said insured voyage as a vessel of such a nature and description as the said vessel could reasonably be made, they should find their verdict for the plt. on the said issue.

The deft.'s counsel excepted to that ruling, and contended that the Lord Chief Justice ought to have directed the jury that, inasmuch as it was proved that at the time of commencing the said voyage the vessel was not in respect of the hull thereof fit to encounter the perils of the voyage insured, they ought to find their verdict for the deft.

The jury returned the verdict for the plt.

Mellish, Q. C. (Vernon Lushington with him) in support of the bill of exceptions.—The bill of exceptions was tendered for the purpose of appealing against the decision of *Burgess v. Wickham*, 8 L. T. Rep. N. S. 47; 33 L. J. Q. B. 17, where it was held that the term seaworthiness is a relative term depending on the nature and description of the vessel and the voyage, and that when an insurer agrees, with full knowledge of the facts, to insure a vessel incapable from size or construction of being brought up to the ordinary standard of seaworthiness, the implied warranty is satisfied if the vessel is made as seaworthy as she is capable of being made. It is submitted that that decision was erroneous, and that under the circumstances the warranty of seaworthiness implied in every policy was not fulfilled. Unless the warranty is expressly excluded by the policy it ought to be applied in every case; it is more consistent with legal principles that the loss should fall upon the owner rather than upon the underwriter under such circumstances. The question ought not to be left to the opinion of a jury; and parol evidence ought not to be received for the purpose of excluding the implied warranty of seaworthiness. In *Dixon v. Sadler*, 5 M. & W. 413, Parke, B. said: "The question depends altogether upon the nature of the implied warranty as to seaworthiness or mode of navigation between the assured and the underwriter on a time policy. In the case of an insurance for a certain voyage it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk, and if the voyage be such as to require a different complement of men or state of equipment in different parts of it—as if it were a voyage down a canal or river, and thence across to the open sea—it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it." See also

Biccard v. Shepherd, 14 Moo. P. C. 471, 492;

Haywood v. Rogers, 4 East, 590, 7;

Bouillon v. Lupton, 15 C. B. 113.

An underwriter is not bound to know the principles

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of shipbuilding, or that from the dimensions stated the vessel was not seaworthy. Novelty in shipbuilding occur frequently; and if it was stated that the ship was to be built in the shape of a cigar, and that should turn out to be unseaworthy, would he be liable on an ordinary policy? If the parties mean that the warranty of seaworthiness shall be excluded, it should be so expressed in the policy:

Gibson v. Small, 4 H. L. Cas. 423;
Knill v. Hooper, 2 H. & N. 277.

Borill, Q.C. (*Raymond* and *Bosanquet* with him), for the plt., was not called upon to argue.

WILLIAMS, J.—In this case the judgment will be affirmed for the reasons assented to by all the court in the case of *Burgess v. Wickham*, 3 B. & S. 669, as to the meaning of the term seaworthiness. We express no opinion upon the question controverted by Blackburn, J. in that case, as to the admissibility of parol evidence to qualify a warranty in a written policy either expressed or implied.

Judgment for the plt.

Attorney for the plt., *Saxton*.

Attorney for the def., *E. W. Field*.

ADMIRALTY COURT.

Reported by ROBERT A. PRITCHARD, D.C.L., Barrister-at-Law.

June 18, 20, and July 15, 1864.

(Before the Right Hon. Dr. LUSHINGTON.)

THE EGYPTIAN.

Collision—Extent of the wrong-doer's liability.

A successful plt. in a cause of damage is entitled to be reimbursed by the def. to the extent, but only to the full extent, of the damage occasioned.

The burden of proving the damage done lies in the first instance upon the plt., but it is for the def. to show that, notwithstanding prima facie evidence to the contrary, there was another and concurrent cause to which the damage may be attributed.

If a portion only of the damage is clearly attributable to the wrong-doer, and that portion cannot be distinguished from the rest, the wrong-doer is responsible for the whole damage.

Even though the injured vessel may have been at the time of collision in such a condition that the collision occasioned an unusual amount of damage, a wrong-doer is nevertheless responsible for all the consequences.

A schooner, having previously encountered severe weather, put into Gibraltar, and while at anchor there was injured by a steamer. The steamer being to blame for the collision, the registrar and merchants, considering it probable that the subsequent condition of the vessel was caused partly by the previous severe weather and partly by the collision, divided the damage. On appeal to the court,

Held, that on behalf of the schooner there was prima facie proof that all the damage was caused by the collision, and that the owners of the steamer having failed to rebut by conclusive evidence such proof, they were responsible for all the damage. Report to be amended accordingly with costs.

This was a proceeding in objection to a report of the registrar and merchants in a cause of damage brought by the Dutch schooner *Jonge Walrave*, against the English screw steamer *Egyptian*. The High Court of Admiralty had by its decision found the *Egyptian* to blame for the collision, and that decision had been confirmed by the Judicial Committee of the Privy Council, and the cause remitted

accordingly, whereupon the usual reference took place as to the amount of injury done.

The damage claimed arose out of a collision in Gibraltar Bay on the 31st Dec. 1861. The schooner sailed from Amsterdam on the 4th Dec., bound for Patras and other ports in the Mediterranean, with a general cargo, and having during the whole of the voyage encountered severe weather, was compelled to anchor in Gibraltar Bay. It was, however, stated that the vessel made no water, and remained quite tight during the whole voyage. On the following morning, namely, the 31st Dec., the steamship *Egyptian* arrived, and having anchored on the port side of the schooner, proceeded to discharge some of the cargo. In the evening of that day, apparently about seven o'clock, the collision took place. It was pleaded on the part of the schooner that the *Egyptian*, when proceeding to sea, ran into the *Jonge Walrave*, her stem striking the schooner's port bow; but on the part of the steamer it appeared that just as she was preparing to moor for the night with a second anchor out, the chain of the port anchor suddenly broke, and she drifted towards the schooner, the starboard anchor was thereupon immediately let go, and the engines were reversed, but the steamer was unable to clear the *Jonge Walrave* before her starboard bow came in contact with the schooner's port bow. The pumps of the schooner were sounded as soon as the vessels were clear, and twenty inches of water were found in her. The first survey was held about ten o'clock on that morning, and the surveyor reported that the vessel was then making seven inches water per hour, and that the water from the pump was as if it had been mixed with molasses or sugar; they recommended, therefore, that the cargo should be discharged forthwith. It was then discovered that out of 696 barrels of which the cargo of sugar consisted, 145 were damaged, and 120 were quite empty. The cost of repairing the damage to the ship amounted to about 50*l.* only. After the complete discharge of the cargo, the second survey on the schooner was held on the 10th Jan. 1862 when the surveyors reported they could not discover the cause of the quantity of water the vessel had been making at the time of their first survey. An additional survey was made on the same day by surveyors appointed by the agents of the *Egyptian* and they reported to the same effect in rather stronger terms. The schooner was then caulked and when that was done she was hove down, first on her starboard and then on her port side, on the 16th and 17th Jan., and was again carefully surveyed and examined both inside and outside and was reported to be quite tight and fit to take in a cargo. That part of her cargo which was supposed to be sound was then reshipped, after which a final survey was held on the 28th Jan., and on the 3rd Feb. the schooner proceeded on her voyage and on reaching Patras it was found that the rest of the cargo of sugar was also slightly damaged. Under these circumstances the plts. claimed to be reimbursed by the defs. for the whole damage sustained by the vessel and her cargo. The claim alleged that, in addition to the cost of repairing the schooner and sundry other items, there was a loss of 1109*l.* 16*s.* 3*d.* on the barrels of sugar which were found empty, and on the damaged sugar which was sold at Gibraltar, and a loss of 333*l.* 18*s.* 2*d.* on the sugar reshipped at Gibraltar, and only found to be damaged on reaching Patras. The reference was attended by counsel on either side, and the principal point mooted was whether the damage to the cargo was occasioned by the collision or by the severity of the weather encountered at sea. From the course which the case took when heard or its merits in court, no witnesses were then examined for the plts., and the defs. had no opportunity of

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eliciting from the schooner's crew any account of her voyage: but it appeared from the printed proceedings that a clear intimation was given at that time that the defendants would dispute, at the reference, their liability for the whole of the damage sustained by the plaintiffs. Notwithstanding this intimation, however, no satisfactory evidence had been adduced to prove how far the damage to the cargo resulted from the collision, or to negative the supposition that it arose in part, at least, from the violence of the weather met with on the voyage to Gibraltar. The log seems to have been lost with the schooner in Sept. 1862, before the cause was heard in court, and no evidence was forthcoming from any of the crew except an affidavit from the master, couched in very general terms. The only witnesses examined were three persons of great experience as surveyors of shipping, who were produced to state in effect that, judging from the nature of the collision as described by the plaintiffs, the schooner would probably have received a great shock and been strained, and become leaky; and that when relieved of the weight of her cargo, and consequently higher out of the water, she would probably recover her form, and that the openings by which the water had entered would close up again to a great extent. On the part of the defendants, it was contended that the collision was a slight one, and that the damage to so many barrels of sugar could not have been occasioned by it, that the claim in this respect was a fraudulent one, and that the cargo was in fact injured before the schooner entered Gibraltar Bay. On the other hand, the plaintiffs relied on the statement in the protest that no water was made by the schooner before she arrived in Gibraltar Bay; and they contended that the blow was violent enough to have occasioned the damage to the cargo, and that the usual presumption must prevail that the damage is to be attributed to the accident immediately antecedent to its discovery. The registrar and merchants considered that the schooner had made some water, and that the cargo had been partially damaged before reaching Gibraltar, but that the leak was increased by the shock the schooner sustained in the collision, and that further injury to the cargo was occasioned by such increase of water. And being in their opinion impossible to determine what proportion of the damage to the cargo had been sustained before the schooner's arrival at Gibraltar, and what afterwards, they divided the damage equally between the two operating causes. Accordingly, one-half of the loss of cargo found damaged at Gibraltar was allowed against the defendants, viz., the difference between what the damaged sugar realized at Gibraltar and what it would have sold for in its sound state at its port of destination; but, in ascertaining that difference, they reduced to two and a half per cent. the commission on the sale charged by the agents at Gibraltar, and consequently increased the proceeds by a corresponding amount, and also reduced the estimated net value of the cargo at Cephalonia on the ground that a sufficient allowance had not been made by the claimants for the charges that would have fallen on the vendors. Demurrage was claimed for thirty-one days at the rate of upwards of 6½d. per ton per day, but they considered the loss of time need not have exceeded twenty-seven days, and allowed demurrage for eighteen days only, namely, for nine days on account of the injury to the vessel, and for nine more as a moiety of the detention occasioned by the injury to the cargo, and at the usual rate of 4d. per ton per day. Five dollars per day were likewise allowed for the same period of eighteen days, as remuneration for the services of Messrs. Archbold and Co., the agents at Gibraltar. Following a similar calculation, two-thirds were allowed of certain other items which were common to vessel and cargo. The claim for the loss on the sugar conveyed to Patras

was disallowed altogether, as no damage to that part of the cargo was discovered on survey at Gibraltar, and there was nothing to show it existed at the time, or that it was not occasioned by perils of the sea during the latter part of the voyage, after it was reshipped at Gibraltar.

Milward and Potter appeared for the *Jonge Walrave*; *Brett, Q. C.* and *V. Lushington* for the *Egyptian*.

DR. LUSHINGTON.—The questions for the consideration of the court are, whether the whole amount claimed was properly due, or whether all the deductions made by the report are justified by the facts, and, if not all, to what extent the deductions ought to be supported. The registrar and merchants have allowed to the plaintiffs a moiety of the loss upon the sugar sold at Gibraltar, subject to some deductions; but they have allowed nothing for the loss on cargo reshipped at Gibraltar; and the principle which has governed their decision with regard to allowing a moiety only appears to be the following, applied, indeed, more stringently to the cargo transhipped at Gibraltar:—The registrar and merchants were not satisfied by the evidence laid before them as to what was the cause of the damage done to the cargo. In their opinion there were two causes—first, the bad weather encountered on the voyage from Amsterdam to Gibraltar; and, secondly, the collision in Gibraltar Bay—but they were wholly unable to decide, from the evidence before them, as to the precise operation of these two causes, or, in other words, how much of the damage was to be attributed to each of the said causes. Then in this difficulty they adopted the expedient of assuming that each cause occasioned the same quantum of damage, and, therefore, as the defendants were not liable for any damage occasioned by shipping water on the voyage to Gibraltar, they reported that the plaintiffs were entitled to a moiety only of the whole damage claimed for loss on the cargo sold at Gibraltar. Nothing was allowed for any loss arising to that part of the cargo which was reshipped at Gibraltar and sold at Patras, there being, in the opinion of the registrar and merchants, no satisfactory proof that the loss—the fact of which was admitted—had been occasioned by the collision. The court, after the consideration of all the evidence, well understands and appreciates the difficulty in which the registrar and merchants were placed, and it may be that the solution of this difficulty adopted by them is as near an approach to equity as the circumstances would allow, but the court entertains very considerable doubt whether it is competent to affirm such report—whether, on the contrary, it is not its duty, whatever may be the consequences, to decide the case according to more strict judicial principles, even though a decision founded upon those judicial principles may not be more satisfactory. This brings me to the consideration of what are the judicial principles which ought to govern the court in ascertaining the amount of damage to which the plaintiffs, successful in a cause arising from collision, is entitled. The general principle is easily stated. The defendant is a wrong-doer, and the plaintiff is entitled to be reimbursed for the damage done to the property; all the damage in consequence of the collision, neither more nor less. But upon whom does the *onus probandi* lie of showing what damage was occasioned by the collision? I apprehend, to a limited extent, on the plaintiffs: first, because they are plaintiffs in the cause, and must make out their case; and secondly, because, being owners of the ship and cargo, they have had the best and most ample means of proving the damage and the cause thereof. But if they show sufficient *prima facie* evidence which, uncontra-

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dicted, would justify the court in coming to the conclusion that the damage was occasioned by the collision, they have fulfilled all that the law obliges them to do. Here, I apprehend, the *onus probandi* shifts, and it lies upon the deft. to show that, notwithstanding the *primâ facie* evidence to the contrary, the damage was not occasioned by the collision, but that there was another or a concurrent cause, to which that damage is fairly to be attributed, and this *onus probandi* is greatly increased where the defts. have charged fraud. I think I must go further, and say that the deft. is bound to produce, in answer to the *primâ facie* evidence of the plt., conclusive proof that the damage is not to be attributed to his own default, where the misconduct of the deft. has occasioned the difficulty. First, then, with regard to the *primâ facie* proof that the damage to the cargo arose from the collision. The evidence shows that this Dutch vessel put into the bay of Gibraltar, not in consequence of any damage received at sea which made that measure necessary, but in consequence of contrary winds, which rendered it difficult, if not impossible, to prosecute the voyage to Malta and Patras. The putting into Gibraltar Bay was therefore a mere temporary measure to await a change of wind, such as any vessel might resort to without having experienced any damage at all. The collision then takes place between the Dutch vessel of 120 tons, and the steamer of 1689 tons—a disproportion of importance in this case. In the preliminary acts the plts. state that the collision took place by the stem of the *Egyptian* striking the port bow of the *Jonge Walrave*; the *Egyptian* states, by her starboard bow striking the port bow of the *Jonge Walrave*. The court, after having adverted to the evidence of the master of the *Egyptian*, said: "I am of opinion that the plts., in the absence of other evidence, have established a *primâ facie* case that the damage done was done by the collision." Then, have the defts. established their case to the satisfaction of the court, either that the collision could not have occasioned the damage, or that there was another concurrent cause which either must have caused the damage or contributed thereto? Independent of any concurrent cause, I am not satisfied that the collision could not have caused the damage. I apprehend the principle to be that, if a part of the damage be clearly attributable to the wrong-doer, and it be impossible to draw the line with precision, and say how much, the wrong-doer must bear the loss. I am of opinion that, if the vessel had been strained upon the voyage to Gibraltar, and that, consequently, the collision occasioned greater damage than if she had been perfectly sound, in such case the *Egyptian* would be equally to blame and responsible for the whole damage. It never can, I think, be maintained that a wrong-doer is not responsible for the damage which actually accrues, though the vessel damaged might be in such a condition that the collision would occasion greater loss than if less susceptible of damage. It constantly happens, in cases of collision, that the vessels which suffer therefrom, though seaworthy, are not in their structure and condition of first-rate character, and therefore suffer more severely than others of less age and stronger build. What evidence is there to show that the damage which actually accrued to the cargo arose on the voyage to Gibraltar? There is nothing but the protest of the master, which, if I am to believe, there could have been no damage to the cargo during that voyage. And why should I disbelieve it, and hold it to be evidence for the defts., when it contradicts the case they set up? The argument has gone this length, that because the master asserts from day to day, or almost from day to day, that the vessel made no water, that therefore it must have made water. I can

come to no such conclusion, and I see not the protest to justify the suspicion that taken by the master was not a proper care of interest of the owners and their possible nothing inconsistent with the usual form of in similar cases and questions relating to vessels. So far as the case for the defts. upon the improbability of the collision occasioned so large a damage, I am not satisfied that any such improbability as would justify me posing, without, or indeed contrary to, the evidence that the damage had been occasioned before reached Gibraltar. [The learned Judge referred to the surveys, to the evidence of skilled witnesses, and to the testimony given subsequently to the registrar's report, which I believe he (the learned Judge) considered viewed with great vigilance, and proceeded taking a careful review of all the facts, and always reluctant to disturb a report of the and merchants, I am unable to concur in their conclusions. With respect to the damage at Gibraltar, I am of opinion that the report of the registrar and merchants, dividing the loss on legal principles be supported; that the court be bound to pronounce a judgment for or against the claim, or for a definite part, as proved, and not from conjecture. I think the plts. have produced *primâ facie* evidence to support their whole claim in this particular, the defence of fraud is not proved, nor sufficient evidence produced to invalidate the plts.' claim. I adhere firmly to the principle, that in all cases of doubt, ought to have the benefit of doubt against a wrong-doer. My decree will have the following effect:—To refer back the claim with directions to allow the whole loss sustained at Gibraltar, and, on the same principle, the proper charges incidental to such loss to disturb the report as to any of those items have been in part disallowed on account of being extravagant charges, and the rest of the report will stand. The plts. must have then

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., of the Middle
Barrister-at-Law.

Saturday, July 23, 1864.

(Present—The Right Hon. Lord KING;
KNIGHT BRUCE, L.J., and Sir J. ROMILLY.)

THE AMALIA.

THE MARIE DE BRABANT.

Ship—Collision—Allegation of cause of collision—
Pleading—Improperly starboarding helm—
of evidence.

In a cause of collision the plt. alleged, first deft. improperly starboarded; and secondly, not starboarded, at all events he neglected to ought to have done:

Held, the court might, on the evidence, well find the plt. without deciding whether the deft. had starboarded or not; for the first charge, if proved, involved the second; and if not proved, was sufficient to sustain the judgment. The objection of want of certainty in pleading untenable.

Comments on the balance of evidence as to collision between two screw steamers, one of which improperly starboarded her helm.

This was an appeal from the Court of Admiralty of England.

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THE AMALIA. THE MARIE DE BRABANT.

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The case arose out of a collision which took place in the Mediterranean, between the *Marie de Brabant* and the *Amalia*, on the 12th May 1863. They were both screw-steamers, the former of 564 tons, and the latter of 1284 tons. The *Amalia* was coming from Malta on the voyage to Gibraltar and Liverpool. The *Marie de Brabant* had sailed from Antwerp bound to the East, and having called at Gibraltar, was proceeding to Malta. There were cross-actions in the Admiralty Court, where it was decided that the *Amalia* was solely to blame, from which judgment the present appeal was brought.

Brett, Q. C., Milbord and V. Lushington, for the app. the *Amalia*, contended that the resps. having expressly pleaded facts from which, as was held by the judge below, the necessary inference was that the *Amalia's* helm had been improperly starboarded, and having in their evidence endeavoured to prove that the collision was thereby occasioned, were not entitled to recover, the court having declined to find that the helm of the *Amalia* had been so starboarded, and that the collision had thereby been occasioned: (*The Ann*, 1 Lush. 55; *The East Lothian*, 1 Lush. 241.) The case of the *Marie de Brabant* was manifestly untrue; and the collision was occasioned by the want of due look-out on board the *Marie de Brabant*, and by her improperly porting her helm and endeavouring to run at full speed across the hawser of the *Amalia*.

Dr. Deane, Q. C. and Clarkson for the *Marie de Brabant*.

Sir R. Phillimore and Dr. Twiss for the owner of cargo on the *Marie de Brabant*.

Cur. adv. vult.

LAD KINGSDOWN.—Two points were urged by the app. counsel in these appeals. They contended—1. That supposing the evidence to justify the finding that the *Amalia* was alone to blame, it did not make out the case alleged by the petitioner in her pleadings, and that she was not therefore entitled to recover. 2. That the evidence did not warrant a finding that the *Amalia* was at all to blame, or at all events that she was solely to blame. The first objection rested upon this—that the petition of the *Marie de Brabant* alleged an injury which it was said could have happened only by the *Amalia* starboarding, and that it alleged in point of fact that the helm of the *Amalia* was improperly put to starboard; and it was pointed out that the court below had refused to decide whether the *Amalia* had starboarded or not, and yet had given judgment against her. It is of great importance to the due administration of justice, that parties who seek relief in the Court of Admiralty should state the injury of which they complain with sufficient clearness and accuracy to enable their adversaries to know the case which they have to meet and to prepare their defence accordingly; and when the plt.'s allegation had been such as to mislead his opponent upon this essential matter, it has been held by this committee that the plt. was not entitled to recover. As to matters which have taken place on his own ship, he is enabled to speak, and is reasonably required to speak, with precision and certainty. With respect to what has been done on board his adversary's ship, he can in many cases, probably in most cases, speak of what was done only by inference. In this case the plt. has alleged that the *Amalia* starboarded her helm improperly; but he has also formally alleged that her helm was not duly and properly put to port as it ought to have been. The first charge, if proved, necessarily involves the second; but if the first be not proved, the second remains, and if established in fact, is quite sufficient to sustain

the judgment. The deft. has distinct notice of the charges which he has to meet: first, that he starboarded; secondly, that if he did not starboard, at all events he neglected to port as he ought to have done. We are clearly of opinion that this objection cannot be maintained. It remains to consider the effects of the evidence. As to what was actually done by the *Marie de Brabant* when she sighted the *Amalia*, there is no dispute. Whether what she did was in the circumstances a right thing to do, is a different question. She alleges that she first saw the white light of the *Amalia* at a distance of four miles and two points on her port-bow; that after watching the light, as the bearing continued about the same, she ported her helm in order to give the *Amalia* a wider berth till the light was brought three points on her port-bow, when the helm was steadied; that afterwards the green light of the *Amalia* came in view, and she then put her helm hard a-port, but that the *Amalia* ran into her with her stem and starboard bow with such violence as to sink her. That the *Marie de Brabant* did put her helm to port, and afterwards hard a-port, as thus alleged, is not disputed by her opponent. The *Amalia* insists that it was this porting of the *Marie de Brabant* which occasioned the collision, for she alleged that the ships were on such courses that if each had continued without altering her helm they would have passed clear of each other starboard to starboard, but that the *Marie de Brabant*, by improperly porting, ran across the bows of the *Amalia*, and produced the accident. On her part it is positively denied that she had starboarded her helm, and it is contended that it never became her duty to port. The first question to be determined is, whether when the ships met each other the *Amalia* was on the starboard side or on the port side of the *Marie*. If she were on the port side, and only two points on the port side, there can be no doubt that she was justified in porting, and that the effect of it was to enable the two vessels to pass each other, port to port, as it was their duty to do, with greater security. If, on the other hand, they were in such a situation that they might have passed without danger, starboard to starboard, by merely continuing their courses, then by porting the *Marie* may have run into the danger which otherwise she would have avoided. Now, upon this point there is great contradiction in the evidence. The court below has seen and heard the witnesses, and no complaint is made of the manner in which the evidence was summed-up and the case submitted by the learned judge to the Trinity Masters. The whole court have come to the conclusion that in the circumstances proved it was the duty of the *Amalia* to port her helm; that she did not do so until the moment of the collision; and they have therefore in effect decided that the ships met in the positions described by the resp. and not in those alleged by the app. Adhering to the rules which we have so often had occasion to state, we cannot disturb this finding unless the app. can satisfy us that the true result of the evidence has been mistaken in the court below. With this view he relies mainly upon two facts. First, that if the ships had met stem on, or port side to port side, the *Marie de Brabant* must have seen the red lights of the *Amalia*, and that in point of fact she did not see them. Secondly, that according to the case alleged by the *Marie de Brabant*, no collision could possibly have taken place unless the *Amalia* then had starboarded, and that it was proved beyond all question that in fact she never did starboard. As to the first point, the statement and the evidence on the part of the *Marie de Brabant* show that no coloured lights were seen from her on board the *Amalia* until just before the collision, when her green light was seen after, as it is alleged, she had starboarded. Now it is proved

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that the *Amalia* actually carried lights of unusual size and brightness; whether the vessels met on the one side or the other the coloured lights, it should seem, must have been visible—on one hypothesis the red, and the other the green. That they were not seen is not easily explained. Their position with reference to the ship's boats and the bales of cotton does not afford a satisfactory explanation. This would be material if there were reason to suppose that the *Marie* had not kept a good look-out, but we think that this suggestion is displaced by the evidence. For the present purpose, that of deciding on which side the vessels met, it does not seem of so much importance. Secondly, we come then to the great question as to the starboarding. In support of the statement that the *Amalia* starboarded there is the evidence of Ferange, the mate of the *Marie*, who was the officer on deck in charge of the ship; of Goethalls, the look-out man; of Lemans, the seaman, of Roggmans, the helmsman; and of Von Dippendael, the master. These witnesses, of course, can speak only to the fact that the helm of the *Amalia* was starboarded by describing the course of the *Amalia*, and the change which took place in it before she ran into the *Marie*. This change they say could have been occasioned only by the *Amalia* being placed under a starboard helm. Against this is to be set the evidence of the witnesses on board of the *Amalia*, Pollard the mate, Nagle the boatswain, and one or two others, who concur in stating in effect that the helm of the *Amalia* was not altered until the red light of the *Marie* was seen coming across their bows, when their helm was put hard a-port. With respect to Pollard, we must say that he appears to us to give his evidence in a very unsatisfactory manner, and to have fenced with the questions put to him, or to have been incapable of understanding them. The master of the ship did not come on deck just before the collision, and this person, the third mate, was the officer in charge of the ship at the time of the collision. Now, in this competition of witnesses, there are two circumstances which it appears to us must determine our judgment as to the side on which the truth lies. O'Neill, the man at the wheel on board the *Amalia*, was not called. He must have known with certainty whether the helm of the *Amalia* had ever been starboarded or not. He was in court when the other witnesses were examined, but the apps. declined to call him. Davison, who is said to have been assisting him, was called, and it was urged that this is the same thing, but it is really a very different thing. Davison had gone to assist O'Neill, in case assistance was required, but he was not with him at the wheel. He says that he went on the poop, he did not go to the wheel, but to the starboard side of the poop; that while there he first saw a white light, and about eight minutes afterwards a red light, that the boatswain then gave an order to hard a-port; that he hurried to the wheel in order to assist in putting the helm hard a-port, but that the boatswain was there before him, and that the helm was put hard a-port. That this was done may be very true; but the question is, what had been done previously. Now, to this fact the witness cannot speak, and O'Neill could have spoken with perfect knowledge. No excuse is laid by any evidence for not examining him on the part of the apps. Their suggestion that he was a corrupt and adverse witness, without any affidavit or other evidence to support the charge, can be of no avail. If he appeared to be an adverse or unfair witness, the court would have allowed the apps.' counsel to treat him as such, and would have given to his testimony such weight, and no more, as it might seem to deserve. All that we can infer from the refusal or neglect to call him is this, that if he had been examined, his

evidence would have been prejudicial, if not to the apps.' case, and that for this reason not examined. The other fact, which seems very instructive, is this: a collision might have been produced between the two vessels in either of the two ways suggested by the parties—*Marie* suddenly porting and running across bows of the *Amalia*, or by the *Amalia* starboarding and running into the *Marie*. We think that the direction of the blow would have been different, according to the manner by which the collision was occasioned. If it had been occasioned by the porting of the *Marie*, we think the blow would have led aft, by the starboarding of the *Amalia*, that it would have led forward. Now, upon this point the contradiction in the evidence. Von Dippendael, master of the *Marie*, says that the blow was in an oblique direction below the mast and the foremast, a little oblique direction from the mast of the *Marie* towards her stern, and her bows came across the *Marie* from the stern towards the fore part of the ship. Ferange, the mate, says the blow slanted forwards; that the *Amalia* did not come perpendicularly upon the *Marie*, then she could not have hit her that sliding way, and Willman, the look-out man on board the *Amalia*, confirms this, and says that she struck the *Marie* a slanting blow, slanting from the fore part towards the stern of the vessel. This statement is not inconsistent with—on the contrary rather favoured by—the actual marks on the bows of the *Amalia*, according to the certificate of the surveyor, and the *Marie* having seen all the evidence on the point which the circumstances admit of. If it were necessary to the question, therefore, we must hold, upon balance of the evidence before us, that the starboarding of her helm, and thereby occasioning the accident; but it is sufficient for disposing of the case to say that the apps. have failed to convince us that the judgment below is erroneous, either as to the facts or as to the application of the rules of the law which were applied, or as to the effect of the evidence. We must humbly refer the matter to Her Majesty our opinion that the appeal be dismissed with costs.

Decree aff

Apps.' proctors, Pritchard and Sons.

Resp.'s proctors, Clarkson, Son and Cooper and Stokes.

(Present—The Right Hon. Lord KING, KNIGHT BRUCE, L. J. and Sir E. RYAN.)

THE CONSTITUTION.

Ship—Collision—New sailing rules—Sailing meeting—Practice as to new trials.

Two sailing vessels, one proceeding to L. and from L., saw each other about a mile off. The wind on opposite sides, as they were not end-on, or nearly end-on, but crossing,

Held, the 12th, and not the 11th new sailing rule, and that one of the vessels ought to have got clear way.

The practice of the Court of Admiralty does not require new trials, owing to the wandering of the seamen and other reasons. And on an appeal the Judicial Committee the sentence must be either affirmed or altered, and it will not be altered unless the appellate court is reasonably convinced that the sentence was wrong.

This was an appeal from a sentence of the Court of Admiralty in a cause of damage, prom

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the owners of the *George Dean* against the owner of the *Constitution*.

The cause arose out of a collision which occurred between the *George Dean* and the *Constitution*, at about six o'clock on the evening of the 11th Feb. 1864, in the neighbourhood of the Skerries, off the coast of Anglesea.

The *George Dean* was a brig of 182 tons register, and the *Constitution* was a ship of 1282 tons register.

It was alleged in the court below on the part of the present apps. that the *George Dean* was sailing with the wind a fresh gale from the south-west, close hauled to the wind on the port tack, heading about west north-west, and making about a knot and a half an hour, and that whilst she was so sailing the *Constitution* with the wind free ran into her starboard waist and caused her to founder.

The case set up in the court below by the owners of the *Constitution*, the present resps., was, that the *Constitution*, with the wind about S. W. by S., unsteady and freshening, was close hauled to the wind on the starboard tack, when a green light was seen about a point and a half to two points on her port bow. That the *Constitution* was kept close to the wind on the starboard tack. That the green light was watched for a short time, when it disappeared, and that shortly afterwards a green light, and then the brig *George Dean*, were seen at a short distance from the *Constitution*, and about a point and a half on her port bow, and approaching the *Constitution*, and rendering a collision inevitable. That the helm of the *Constitution* was put hard a-port; but that the *George Dean* with her starboard side came into collision with the stem of the *Constitution*.

The learned judge of the court below was assisted by Captain Drew and Admiral Collinson, two of the elder brethren of the Trinity Corporation. The evidence on both sides was taken orally in open court.

A cross-action had been instituted by the owners of the *Constitution*, the present resps., against the owners of the *George Dean*.

In his address to the Trinity Masters, the following observations were made by

Dr. LUSHINGTON.—Gentlemen.—You are well aware that we are under the government of a recent Act of Parliament, and new steering and sailing rules, which we must apply to the circumstances of this case. Now of these two vessels, the one was proceeding from Liverpool and the other was proceeding to Liverpool; and the first question which I wish to address to your consideration is, whether the facts of the case show that the 11th article of the new rules applies, or the 12th. These two vessels see each other at a considerable distance, looking at all the facts of the case, not less than a mile; and I think it inevitably follows that if what was right had been done there could have been no collision. What they did do seems rather to resolve itself into this, they neither of them did anything. The vessel on the port tack kept her course, and the vessel on the starboard tack, according to her own statement, made no alteration in her helm until the actual collision was taking place. With a view to drawing your attention to the question under which of the two rules the case falls, I will advert to the 7th article of the two preliminary Acts. It is alleged that the *George Dean* was close hauled on the port tack heading W.N.W., and on the other side it is stated that the *Constitution* was close hauled on the starboard tack, and heading S.E. by S. Now the 11th rule is this: "If two sailing ships are meeting end-on, or nearly end-on, so as to involve risk of collision, the helms of both should be put to port, so that each may pass on the port side of the other." Now, subject to your better opinion, I should say this is not the

rule that applies, and that these two vessels were not meeting end-on, or nearly end-on, so as to involve risk of a collision. According to my view, the case falls under the 12th rule: "When two sailing ships are crossing"—there is a distinction in these rules between meeting and crossing—"so as to involve risk of collision then, if they have the wind on different sides," which is the case here, "the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side," and then follow certain exceptions. Now, assuming these two vessels were crossing so as to involve risk of collision, then the passage I have read directs that the ship with the wind on the port side—that is the port-tack ship—shall keep out of the way of the ship with the wind on the starboard side. If it stood there it would be a very simple matter: the *George Dean* being on the port tack would have been bound to give way to the *Constitution*, which was on the starboard tack. But the rule goes on: "except in the case in which the ship with the wind on the port side is close hauled, and the other ship free, in which case the latter ship shall keep out of the way." Now, to apply the rule so qualified to the present case. Assuming the *George Dean* was close hauled upon the port tack. If you are of opinion that the *Constitution* was on the starboard tack close hauled, then, in that case, the *George Dean* was bound to keep out of the way; but if the *Constitution*, though on the starboard tack, had the wind free, she would be bound to get out of the way; and by the term "get out of the way," we mean, take her own choice, to go on one side or the other. Another rule then follows, which I will presently notice, as to the duty of the other ship. It is thus of the greatest importance in this case that you should determine whether the *George Dean* was close hauled on the port tack; and, secondly, whether the *Constitution* was close hauled on the starboard tack. I repeat it again; if the *George Dean* was close hauled on the port tack and the *Constitution* was free, then it was the duty of the *Constitution* to have kept out of the way, which she did not do; and then, moreover, it was the duty of the *George Dean* to do nothing; because here is a very important rule: "Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article." Therefore, supposing the starboard-tack vessel had the wind free, it was the duty of the port-tack vessel to keep her course, which she did. Now as to the question, purely one of fact, whether the starboard-tack vessel had the wind free, which is the only question in the case, I think it would be vain to go through the evidence. If you should be of opinion that the starboard-tack vessel was not sailing free, then the *George Dean* was to blame; and if you come to the conclusion she was sailing free, it is clear as daylight that the port-tack ship should have kept her course, and the starboard-tack ship given way. Now we have had great discussion as to the wind and the proximity to the Skerries; but these matters really do not appear to me to be of importance to discuss. I conceive it all depends upon what I have stated, and therefore we will go into the next room.

AFTER CONSULTATION.

Dr. Lushington.—We are of opinion that the *George Dean* is to blame for this collision, and that no blame attaches to the *Constitution*.

The *Queen's Advocate*.—Perhaps it would be convenient to your Lordship to state the grounds and the reasons upon which that decision is founded.

The Court.—I never undertake to give you the argument of the Trinity Masters, for if I did so I

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should in all probability make a mistake; but our judgment is founded upon this, we think that both vessels were close hauled, and that under the terms of the rule the port-tack vessel is to give way and the starboard-tack vessel to keep her course: we consider the case falls under the 12th rule.

The *Queen's Advocate* and *V. Lushington*, for the apps., the owners of the *George Dean*, contended that the evidence showed that the *Constitution* was in fact sailing free, and was solely to blame.

Dr. Deane, Q.C. and *Clarkson* for the resps.

LORD KINGSDOWN.—The first point to be considered in this is, whether the questions of law which arose in it were properly decided by the learned judge, and the questions of fact upon which the decision depends were accurately stated in his summing-up to the Trinity Masters. Upon this subject we entertain no doubt whatever. We agree with the learned judge that in the courses in which these vessels met, the 11th of the New Navigation Rules has no application, and that the 12th rule must determine the rights of the parties. The vessels were not meeting end-on, or nearly end-on, and the only question is, which was bound to get out of the way. Now the rule prescribes that when two sailing vessels are crossing so as to involve risk of collision, then if they have the wind on opposite sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close hauled and the other ship free, in which case the latter ship shall keep out of the way. In this case there is no doubt that the ships were crossing; that they had the wind on opposite sides, the *Constitution* on the starboard side and the *George Dean* on the port side. It was, therefore, the duty of the *George Dean* to get out of the way unless the *Constitution* had the wind free. This is stated by the learned judge to the Trinity Masters to be the only question in the case, and we entirely agree with him. In dealing with the effect of the evidence on this question, we are involved in the greatest difficulty. It depends partly upon the credit due to the witnesses, of which we have but imperfect means of judging, and partly on the inferences which persons of nautical skill, of which we are necessarily destitute, may draw from facts which are established. The court below saw the witnesses, the Trinity Masters, of whom one was Admiral Collinson, a seaman of the greatest distinction, personally examined the witnesses, and would be far better able to understand them, and to judge of the probability or improbability of their story, than it is possible for us to do even with the assistance which we receive from the able naval officers who are ordered to attend the committee in these cases. It was argued by Mr. Brett, that an appeal to the Judicial Committee is not like an application to a court of law for a new trial, where, if there be evidence to warrant the verdict, the court will often not disturb the finding of the jury (to whom the decision of the fact belongs), though it may not entirely approve of it; that here we are sitting, not only as judges, but as a jury, from which it was inferred that in order to affirm, we ought to be satisfied that the finding is that at which we should have arrived if the matter were *res integra*. We do not agree to that principle. We laid down in the case of the *Julia*, 14 Moo. P. C. 235, in the year 1861, the rules by which we must be guided. The practice of the Court of Admiralty does not allow of new trials; and, considering that from the pursuits and habits of life of seamen, on whose testimony the questions of fact usually depend, it would generally be impossible in such

cases to collect them again for a second trial as for other reasons, we think the rule a w We must either affirm or alter a sentence or and those who call upon us to alter it must us with a reasonable conviction that it is We certainly are unable to arrive at that co in the present case. The evidence is entir tradictory upon many points; but in som the contradiction is the strongest, there s us to be reason for thinking that the rather on the side of the apps. than of tl For instance, one important question is, wha *Constitution* was steering more or less in a s direction. Abernethy, the master of the *Dean*, says that the *Constitution* was steering and had the wind free. On cross-examin appears that his reason for saying that is, t was the course to Liverpool from the poi she was at the time of the collision; but th for Point Lynas, he says, would be S.E. and we think it clearly proved that she was to Point Lynas, in order to take a pilot t pool, and not direct to Liverpool. The ot nesses on board the *George Dean* who speal course of the *Constitution*, do not seem to u as we are capable of judging, to assign ve reasons for their statements. MacNay, the of the *Constitution*, says distinctly that s steering from S.E. to S.E. by S., th not being steady; that she was standing the wind with her yards sharp up; that he was such (which necessarily means so muc that he did not know whether he should Point Lynas. It was strongly urged that i which the *Constitution* was carrying prov she could not be close hauled; but tl a point which excited the attention Trinity masters in the court below, and . Collinson put questions on the subject to nesses on behalf of the *Constitution*, and as curred in the judgment, must have been sat the point. That the yards were braced-up c sworn positively by McNay, the master, and the mate, who, on cross-examination, sai yards were sharp up as close as ever we c them. I had two pulls at the braces to get as close as I could." Some observations we by the app.'s counsel on the state of the log *Constitution*, in which an erasure appeared been made, and an alteration introduced a course which the ship was steering at the collision. It was pointed out at the tri mate by whom the log had been kept, and w his explanation of the circumstance. At fi it appeared to be suspicious, but all suspici to us to be removed by the fact that the ent no means favourable to the case of the re that, if an entry were to be fabricated, it w been quite as easy to make it "south-east b as south-east by east." Upon the whole, th think the case one of much doubt, we c satisfied that the decision below is erroneo must humbly report to Her Majesty our that it ought to be affirmed, but without co

Sentence af

App.'s proctors, *Pritchard and Sons*.

Resp.'s solicitors, *Gregory and Rowcliffe*.

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HARVEY v. BECKWITH.

[CHAN.]

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKERMAN and JAMES B. DAVIDSON,
Esqrs., Barristers-at-Law.

Monday, June 6, 1864.

(Before the LORDS JUSTICES.)

HARVEY v. BECKWITH.

Insurance on vessel—Coasting trade—Construction.

The rules of a Mutual Marine Insurance Association provided that vessels crossing the North Sea to any port north of the Texel, the Atlantic, or Bay of Biscay, or to any port south of Brest, should not, if the cargo consisted of iron, carry more than a certain percentage above the registered tonnage; that "ships employed in the coasting trade and ports between the Texel and Brest" should not carry more than a specified weight of cargo. "And in all cases of loss while so laden," the owner should be subject to a stated percentage of deduction:

Held by Knight Bruce, L. J. (agreeing with Wood, V. C., but dissenting Turner, L. J.), that a vessel which was lost on the coast of Norfolk whilst on a voyage from Sunderland to Bordeaux, was not "employed in the coasting trade," and that the words "while so laden" applied to both classes of ships mentioned in the above rule. The plt. was therefore entitled to the sum insured, less the specified percentage of deduction.

This was an appeal from a decree of Wood, V. C.

The bill was filed by the plt., a shipowner, in order to recover from a Mutual Marine Insurance Society, called The Colchester and Wivenhoe Total Loss Mutual Marine Association, the whole of a sum of money, for which his brig called *The Faith* had been insured with the society.

On the 21st Feb. 1863, the plt. executed the deed of settlement of the society in respect of the ship, and he thereby became one of its members. Each person who executed the said deed thereby covenanted with the other and others of them to insure from the hour of the day on which the owner of each ship executed the deed until the 3rd Feb. 1864, the respective sums set opposite to the names of the ships, the respective names of which were set opposite to the seals of the persons who executed the deed, in case each ship should suffer total loss; and it was agreed that, in the event of such loss, each of the persons executing the deed should be liable to pay so much of the sum for which the ship lost was insured as should become payable by reason of the insurance, rateably and proportionately, and not jointly or in partnership, according to the rate and proportion which the sum insured upon each vessel at the time of such loss bore to the whole sum insured by the association, subject to the rules thereafter contained.

By these rules the defts. Mr. Beckwith was appointed secretary, and several other persons, who were made defts. to the suit, were appointed its committee of management, with power to grant policies of insurance and to settle and adjust all claims, losses and charges. The rules further required that there should be a meeting in each half-year for these purposes, and it was provided that all losses ordered to be raised by the committee should be drawn for by the secretary, and in case any person should neglect to pay his proportion of the losses within fourteen days after notice of the amount thereof in writing should have been directed to him by the secretary, the proportion of the person so making default should become a debt in law due from him to the owner of the ship lost, and all proceedings for the recovery thereof should be taken in the County Courts. And it was provided that all disputes as to the amount of liability

and as to the construction of the rules should be settled by arbitration.

The 25th of the rules was as follows:

That ships crossing the North Sea to any port north of the Texel, to the Atlantic or the Bay of Biscay, or to any port south of Brest, if the cargo consist of iron or other metal, metallic ore, slates, bricks, stone, or sulphur, shall not carry more weight than 35 per cent. above the registered tonnage N. M., or 50 per cent. N. N. M.; that ships employed in the coasting trade between the Texel and Brest, with cargoes consisting of any of the above-named articles, shall not carry more weight than they make out upon an average with coals; and in all cases of damage whilst so laden, the claim of the owner or owners shall be subject to deduction as follows: that is to say, vessels in class A 1, 10 per cent.; in class A 2, 15 per cent.; and in class A 3, the owner shall forfeit all claim whatever. But, notwithstanding as aforesaid, no vessel shall be considered to be loaded with the excepted articles where the cargo does not consist of more than 10 per cent. of the burden of the vessel."

The *Faith* was of the registered tonnage of 261 tons N. N. M., and she was entered in the class A 2 upon the books of the association. No policy in respect of her was ever granted to the plt.

On the 21st May 1863 the brig was totally lost. She was then on a voyage from Sunderland to Bordeaux, and her cargo consisted of 355 tons of coals, and 100 tons of pig iron. The iron was entered as part of the cargo, and freight was paid upon it; but it was alleged in the bill that it was taken as ballast only. The loss took place upon Blakeney Bar, between Wells and Cromer on the coast of Norfolk.

The plt. then claimed from the association the whole of the sum (£600L) for which the vessel was insured as aforesaid; but the claim was resisted on the ground that he had violated the 25th rule by loading the vessel beyond the 50 per cent in excess of the registered tonnages mentioned in that rule.

The matter was referred in the first instance to arbitration; but, arbitration failing, the bill was filed by the owner against the secretary and the members of the association to procure payment as upon a total loss of the whole sum insured, without any deduction in respect of the iron on board; or of the whole sum less 15 per cent., according to the 25th rule. The bill also prayed that the defts. might be decreed to execute to the plt. a proper policy of insurance.

The evidence established that the *Faith*, when she was lost, was not carrying more weight than she could make out upon an average with coals.

At the hearing before Wood, V. C., it was admitted on the part of the plt. that the pig iron on board must be taken to have been part of the cargo. It was contended for the plt. that the ship, though bound to a port south of Brest, was not crossing the North Sea, the Atlantic, or the Bay of Biscay, but that she was employed "in the coasting trade" at the time of the loss, and that, if such were the fact, as the cargo she carried did not exceed the weight fixed for a coasting vessel, no deduction from the sum assured ought to be made.

On the part of the defts. it was argued that the plt. ought to have proceeded at law, and could not maintain a bill in this court; that the iron was part of the cargo; that the vessel was not on a coasting voyage, but was bound to Bordeaux, and it made no difference that the loss took place upon the English coast, and that the deduction of 15 per cent. on vessels in class A 2, applied only to ships employed on a voyage to ports between the Texel on the north and Brest on the south, or employed in the coasting trade. The iron carried exceeded the prescribed proportion, and nothing was payable under the insurance.

The learned V. C. held, that the bill was maintainable, and that the vessel was not at the time of her loss "employed in the coasting trade." The plt. was entitled to recover the sum assured, less 15 per cent., and he decreed accordingly, ordering the defts. the committee to pay the costs of the suit.

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The defts., the committee of the association, appealed.

A. E. Miller (with him Sir Hugh Cairns, Q. C.) supported the decree.

Wilcock, Q. C. and Walford appeared for the apps.

Lord Justice KNIGHT BRUCE said, that these rules were so worded, with such remarkable ambiguity and obscurity, that if they had not been already discussed before one of the learned V. C.'s, and adjudicated upon by him as being intelligible, he should have been almost disposed to hold them good for nothing as being quite unintelligible—to do which would, as he supposed, have had the effect of giving to the plt. the whole amount for which the insurance upon the ship was effected, without making any deduction. But, as so eminent a judge had come to the conclusion that the rules were so far intelligible that they would be construed, he himself deferred to that view. That being so, the question for the court was, whether his Honour had arrived at that interpretation with which his learned brother and himself ought to agree. He himself was of opinion that, if any interpretation could be adopted at all, it would be impossible to suggest a better one than that which the V. C. had suggested; and indeed that interpretation appeared to him more likely to be right than any other. The question was, whether the words "whilst so laden," in the 25th rule, referred to both classes of vessels mentioned in the rule, or to one of them only; and upon the whole, in his opinion, the better and sounder interpretation was that these words applied to both classes, and not to the latter only. Either the clause was unintelligible and impracticable, in which case the plt. would be entitled to the whole of the amount insured, or it must in his (the L. J.'s) opinion be interpreted as his Honour had interpreted it. Upon all considerations the latter conclusion seemed to him the better one, and it would be the better course to let the decree stand as it then stood.

Lord Justice TURNER, after considering the words of the rule, said that he was unable to agree with his learned brother's conclusion; as the L. J., however, agreed with the V. C., the appeal would be dismissed, but without costs.

A. E. Miller objected to this order that the plt. being himself a member of the insuring association, would have to bear his share of the costs of the defts. if the order were made in that form. He submitted that the order ought to exonerate him from paying any contribution towards those costs.

After some discussion the defts. gave an undertaking that such portion of their costs as would be paid by the plt. as a member of the club should be returned to him.

Solicitors for the plt., *Lawless, Nelson and Goodman*.

Solicitors for the defts., *Frederic E. Mawc*.

Saturday, July 16, 1864.

(Before the LORD CHANCELLOR (Westbury.)

NELSON v. BARTER.

Demurrer—Interpleader—Judgment-debt—Foreign attachment.

Plts. were sued by A., who recovered judgment against them, but on the same day plts. received notice that A. had made an equitable assignment of his debt to B., and the judgment remained unsatisfied. A

few days afterwards the plts. were served with attachment papers issuing out of the Lord Mayor's Court, attaching all moneys of A. in their hand at the suit of C. The plts. wrote to B. asking whether he wished them to adopt any and what proceedings in respect of the attachment; to which B.'s reply was that he did not consider himself concerned with the attachment. The action in the Lord Mayor's Court accordingly went on, the plts. taking no part, and finally judgment was recovered against the plts. as garnishees.

To an interpleader bill filed by the plts. against C., B., and A., B. and A. demurred, on the ground (1) that the judgment-debt was not attachable, as being in custodia legis, and as having become beneficially transferred to B., who was not the party sued in the Lord Mayor's Court; and (2) that the plts. ought to have defended the action in the Lord Mayor's Court.

Demurrer overruled.

This was an appeal from a decree of Wood, V. C.

The plts. were assurers, who had underwritten a policy of marine assurance, effected by the deft. John Wilson. The ship was lost, and Wilson brought six actions against the plts. for 100l. each, which were afterwards consolidated; and on the 16th Feb. 1864 Wilson recovered for the full amount of 600l. and costs.

On the same day the plts. received notice that the sums recovered in the actions had been assigned by Wilson to the defts. T. Early and T. E. Smith.

On the 20th Feb. the plts. were served with attachment papers issuing out of the Lord Mayor's Court, in an action in which the defts. W. Barter and E. R. Cummins were plts. and Wilson was deft., whereby all such moneys, goods and effects of Wilson, as the plts. in equity, then had or as should thereafter come into their hands or custody, were attached to answer the claim of the said W. Barter and E. R. Cummins.

On the 25th Feb. the plts. were served with summonses on attachment requiring them to show cause on the 24th March following.

On the 27th Feb. all proceedings in the actions (at the suit of Wilson) were stayed to enable the plts. in equity to move for a new trial.

On the 2nd March the solicitors of the plts. wrote to the solicitors of Messrs. Early and Smith the letter, the material parts of which will be found in his Honour's judgment below; and on the 4th March the solicitors of Messrs. Early and Smith replied in the terms also mentioned below.

The bill alleged (par. 11) as follows: "On the 24th March 1864 the defts. W. Barter and E. R. Cummins duly recovered judgment against the plts. (in equity) in the said action against them as such garnishees as aforesaid."

On the 11th May 1864, the plts. having obtained a rule to show cause in Wilson's actions, the rule was argued and discharged.

The plts. thereupon, on the 23rd May, filed this bill against Messrs. Barter and Cummins, Messrs. Early and Smith and John Wilson, praying that the defts. might be decreed to interplead.

The defts., Early and Smith and John Wilson, jointly and severally demurred to the bill for want of equity.

The V. C. on the 28th June last overruled the demurrer. His Honour's judgment was as follows:

THE VICE-CHANCELLOR.—This case comes on upon demurrer to a bill of interpleader, under these circumstances. The plts. are underwriters, and they insured the deft. John Wilson against loss, but disputed the loss when it arose. The case was decided against them, and a judgment was recovered against them by Wilson, in respect of the money for which they had underwritten; but in the meantime they

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received notice, before Wilson was paid, from the solicitors of one set of debts, namely, the demurring debts. Thomas Early Smith and Thomas Early, that Wilson had assigned to them the moneys due to him under the judgment. Of course, therefore, they could not safely pay that money to Wilson or to any person claiming through Wilson. On the other hand the other debts. Barter and Cummins, by the process of foreign attachment in the Lord Mayor's Court, attached the debt due to Wilson from the pits in this suit for this sum so found due on the judgment. In that state of things they were, of course, doubly harassed; and, being so harassed, they wrote a letter to the solicitors of the two debts, Early and Smith, who had taken this assignment of Wilson's debt, saying, that as solicitors for the pits in this interpleader suit, they beg to inform them that they have been served with attachments at the suit of Barter and Cummins against John Wilson: "Will you be good enough to inform us if you wish the above-named gentlemen to adopt any and what proceedings in respect of the above attachments, and, if so, if you are ready and willing to guarantee them against all loss, costs, and damages in respect of any proceedings they may take in reference thereto?" The answer to that letter is: "It does not appear to us that our clients need concern themselves with the attachments mentioned in your letter of the 2nd inst. Should the verdict for the pits stand, they will look for payment as a matter of course." Therefore, that answer plainly told these gentlemen, "We pay no regard to your being sued, and being subject to a debt which you acknowledge to be a debt, we are anxious and ready to pay to either party entitled; we do not care about your being sued on foreign attachment, take your own course, and we shall rely undoubtedly on our assignment of the debt." It appeared to me, I confess, on the first aspect of the case, that it was a clear case for interpleader. But the defence on this demurrer is this: Smith and Wilson demur on this ground. They say the foreign attachment was utterly absurd and unavailable, because no foreign attachment lies in such a case when there is a suit in respect of a judgment which has been recovered by a proceeding in a court of superior jurisdiction, a court of common law; that no foreign attachment will lie on that judgment whilst it remains unsatisfied, and that the pits in this interpleader suit might have simply pleaded *nil habet*, and that that would be an answer to the demand. But the question which arose to my mind is, are they obliged to do that? Are parties, who are sued at law in a case in which they have not the slightest interest, to be put to the expense of defending a suit in which they do not care which of the two parties are entitled? Are they obliged, however ridiculous or absurd the one suit may be, (unless it is so preposterous that you must necessarily infer collusion in the non-resistance of the debts,) to put themselves to the expense of defending that suit? I think not. I think they took the right course in writing to these debts. to say, "This matter is your matter, not ours. Are we to take any steps or not?" and that it is not the proper course for these persons who claim the debt by assignment to say, "You must take your own course, we shall stand on our rights, hold you liable, and you may set up what defence you like," in a suit in which they have not the slightest interest. I have no doubt whatever on the authorities. I have looked back to the old authorities, and I find Lord Eldon puts the case very shortly in *Angell v. Hadden*, 15 Ves. 244. He there, in going through the *Duke of Bolton's* case, mentions a case in which there was a trustee for a number of persons of a certain fund. The case came before Lord Thurlow. The stakeholder of that fund was

willing to pay the trustee, and that would have been a good discharge as against all the several persons who claimed interests. But the several persons who claimed an interest in the fund had made assignments, and had mixed up the question with a great many difficulties, and the trustee was threatened with suits from one assignee and another assignee the different persons who were *cestuis que trust* of the fund, and he declined to take the fund. The question was, whether he had a right to have the fund. Lord Eldon states the ground of the decision to be "that the duke held the money for the trustee, if he chose to assert his legal title on behalf of others; but, if he would not assert that title, there was a principle of jurisprudence in this court, entitling the duke to say he had the money ready to be handed over to any person who had the right to receive it, and, all these persons making claims, to desire the court to tell him to whom he ought to pay it." Then he puts, in one sentence, the ground thus: "The ground, therefore, was not that he might not be able by great attention and caution to make himself secure; but that he might secure himself by one suit, instead of perhaps forty, as one payment ought to discharge him." Perhaps this gentleman, by great caution, might make himself secure by pleading *nil habet* and going into the question. I am inclined to think with Mr. Jolliffe (and I am rather with him on the authorities) that the foreign attachment would not apply, and that these gentlemen might have defended that suit; but why was he to take any trouble about that which was not at all his concern? He writes to those, whose concern it was, "I am sued in respect of a debt that you say is yours; another person says it is his, and that other person will not recognise your assignment; I do not know whether you have got an assignment or not. He has notice that it is a good assignment, it is not a matter that he knows about, and he says, you must settle that with the person claiming by way of foreign attachment. I do not think it is an answer to him to say that the foreign attachment would not lie. There is a case something like it before Lord Eldon, of *Stevenson v. Anderson*, 2 Ves. & B. 407. There one Anderson obtained goods from Messrs. Goodall, his correspondents in Scotland; and, to indemnify them, he remitted four bills of exchange accepted by different persons, and indorsed by him Anderson. The Goodalls sent them to Stevenson as their agent. Therefore they were in the hands of Stevenson in that way, they had been remitted to the hands of the Goodalls to obtain payment. Then one Dick, who was also a debt in the interpleader suit, "of Dundee, in Scotland, claiming as a creditor of Anderson, having instituted proceedings against him for that debt before the Lords of Session in Scotland, served the Goodalls with letters of arrestment" (just like the foreign attachment) "upon any property of Anderson in their hands." Then Anderson wrote to the Goodalls, desiring to have the bills returned to him. He also demanded them back from the plt., and on his refusing brought trover against the plt. Then he files an interpleader bill, the Goodalls are out of the jurisdiction but he makes them parties, and Anderson puts in a general demurrer for want of equity. They argue, amongst other things, this: they say, "This bill of interpleader is of the first impression, by a person having no money in his hands, but holding these bills as an agent to procure payment, instead of which he files this bill;" hazarding by the delay the loss of their amount. Then another novelty, they say, is, that they are called upon to interplead with people who are out of the jurisdiction, which had been held to be a fatal objection in a late case, and that this bill, under the pretence of interpleader, is really a bill against Anderson alone to compel him

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to involve himself in Scotch litigation. On the other side this is said: the plt. admitted that there was this difficulty in their case, "It is true that Mr. Erskine, in his Institutes, says, that bills of exchange are not attachable by the laws of Scotland" (which raises the same sort of argument which is raised here) "but Mr. Bell shows" (this is Bell's Commentaries) "that this is not to be received absolutely; that bills may be attached in the hands of a person intrusted as the Goodalls were. Admitting, however, that to be questionable, the plt. should not be put to the difficulty of agitating that question." He is not the person to agitate it. Then, on the other side, they rely a good deal upon the parties being abroad; they rely a good deal on Stevenson being a mere agent and wanting to involve Anderson in litigation, and indicating a disposition, on the part of Stevenson, to collude with the Scotch persons for whom he acted as agent. Lord Eldon says: "I have looked at this record with great care, and every case I can find of interpleader; and, though I doubt whether there is perfect *bona fides* on the part of the plt., I find it decided that the court is, in the first instance, concluded by his affidavit, that there is no collusion, and will not admit an affidavit to the contrary. Upon the next consideration, whether the plt. has stated a right to come here as to these bills—for which it is said he would be answerable to his principals, residing in Scotland—it is very difficult to maintain that he would not be answerable to them in an action if they revoked the purpose for which he was employed; but there is enough to make them parties to a bill of interpleader. Next, if Anderson could maintain his action of trover for these bills—and there is great semblance that he might—that makes a double claim, which, according to some authorities, is sufficient. There is also an attachment in Scotland, which from Bell's last publication is a circumstance raising considerable doubt, whether bills, under such circumstances, are not attachable, notwithstanding what is said in Erskine's Institutes." That is just the case raised here, that it is a question of some degree of doubt. I cannot say there is not a degree of doubt, though the inclination of my opinion is that this debt would not be attachable; but still there is some degree of doubt upon the authorities on the point, and it appears to me that the plt. is not the person who ought to be subjected to litigation or put to any inconvenience on that doubt. It is said that he has suffered the judgment to go by default. But it was not until he had given this notice to Early and Smith; and I apprehend it does not lie in Early and Smith's mouth to say that he has put himself in a worse position. What Barter and Cummins, who are not demurring parties, may say I do not know. They may perhaps say, "You have let the judgment go by default, and you are too late in coming here." But that does not lie in the mouth of Early and Smith at all. They had full notice, they did not choose to interfere, they said, "We stand upon our own rights." That is the position that the plts. are in. If Early and Smith are right—they say, "We allow you, our trustees, to be harassed by another suit, and all we say is, when you give us notice, you must take your own course, we shall look to you." It appears to me that it is a clear case of interpleader, and therefore the demurrer must be overruled.

Rolt, Q. C. and Jolliffe, on behalf of Messrs. Early and Smith and John Wilson, supported the appeal.—The defts. Messrs. Barter and Cummins had attached this debt after verdict, but before judgment. The plts. might then have pleaded *nil habet*; but if, on the other hand, they chose to consent to the foreign

attachment, it was impossible they could be allowed to call upon the defts. to interplead. First, this money was not attachable. It was in *custodiâ legis*: (*Humphrey v. Barns*, Cro. Eliz. 691.) Secondly, the custom of foreign attachment in the Lord Mayor's Court does not apply to debts the beneficial interest of which is vested in a person other than the deft. sued in such court, whereof the garnishee has notice:

Westoby v. Day, 2 EL & BL 611.

A. E. Miller (Sir H. Cairns, Q. C.) with him, for the plts., were not called upon.

THE LORD CHANCELLOR.—I have no doubt that, if all the facts of this case had been brought before me, it would have turned out to be not a case for interpleader. But I am bound to take the case upon the allegations of the bill. The substance of the argument was this, that if the plts. had done their duty they would not have had judgment recovered against them as garnishees, and that, having regard to the other allegations in the bill, it must be held that that judgment was unduly recovered. But the bill unfortunately states that that judgment was duly recovered, and the demurrer admits that allegation to be true. It may be true as a proposition of law, that at the time when the attachment was lodged there was no admitted debt due from the plts. to Wilson. It may also be perfectly true that, at the time when the attachment was lodged, the beneficial interest of any debt that might be due from the plts. to Wilson had been *bonâ fide* transferred for valuable consideration to Messrs. Early and Smith. But there may have been some ground of law, or some ground of conduct upon which the attachment creditor was entitled to recover judgment against the garnishee, notwithstanding this objection; and I am bound to assume that this judgment was recovered duly, as it is alleged to have been so recovered. That being so, the attachment creditor is placed in the same situation towards the garnishee as if he were assignee of the debt. Then, notwithstanding the title which the attachment creditor gets and perfects by means of that judgment, the original creditor is still at liberty to dispute the title of the attachment creditor, and the liability of the garnishees in respect of the judgment which has been recovered against them by the attachment creditor. That is a clear revival of a disputed claim, which had its origin in the acts and conduct of the original creditor to whom, but for those acts, the debtor might have been liable. Therefore I think the V. C.'s conclusion was a perfectly right one. The letter is of importance only as showing what were the facts of the question. The plts. give notice of this attachment, and request to know whether there shall or shall not be any proceedings. The result, therefore, is, that the plts. did everything that was required of them, and it is impossible not to say that they did not act impartially and equally between the parties. If I had, what I have not, and what I am bound to exclude, facts brought before me to show that this action in the Lord Mayor's Court was not defended as it ought to have been, but that the plts. (in equity) neglected their duty and submitted to the jurisdiction; these facts might have established such a case of collusion as would have disentitled the plts. (in this bill) to have been treated as *bonâ fide* creditors of Messrs. Early and Smith. I cannot assent to the ingenious arguments that have been employed in support of this demurrer, because, admitting the truth of the bill, and the legal argument founded thereon, there may yet be circumstances to justify the verdict in the Lord Mayor's Court. I must take the case as I find it, and refuse this appeal with costs.

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DE LA ROSA v. PRIETO.

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COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

May 3 and June 13, 1864.

DE LA ROSA v. PRIETO.

*Medical Act—21 & 22 Vict. c. 90, s. 32—Registration
—Contract made on board a foreign vessel of war—
Lex fori.*

Sect. 32 of the Medical Act, requiring a person who is suing to recover any charge for medical or surgical advice, attendance, or for the performance of any operation, or for any medicine prescribed and supplied, to prove that he is registered under that Act, applies to an action brought by one of two medical men against the other to recover remuneration for attending to his patients during his absence, according to an agreement made between them.

Although a foreign vessel of war is for some purposes considered as part of the territory of the state to which it belongs, a contract made on board between one of the officers and a person domiciled in England, is affected by the municipal law of England requiring certain proof to be given by a plt. suing upon such a contract.

An agreement was made on board a Peruvian man-of-war lying in the Thames between the plt., a foreigner, domiciled and practising as a medical man in England, and the deft., who was the medical officer of the vessel, by which the plt. agreed for a stipulated remuneration to act as medical officer to the vessel, while she lay in the Thames, as the plt.'s substitute. The plt. having brought an action to recover this remuneration for his services, and not proving that he was registered under the Medical Act, it was

Held, that he could not maintain the action.

The declaration contained counts for work and labour and on accounts stated. Pleas, never indebted and payment.

The plt. was a medical man, not a native of England, but domiciled in England, where he had practised since 1855. He had no English diploma, and was not registered under 21 & 22 Vict. c. 90. The deft. was a Peruvian and medical officer on board a Peruvian vessel of war lying in the Thames. Being desirous of absenting himself from the ship for some time, he arranged with the plt. that the latter should act as medical officer for the vessel during his absence, for a remuneration agreed upon between them. The arrangement was made on board the vessel. The plt. did act as medical officer for the vessel, and not having been paid by the deft. brought this action. It was objected at the trial that the plt. was prevented from recovering by sect. 32 of the Medical Act (21 & 22 Vict. c. 90), which is as follows:

After the 1st Jan. 1859 no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act.

On behalf of the plt. it was contended that the section did not apply to such a contract as that between the plt. and the deft., and that the statute law of England did not govern a contract made upon a Peruvian man-of-war, which must be considered as a Peruvian territory.

A verdict was entered for the plt. for 85l., the deft. having leave to move to enter a verdict for him, or a nonsuit. A rule having been obtained accordingly,

Beasley (Gates with him) showed cause.

Griffiths supported the rule.

Cur. adv. vult.

June 13.—BYLES, J. delivered the judgment of the court.—We are of opinion that the plt., being an unregistered medical practitioner, cannot recover for medical attendance afforded to the patients of the deft. on the deft.'s credit. It was contended at the trial that the Act of Parliament, 21 & 22 Vict. c. 90, ss. 31 and 32, did not apply to contracts between medical men themselves, but was confined to cases in which the patients are sued for medicines or medical attendance. We agree that the Act has no application in the case of an unregistered assistant suing a registered practitioner for his salary. But where the action is brought either against the patients themselves or against any one who is to pay for medical attendance or medicines prescribed and supplied to them, we think the statute applies. Suppose medicines administered by an unregistered practitioner to a patient under a guarantee for payment given by a third person, the statute would, we conceive, be a defence either to the principal debtor or to the surety. Suppose medicines administered to the poor of a parish or union on the credit of overseers of the parish or guardians of the union, the statute would in like manner be a defence, for the case would fall both within the words and spirit of the enactment. The patient does not the less require protection because the paymaster is a third person. In the case now under consideration the deft., when he went abroad, and engaged the plt. to act in his place, agreeing to pay for medical attendance afforded by the plt. during his absence, was in the situation of an ordinary paymaster and not the less so because he happened to be a medical man, for the patients during his absence had no benefit from his skill or attendance. It was further contended that the ship on board of which the contract was made, being a Peruvian ship of war, lying in the Thames, the contract was not governed by the municipal law of this country, but by the law of Peru. For many purposes a foreign vessel of war, not only on the high seas, but even in the waters or ports of a friendly state, is undoubtedly considered as foreign territory, and in some cases the local jurisdiction may be excluded: (see Wheaton's Elements of International Law, 189, and 1 Kent's Com. 164, n.) It is easy to perceive that questions of great complexity and difficulty may arise; and if this contract had been made, not only on board the vessel, but between parties who were on both sides part of the crew, if it had been a contract to be entirely performed on board the vessel, and if the question had arisen otherwise than in the form of an action in an English court, requiring certain proof to be given at the trial, there might have been much weight in the suggestion. But, first, the contract was not made between Peruvians only, but between a plt. domiciled in England and a Peruvian; the plt. being by the law of this country subject to a personal disqualification. Secondly, it was not to be performed entirely on board the vessel, but partly on shore; and, generally speaking, a contract is to be governed by the law of the country where it is to be performed, so that it is impossible that the Peruvian law should entirely govern this case. Thirdly, the disqualification to sue in England for medical attendance afforded by him within the ambit of the English territory arises from the necessity of proving his registration at the trial. It is part of the *lex fori* of the country where the remedy is sought, and even in cases where the law of another country is to interpret the contract, yet the *lex fori* is to govern the remedy: (see *Huber v. Steiner*, 2 Bing. N. C. 202; *Don v. Lippman*, 5 Cl. & F. 1; *Story's Conflict of Laws*, 840, 2nd edit.)

Rule absolute to enter verdict for the deft.

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KOBEL v. SAUNDERS—PEARSON v. GOSCHEN AND OTHERS.

Thursday, June 23, 1864.

KOBEL v. SAUNDERS.

*Maritime insurance—Implied warranty—Seaworthiness.**Where goods are insured for a voyage there is no implied warranty on the part of the insurers that the goods are seaworthy.*

Action upon a policy of insurance upon a ship's cargo of cocoa-nut oil in casks from Cochin to Marseilles.

Fourth plea :

That the premises so insured were not seaworthy for the said voyage at the time the said ship departed and set sail thereon.

Demurrer.

The grounds of demurrer were stated to be, that there was no implied warranty of seaworthiness of goods insured by a policy, and that the plea did not allege that the loss was attributable to the condition of the goods.

Sir G. Honyman appeared to support the demurrer, but

Watkin Williams was called on to support the plea.—It is an implied condition of every contract of insurance that the subject of insurance is in a proper state to encounter the risk insured against. Goods insured ought to be in a condition to encounter the ordinary incidents of a sea voyage without incurring damage, supposing no accident to happen. It is no argument against this plea that it is new in form :

Boyd v. Dubois, 3 Camp. 183;

1 Park on Insurance, 458;

3 Kent's Commentaries, 360;

Gibson v. Small, 4 H. of L. Cas. 353.

WILLES, J.—I am of opinion that the deft.'s fourth plea is not a sufficient answer to the plt.'s claim. It might be sufficient to dispose of the case by saying that the plea is novel in character and principle, and that in actions on policies of insurance, in which questions of a similar kind are so often raised, and in which the ingenuity of counsel suggests all kinds of claims and answers, we should have had instances of attempts to plead such a plea as this, if it had been a good plea. But, besides being novel, the plea is inadmissible as seeking to create a new implied warranty in a contract of insurance. An insurer is not liable to make good damage resulting from any peculiar vice in the thing insured itself, and unseaworthiness is expressly provided for in the law of some countries. But it is necessary to trace the damage for which an indemnity is sought to the unseaworthiness which is proved to have existed. With respect to goods this is familiar law, and is stated in Smith's Merc. Law, 359, where, on the authority of *Boyd v. Dubois*, it is said: "If goods be put on board in a damaged condition and are in consequence liable to effervescence and generate the fire by which they are consumed, the underwriters are not liable." In our law seaworthiness is made to depend upon a warranty, so that, if a vessel is unseaworthy, as, for example, from not having a sufficient crew on board, and she is lost by reason of some cause not connected with that unseaworthiness, it will be sufficient for the underwriter, in repudiating his liability, to prove that she was unseaworthy. Unless you are to invent a new implied warranty with respect to goods, and say that, where goods are insured and the premium paid, and the goods destroyed by the perils insured against, the insurers are not liable by reason of some unseaworthiness in the goods, this plea is bad. I never can consent to introduce a novelty likely so seriously to affect the mercantile law of the country.

BYLES, J.—I concur in saying that who perish by their own vice they are not destitute of perils of the sea insured against. The project of taking advantage of such a ground of defence by pleading in the ordinary way, that they were not lost by the perils insured against, was said by Mr. Watkin Williams that there was no warranty that the goods were seaworthy, but not so. This very case is provided for in the Code de Commerce, and unseaworthiness is said to be within the perils insured against; but it is said that freedom from such a defect is a condition precedent to the liability of the underwriter attaching.

KEATING, J. concurred. Judgment for

Attorneys for the plt., *Waltons and Bubb*.
Attorneys for the deft., *Thomas and Holla*.

PEARSON v. GOSCHEN AND OTHERS.

Charter-party—Bill of lading—Lien for freight—Right of charterers' agents, on whom charterers had stopped payment, to take bills shipped on their account—Effect of new party entered into by the master with respect to goods—Lien on goods subsequently shipped.

A ship was chartered to go from Glasgow to Rio de Janeiro and back to the United Kingdom, the voyage to be at the rate of 4l. 10s. upon the homeward cargo. The charter-party contained a provision that the owners should have a lien on the cargo for freight, dead freight, demurrage and other charges. The vessel proceeded to Rio de Janeiro and the charterers' agents loaded a part of the cargo for which the captain, in pursuance of a clause in the charter-party, enabling him to sign bills of lading for any rate of freight without prejudice to the charter-party, signed a bill of lading at 40s. per ton. Intelligence was then received that the charterers had stopped payment, and their agents insisted that the captain must either return the goods shipped under the charter-party or charter another vessel. The captain, under protest, entered into a new charter-party for the voyage to the United Kingdom at a rate of freight for cargo of 30s. per ton. A further quantity of goods was then loaded by the same persons, but the vessel was not furnished with a bill of lading for the whole amount so loaded, the bill of lading for the first part being signed by the captain at 30s. per ton. On the vessel's arrival in England, the owner claimed a lien upon the goods loaded for the freight at the rate of 4l. 10s. per ton.

Held, that the goods shipped before the vessel was received of the failure of the charterers had been shipped under the charter-party, and the captain had no power to vary the contract of carriage by entering into a fresh charter-party with them at a different rate of freight, and that the shipowner had a lien upon them for freight at 40s. per ton; and that the goods subsequently shipped were not shipped under the charter-party, the owner was bound by the bill of lading for them, and had a lien upon them for freight at 30s. per ton only; that the owner had no lien upon a cargo for the difference between the freight at 40s. and the freight at 30s., as being dead freight; meaning of the lien clause in the charter-party.

Special case stated by consent for the opinion of the Court.

CASE.

The plt. Mr. Adam Pearson, is a resident and carrying on business at Glasgow; the defts. carry on business as merchants in

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PEARSON v. GOSCHEN AND OTHERS.

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under the style or firm of Messrs. Fruhling and Goschen.

On the 17th Oct. 1862, the plt. chartered the ship the *Hooyland* to Messrs. Charles Thorburn and Co., of Glasgow, for a voyage for the round from Glasgow to any safe port at Porto Rico, and then back to a port in the United Kingdom. According to the terms of the charter-party, the freight for the voyage was to be at the rate of 4*l.* 10*s.* per ton upon the homeward cargo, delivered and to be paid as follows, namely, 350*l.*, by approved bills at four months' date, payable in London on sailing of the vessel from Glasgow, and the balance, one-half in cash on right delivery of the homeward cargo at port of discharge, and one-half by approved bills on London at four months' date at same time. The disbursements of the vessel at Porto Rico were to be paid by the charterers' agents in full, of which 100*l.* was to be deducted from the freight. Forty-five working days were to be allowed for discharging and loading at Porto Rico, and waiting orders at Queenstown or Falmouth, and twenty-five working days for loading at Glasgow, to commence on the 27th Oct. then current, and ten days on demurrage over and above the said lying days, at 6*l.* per day, to be paid day by day as the same should become due. And it was agreed that for security and payment of all freight, dead freight, demurrage, and other charges, the master and owners were to have an absolute lien and charge on the said cargo or goods laden on board, bills of lading to be signed by the master as presented to him, and at any rate of freight without prejudice to the charter-party. A copy of this charter-party is to form part of the case.

This charter-party was made by Messrs. Thorburn and Co., as agents for Messrs. McCormick, Ball and Co., of Porto Rico. The *Hooyland* received her outward cargo at Glasgow, and on the 1st Dec. 1862 set sail for the port of Arecibo in Porto Rico, having been kept on demurrage at Glasgow five days, which, at 6*l.* per day, would amount to 30*l.*

The *Hooyland* arrived at Arecibo on Saturday the 10th Jan. 1863, and after some delay in unloading, owing to bad weather, the discharge of the cargo was completed at another port, called San Juan, on the 13th March.

At San Juan the captain of the *Hooyland* was directed by the charterers to proceed to the port of Ponce, another port in Porto Rico, for his homeward cargo, and to address himself there to the charterers' agents, Messrs. Lohse, Cortada and Co., who would ship the homeward cargo.

The captain accordingly proceeded to Ponce, at which place he arrived on the 23rd March, and at once reported himself to Messrs. Lohse, Cortada and Co., according to his instructions from the charterers, and he put into their hands a copy of his charter, which they read. He also inquired of them how soon the homeward cargo would be ready, and they replied that the cargo was then ready.

As soon as the discharge of the ballast then in the vessel was completed the shipment of the homeward cargo was commenced. 498 hogsheds and forty-nine barrels of sugar marked "M. B. C." were loaded on board, and a bill of lading for the same signed and delivered by the captain to Messrs. Lohse, Cortada and Co., at a freight of 40*s.* per cwt., payable on delivery in the United Kingdom. The further shipment of cargo then ceased, and after a delay of some days, during which the captain was applying for the remainder of the cargo, Messrs. Lohse, Cortada and Co. informed him that Messrs. McCormick, Ball and Co. had suspended payment, and that they could not ship any more cargo on account of their failure, and they also required him to discharge and return to themselves the cargo

already shipped, and for which he had signed a bill of lading as above stated.

The captain refused to discharge or return any portion of the cargo which he had received on board. Messrs. Lohse, Cortada and Co. thereupon told him that he would be compelled to discharge the cargo, or sign another charter. They then again required him either to sign a new charter with them, or to discharge the cargo, and threatened, in the event of his refusal, to compel him to do so.

At this stage of the proceedings the captain attended with one of the firm of Messrs. Lohse, Cortada and Co. before the British vice-consul, in order to obtain his opinion, who told him that by the Spanish law he would be obliged to sign a new charter, or to discharge his cargo, and advised him to sign a fresh charter.

The captain had in the meantime written, at the request of Lohse, Cortada and Co., to Messrs. McCormick, Ball and Co., stating what had taken place, and received from them the following reply :

Arecibo, P. R., 10th April 1863.

Sir,—We regret to be compelled to inform you that we have declared our suspension of payments, and are in consequence unable to provide you with your return cargo of produce, or assume any responsibility in the matter. You are therefore at liberty to act as you please, and consider most to the benefit of your owner's interests. We hope, however, you will be able to effect some arrangement in Ponce which may diminish as much as possible the very heavy loss which will unfortunately fall upon our friends concerned in this affair. In doing this we feel assured that you will meet with the best advice an every assistance from Messrs. Lohse, Cortada and Co.—We are, Sir, your obedient servants,

MCCORMICK, BALL and Co.

Capt John McAlley, British barque *Hooyland*, Ponce.

Thereupon the captain, after protesting against the proceedings of Messrs. Lohse, Cortada and Co., entered into a new charter-party with them, by which the *Hooyland* was chartered for a voyage from Ponce to Queenstown or Falmouth for orders to a port of discharge in the United Kingdom, at the freight of 30*s.* per ton. A copy of this charter is to form part of the case.

All the parts of the bill of lading signed under the first charter were destroyed by Messrs. Lohse, Cortada and Co. Messrs. Lohse, Cortada and Co. then proceeded with the lading, and shipped a further quantity of sugar, viz., 108 hogsheds and 8 barrels, making the whole amount 606 hogsheds and 57 barrels. The lading was finally completed on the 21st April 1863, and a bill of lading signed for the whole quantity at 30*s.* per ton, payable on delivery in London. A copy of this bill of lading is to form part of the case.

On the 22nd April 1863, the captain addressed the following letter to the plt. :

Barque *Hooyland*, Ponce, Porto Rico.
22nd April 1863.

Sir,—I am sorry to inform you that after all the delay and trouble we have had in this island, that McCormick, Ball and Co. have stopped payment. I got notice from the agents here that they were unable to provide a homeward cargo for the *Hooyland*, I having on board at the time 498 hogsheds and 49 barrels of sugar, shipped by Messrs. Lohse, Cortada and Co., of this port. As soon as they got notice of McCormick, Ball and Co.'s failure, they claimed the cargo, and wanted me to discharge it or sign a fresh charter. I refused to do either. I went to the British consul, and he told me I would be obliged to discharge the cargo or comply with their request. I would do nothing until I heard from McCormick. An express was sent to Arecibo, which took six days to go there and back. The letter I inclose; so what could I do? Rather than discharge the cargo I noted a protest against the charterers for non-performance of the agreement, and had to accept charter at 1*l.* 10*s.* per ton to call at Falmouth for orders. We are now loaded, and will sail to-morrow morning. We have on board 606 hogsheds and 57 barrels. We could stow about 100 more barrels, but they have no more to give me. We have to pay all our expenses here, drudgerage of this cargo, and port charges. I had to buy some beef and bread here. I was afraid of being short on the passage.—I am, Sir, your humble servant,
JOHN McALLEY.

Adam Pearson, Esq.

With the above cargo the ship was not full;

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loaded, there being space for no less than 100 barrels of sugar in addition, and there was a deficiency of 98 barrels upon the quantity guaranteed to be shipped by the original charter-party, the freight of which, at the rate of 4*l.* 10*s.* per ton, would have been 35*l.* 13*s.* 8*d.* The ship was detained at Porto Rico in discharging her outward cargo and loading her homeward cargo, eight days beyond the time allowed by the original charter-party, which at 6*l.* per day, makes a claim of 48*l.* for demurrage there.

Previously to the suspension of McCormick, Ball and Co. as above mentioned, they had expended 140*l.* according to the following accounts:

Port charges and ordinary disbursements of the ship at Aquedilla, San Juan and Arecibo, up to the 24th March 1863	Dols.	£
	492-50	100
Cash to captain, about	105	
Provisions	64	
Fine on account of error in manifest ...	26	
Up to 24th of March	195	40

The above sums were paid by McCormick, Ball and Co., who signed at the foot of the accounts an order of transfer to Messrs. Lohse, Cortada and Co. in the following terms:

Arecibo, March 24, 1863.

Pay to Messrs. Lohse, Cortada and Co., value in account.
McCORMICK, BALL and Co.

The captain subsequently at Ponce, on the 15th April 1863, certified these accounts as correct, and to be deducted from his homeward freight.

Messrs. Lohse, Cortada and Co., after the ship arrived at Ponce, paid the following sums:

For lighterage and loading the whole of the sugar	£	50
For ship's disbursements	26	£ s. d.
Cash to captain and provisions	35	119 19 0

To this they added the two first-mentioned accounts transferred to them as above stated, and took the captain's receipt for the whole 251*l.* 19*s.* referred to in the next paragraph of the case.

On the back of the bill of lading finally signed by the captain as above mentioned, he was required to sign, and did sign, the following receipt:

Ponce, 22nd April 1863.

Received from Messrs. Lohse, Cortada and Co., the sum of 251*l.* 19*s.* sterling, and furthermore declare that my vessel is dispatched within the time agreed, and that I have no claim whatever for demurrage, dead freight, &c.
251*l.* 19*s.* (Signed) JOHN MCALLEY.

The ship sailed on her homeward voyage on the 22nd April 1863, and called in due course for orders at Falmouth, where she was detained one day on demurrage waiting for orders. The captain then having received orders from the defts., proceeded to London as his port of discharge, where he arrived on the 6th May 1863.

At this time the plt. had received the sum of 360*l.* payable on the sailing of the vessel from Glasgow, according to the provisions of the original charter-party.

The freight upon the 498 hogsheads and forty-nine barrels shipped in the first instance at Ponce, and for which the bill of lading afterwards destroyed was given, would amount at the rate of freight in that bill of lading to the sum of 520*l.* 1*s.* 6*d.*, and the freight for the residue of the cargo, afterwards shipped at the rate of the original charter-party, namely at 4*l.* 10*s.* per ton, would amount to the sum of 112*l.* 11*s.* 8*d.*, and at the rate inserted in the bill of lading for the same, namely 30*s.*, to the sum of 84*l.* 8*s.* 9*d.*

The freight of the whole cargo shipped, namely the 606 hogsheads and fifty-seven barrels, at the rate of freight mentioned in the first charter, would amount to 1423*l.* 18*s.* 7*d.*, and at the rate of freight mentioned in the second charter, and in the bills of lading held by the defts., would amount to the sum of 474*l.* 9*s.* 10*d.*

The above cargo was consigned by Lohse, Cortada and Co., to the defts. as their for the sale of the same on their account, a forwarded the bills of lading to the defts. 1 purpose.

The defts. were holders of the bills of lading agents for Messrs. Lohse, Cortada and Co., the above purpose, when the plt. having intelligence of the above circumstances, and the arrival of the cargo, caused the followin to be sent to the defts.:

London, 16th Ma

Gentlemen,—Being advised that the cargo of the *Hooyland*, from Porto Rico, is consigned to you, we beg to notice that we hold a lien upon the same for a freight, dead freight and demurrage in terms of party, made in Glasgow on the 22nd Oct. 1862, bet owners of the said vessel and Messrs. McCormick, Co., of Porto Rico; and further give you notice not with the said cargo until same is released from the cl made by us above.—We are, gentlemen, your obed vants,
SITER and HAYWOOD.

Agents for the owner of the barque *Hoc*
Messrs. Fruhling and Goschen.

The cargo was afterwards landed in the and a stop put upon the same by the plt. claim on account of freight and demurrage.

The defts. were willing to pay the amount freight according to the bill of lading held b less the above-mentioned sum of 251*l.* 19*s.* appeared by the indorsement at the back of of lading to have been paid on account freight, amounting with such deductions t and they have since paid this amount into co no question arises upon it. The plt. refused, b to give up the cargo upon the payment of su The defts. afterwards wrote to the plt. lowing proposition:

London, 4th No

Sir,—If you will be good enough to withdraw your the cargo per *Hooyland*, we undertake to hold responsible to you for your claim, in the event of yo able to establish your lien on the cargo for the fre demurrage due under the original charter-party; proceedings at law or equity, which would be com you while the sugars were on shipboard, or under st be equally competent against us. We are of course pay the 30*s.* freight under the new charter-party.— Sir, yours obediently,

(Signed) FRUHLING and G.
Adam Pearson, Esq., Glasgow.

The plt. acceded to this proposition, the st accordingly withdrawn and the cargo deliv the defts.

It is agreed that the court may draw s ference of fact as a jury might draw. The q for the opinion of the court are:—First, v the plt. is entitled to recover against the def further sum of money than the said sum c paid into court. Secondly, if so, which of the mentioned sums of money the plt. is entitle cover beyond the said sum of 225*l.*

If the court should answer the first que the negative, judgment is to be entered defts.; but if in the affirmative, then ju to be entered for the plt., for such sum court find, in answer to the second question, is entitled to over and above the said sum o

Watkin Williams (*Lush*, Q. C. with him) a for the plt.

Sir G. Honyman (*F. M. White* with him) defts.

The arguments are sufficiently noticed judgment.

The following cases were referred to:

Shand v. Sunderson, 4 H. & N. 381;
Kirchner v. Venus, 15 Jur. 395;
Howard v. Tucker, 1 B. & Ad. 712;
Kern v. Deslandes, 10 C. B., N. S., 205; 5 L. N. S. 349;
Thompson v. Small, 1 C. B. 323;

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Blasco v. Fletcher, 9 L. T. Rep. N. S. 169; 32 L. J., C. B., 284;
Blackburn's Contract of Sale, 262;
Sickens v. Irving, 5 C. B., N. S., 165.

And by Willes, J.:

Phillips v. Rodie, 15 East, 547; and
Birley v. Gladstone, 3 M. & S. 205.

WILLIAMS, J.—We are of opinion that the plt. is entitled to recover in this action. The first question submitted to our consideration is, whether the plt. is entitled to recover more than the 225*l.* paid into court? We are of opinion that he is. At present it is unnecessary to fix the exact amount in figures: it will be sufficient if we fix the principles on which we think that it ought to be calculated. With respect to the 498 hogsheds loaded before the intelligence was received of the failure of M'Cormick, Ball and Co., the original charterers, we think that the plt. is entitled to freight at the original price stated in the charter-party, namely, 4*l.* 10*s.* per ton. The ground of our conclusion is, that upon the facts laid before us, from which we are to draw inferences of fact, we have concluded that the 498 hogsheds were not only shipped under the original charter-party, but were shipped by Lohse, Cortada and Co., as agents for the original charterers, and therefore the case is on the same footing as if they had been shipped by the original charterers themselves, and the law admits of no doubt that charterers having shipped the goods, have no right to desire them to be unshipped; and it was the captain's duty to hold them for the benefit of the owners, and their lien for freight. Then comes the question, what was the effect of the new bill of lading which the captain thought himself compelled to sign at a reduced rate of freight? It seems to me that it had no effect at all. The captain had no authority from the owners under the circumstances to substitute a new bargain for the bargain which existed and which his principals had a right to insist upon as binding upon the charterers. Therefore, as far as the 498 hogsheds are concerned, the amount must be taken upon the basis of the charter-party at the price of 4*l.* 10*s.* per ton. With respect to the 108 hogsheds afterwards put on board, we deduce that the charterers and their agents having declined to ship any more goods on board on the terms of the original charter-party, the captain was acting as a prudent captain would act for the benefit of his owners in contracting to take goods upon the terms of the bills of lading which he signed. They were carried independently of the charter-party on a new contract, and the price mentioned in the bill of lading is the price to be paid for them. This disposes of the whole case except the claim for expenses. Besides the 100*l.* for disbursements, some extra expenses were incurred by the captain for the benefit of the owners, which it is admitted must fall on the plt., and for which there ought to be an allowance. Having thus disposed of the case originally argued, we have the point insisted upon by Mr. Watkins Williams, namely, that by reason of the particular terms of the charter-party, which provides for a lien for dead freight, the owner is entitled to a lien for what would have been the amount of freight payable under the charter-party if a full cargo had been put on board. But there is no special stipulation for dead freight, and the charter-party only contains the ordinary printed general words used in mercantile documents. It is said that the damages which the owner would be entitled to claim for the breach of the charterers' agreement to load a full cargo come within the words "dead freight;" but it seems to me that those words are quite inapplicable to such a claim. The

plt. is entitled to damages, to be estimated according to the principles which I have stated.

WILLES, J.—I am of the same opinion. As to the 498 hogsheds, it appears that they were put on board by the agents of the charterers, with the intention of performing the contract of the charterers to fill the vessel. The charter-party provided that those goods should be charged 4*l.* 10*s.* per ton for freight. The bill of lading provided for freight at 40*s.* per ton. If this bill had got into the hands of a *bonâ fide* holder for value, no doubt, as between such holder and the shipowner, payment of 40*s.* only could be enforced, but as against the charterers and all persons representing them, the bill of lading did not supersede the charter-party. If there had been no provision in the charter-party for the giving of bills of lading at a less rate of freight, it might have been contended that a new contract had been made, it might have been necessary to consider if the alteration of the freight was a fraud on the shipowner, as in the case of *Faith v. The East India Company*, 4 B. & A. 630. But the charter-party expressly provides that bills of lading might be given at any rate of freight without prejudice to the charter-party. This might be for the convenience of the charterers in putting the ship up as a general ship, or in disposing of the cargo afloat. But the charter-party stipulated that, if this right should be exercised, it should be done without prejudice to the charter-party. It is quite obvious that, unless what took place between Lohse and Co. and the master resulted in substituting a second price for that agreed on at first, the debts must pay 4*l.* 10*s.* per ton. It is clear, also, that the master could not be justified in relinquishing the right acquired by the owners of the ship upon the shipment of the goods, or in substituting a new contract for that contained in the charter-party. As to the alleged right of a shipper to take back goods according to the law of Spain, it is sufficient to say that no such right is stated in the case. With respect to the 180 tons afterwards shipped, it is clear that they were not shipped under the charter-party, but under a bill of lading, by which freight at only 30*s.* per ton was payable. A master finds himself at a foreign port with only part of a cargo, the charterers being insolvent and refusing to supply any more, is he entitled to enter into fresh contracts to fill up his ship, and is a person who puts goods on board knowing the terms of the charter-party, bound by them? I think that it is one of the cases in which a master doing so is acting strictly within the limits of his authority, and that the owners are bound by the bills of lading. But it is said that the difference between freight at 4*l.* 10*s.* and freight at 30*s.* is "dead freight," and Mr. Williams relies on the provision in the charter-party, "for the security and payment of all freight, dead freight, demurrage and other charges, the master and owners to have an absolute lien and charge on the cargo and goods laden on board." He said that it was necessary to interpret dead freight so as to include this difference. But when these words are found to be only the ordinary printed words of course of the charter-party, it is not necessary to be so particular to find an application for them. The true meaning of dead freight in that context is dead freight liquidated between the parties, and it applies only to cases where it is liquidated by the contract. I am quite aware that the expression has been occasionally applied to damages in respect of room lost by a failure on the part of the charterers to load; but this arises from a poverty of language, and no lien could be claimed in respect of such damages. Except for damages warranted by the contract, the

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captain is not to be his own judge in the matter. This is shown in the cases, and it will be sufficient to refer to *Phillips v. Rodie*, and *Birley v. Gladstone*, already mentioned. The deductions in respect of advances made at Porto Rico are, first, the 100*l.*, and then 40*l.* for extra disbursements, so much as are not ordinary expenses, and not provided for by the charter-party. The payments made by Lohse, although not agreed to be deducted from the freight, were taken by the master as payments to be deducted from what he was entitled to charge. It is not necessary for me to say more.

BYLES, J.—I am of the same opinion. It is a mere question of lien, and nothing which is decided here will prejudice the damages to which the plt. is entitled for losing the profit to be derived from carrying a full cargo at 4*l.* 10*s.* per ton. Now, as to goods already shipped under the charter-party, the captain had no power to vary the contract, and therefore 4*l.* 10*s.* is to be paid for them. Then, was he to return with a half-empty ship, trusting to the credit of the charterer? He was right to do the best for his ship. It is said that the plt. had a lien for damages as being "dead freight." Whatever those damages may be they are to be reduced by the sum received by the plt. under the new contract entered into by the captain, so that the dead freight would come to be the difference between the freight at the old price and the freight at the new; but this is an extension of the meaning of "dead freight." This is in reality a case not of dead freight, but of substituted freight.

KEATING, J. concurred.

WILLIAMS, J.—I forebore to observe on the cases of *Shand v. Sanderson* and *Kirschner v. Venus* and *Deslandes v. Gregory*, because no question as to the law relating to bills of lading signed without prejudice to the charter-party arises, the goods having, according to our view of the subject, been shipped by the charterers themselves.

Judgment for the plt.

Attorneys for the plt., *Thomas and Hollams.*

Attorneys for the defts., *Drace and Sons.*

June 24 and 25, 1864.

RUSSELL v. NIEMANN.

Ship and shipping—Bill of lading—"King's enemies."

"King's enemies" within the meaning of the exception usually contained in a bill of lading, are the enemies of the sovereign whose subject the owner of the ship is, whatever his title may be.

A bill of lading given in a Russian port for the conveyance of a cargo from that port to England on board a vessel which belonged to a subject of the Duke of Mecklenburg, and carried the flag of Mecklenburg, contained the usual exception of "the King's enemies:"

Held, that the exception applied to the acts of enemies of the Duke of Mecklenburg.

Action by the indorsee of a bill of lading of a cargo of wheat against the owners of the ship on which it was loaded.

The declaration stated that

After the 14th day of August, A.D. 1855, certain persons, in parts beyond the seas, to wit, Messrs. Kellner and Co., at Odessa, delivered to the deft. certain goods, to wit, &c., to be by the deft. carried and conveyed in a certain ship of the deft.'s from Odessa to Cork or Falmouth for orders, and thence to one of certain ports as ordered under a certain bill of lading signed for the same by the deft., whereby the deft. agreed to carry the said goods and deliver the same at the port of destination (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of what nature and kind soever excepted) to the order of the said persons, or to their assigns,

paying freight for the said goods and all other conditions as per charter-party. Dated Odessa, the &c. And the plt. says that afterwards and after the said 14th Aug. A.D. 1855, the said persons indorsed the said bill of lading to the plt. in order to pass the property in such goods to the plt. and that thereupon and by reason of such indorsement the property in the said goods passed to the plt. And the plt. says that the said ship proceeded with the said goods on board to Falmouth for orders, and was then duly ordered by the plt. to proceed with the cargo to Limerick, and there deliver the said cargo the same being a port to which the said ship was bound proceed agreeably to the terms of the said bill of lading and charter-party.

It further contained a general covenant of performance of conditions by the plt., entitling him to have the terms of the bill of lading observed, and to sue for breach thereof, and alleged the breach to be that "the deft., although not prevented by any of the excepted perils, made default in obeying the said orders and proceeding with the said cargo to Limerick in pursuance of the said bill of lading and charter-party," and claimed damages for loss of profits, &c.

The fifth plea set out the charter-party. It was made at Odessa, and described the master as being of the good ship, &c., "under Mecklenburg colours now in this port," and the charterers as "Messrs. G. Kellner and Co., merchants and charterers." The voyage was to be "to a safe port in the United Kingdom of Great Britain and Ireland, north-west coast of Ireland excepted, or on the continent between Havre and Hamburg both inclusive, Belgium excepted . . . calling at Cork or Falmouth at the master's option for orders." The exception was as follows: "The act of God, enemies, fire, restraint of princes, and all and every dangers and accidents of the seas, rivers and navigation, of whatever nature or kind soever, during the said voyage always mutually excepted." The plea then set out the bill of lading, and proceeded as follows:

And the deft. further says, that the owners of the said ship and the deft. were respectively subjects of the Duke of Mecklenburg Schwerin, and the said ship was a Mecklenburg ship sailing under Mecklenburg colours, and that the default complained of was caused by the act of the enemies of the said Duke of Mecklenburg Schwerin, being the King's enemies within the true intent and meaning of the said bill of lading.

Sixth plea :

The deft. says, that the said charter-party and bill of lading were respectively as in the fifth plea set out, and that the default complained of was caused by the act of enemies during the voyage within the true meaning of the said charter-party.

Seventh plea :

The deft. says, that the said charter-party and bill of lading were respectively as in the fifth plea set out, and that the default complained of was caused by the restraint of princes during the voyage, within the true meaning of the said charter-party.

The deft. demurred also to the declaration. The plt. demurred to the above pleas, and to the fifth plea pleaded a further replication,

That the said charter-party and bill of lading were respectively made and signed at Odessa, in the empire of Russia and that the said Messrs. George Kellner and Co. were not, nor were nor was any or either of them a subject or subjects of the said Duke of Mecklenburg Schwerin.

To which the deft. demurred.

Sir G. Honyman (*Lush*, Q. C. with him), appeared for the plt.—The declaration is good, for the plt. as the holder of the bill of lading, was the proper person to give the orders as to the port of discharge. The fifth plea is bad, for the enemies of the Duke of Mecklenburg were not the "King's enemies" within the meaning of the bill of lading merely because the ship sailed under Mecklenburg colours. The cargo was loaded in a Russian port, and the bill of lading was signed by a subject of the Duke of Mecklenburg, but that will not give to the word "King's enemies" a meaning other to that which *primâ facie* belongs to them, or bring within the exception default caused by the acts of the King

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of Denmark, who was one of the Duke of Mecklenburg's enemies. As to the sixth and seventh pleas, the words contained in the bill of lading, "other conditions as per charter-party," only apply to matters not expressly provided for by the bill of lading, and the excepted perils mentioned in the latter cannot be extended by incorporating with them those mentioned in the former.

Mellish, Q. C. and Hannen for the deft.—The declaration is bad for not alleging that the orders were given by the plt., being duly authorised by the charterers. [WILLES, J.—The plt. must have leave to amend the declaration if necessary.] The pleas are good; any hostile Government will come within the description of "king's enemies," as distinguished from pirates. The word king must include duke. [WILLES, J.—If the word king referred to the sovereign of the shipper, there would be considerable difficulty in the case of a general ship, where there may be goods of many nationalities, in saying which king is meant.] Besides, the reference in the bill of lading to the charter-party incorporates the latter, and there the word "enemies" is used, and not the words "King's enemies."

Sir G. Honyman replied.

WILLES, J.—This is an action brought upon a bill of lading of a cargo to be carried from Odessa to the United Kingdom, calling at Falmouth for orders. The declaration states that such orders were properly given and were disobeyed. The deft. relies on two points: first, that he was prevented from obeying by enemies of his Sovereign, and that the bill of lading contains an exception which includes the acts of such enemies; secondly, that the charter-party is incorporated with the bill of lading, and that the deft. is therefore entitled to rely on the larger exception in the charter-party. If judgment be given for the deft. on the first point, Mr. Mellish probably will not require us to give judgment on the second. Now, on the first, I agree with the argument for the deft. In order to arrive at the true construction of the words King's enemies in the bill of lading, it is necessary to consider the circumstances under which it was signed. It was signed at Odessa, in the empire of Russia. The shippers were Messrs. Kellner, who appear to be merchants there, but there is no means of ascertaining their nationality. The ship was of Mecklenburg, and its owner was of Mecklenburg. The plt. is English, and the destination of the cargo was English. We have to choose between three persons who may equally come within the description of king, namely, the Emperor of Russia, the Queen of England, and the Duke of Mecklenburg, no one of the three being strictly a "king." But in truth the word "king" in this document simply refers to a sovereign capable of making war, and on whom war can be made. The only reason for saying that the Emperor of Russia is referred to is, that the locality where the bill of lading was signed was Russia, but that is no reason at all. The destination was English, but none of the parties to the contract were English. The person who signed the document and made the stipulation for himself was a subject of the Duke of Mecklenburg. There seems to be abundant reason for his so stipulating in respect of injuries which he might receive from his own enemies, and he describes them as king's enemies. The plea says that the orders given to the deft. were disobeyed in consequence of the acts of such enemies, and I think that judgment upon the demurrer to the fifth plea must be given for the deft.

BYLES, J.—I think that the words "King's enemies" at least include enemies of the carrier if they are not specially directed to them, and that they apply

to enemies of the carrier's Sovereign, whatever his title may be. The exceptions of King's enemies and restraint of princes, include all cases of lawful interruption by lawful authority, leaving the case of pirates to be dealt with by the other exception of dangers of the seas within which, according to the highest authority, they come: (2 Roll. Abr. 248, pl. 10; *Barton v. Wolliford*, Comber. 56.) The three exceptions of King's enemies, restraint of princes, and perils of the seas, include all the species of *vis major* against which it is necessary to guard.

KEATING, J.—I am of the same opinion. The exception is introduced for the benefit of the carrier, who says, "I will undertake to carry the goods in my ship, if I am not prevented by the enemies of my Sovereign."

June 25.—WILLES, J.—For the purpose of completing the record so as to enable it to be taken to a court of error, if it be desired, we think that judgment had better be entered for the plt. on the demurrers to the sixth and seventh pleas.

Attorneys for the plt., *Thomas and Hollams*.

Attorneys for the deft., *Mercer and Mercer*.

Judgment for the deft. on the demurrers to the fifth plea, and to the replication; judgment for the plt. on the other demurrers.

UNITED STATES DISTRICT COURT OF ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate in Admiralty.

NEW YORK (SOUTHERN DISTRICT).

(Before BETTS, J.)

Re THE STEPHEN HART (in Prize).

Prize—Blockade—Evidence—Principles of the law of capture.

Circumstances under which a vessel of a neutral country is held to be guilty of an attempt to introduce contraband goods into the enemy's territory by a breach of blockade.

Depositions given on the re-examination of persons found on board of a captured vessel are admissible in evidence:

Held, first, that the vessel and her cargo were enemy's property when the voyage was undertaken and the capture made;

Secondly, that she was laden with articles contraband of war, declared for the aid and use of the enemy, and on transportation by sea to the enemy's country at the time of capture;

Thirdly, that with full knowledge on the part of the owner of the vessel and the owners of the cargo that the ports of the enemy were under blockade, the vessel and her cargo were dispatched from a neutral port with an intention, on the part of the owners of each, that, in violation of the blockade, both the vessel and her cargo should enter a port of the enemy.

That these circumstances constitute, according to the law of nations, a breach of blockade, for which the ship and her cargo are liable to capture.

The facts of this case are fully set forth in the following:

JUDGMENT.

BETTS, J.—The schooner *Stephen Hart* was captured, as lawful prize of war, by the United States vessel of war *Supply*, on the 29th Jan. 1862, in latitude 24 deg. 12 min. north, and longitude 82 deg. 14 min. west, off the southern coast of

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Florida, about twenty-five miles from Key West, and about eighty-two miles from Point de Yeacos in Cuba, and was sent to the port of New York for adjudication, under convoy of her captor. A libel was filed against her in this court on the 18th Feb. 1862. On the 1st May 1862 a claim to the vessel was interposed by John Myer Harris, of Liverpool, England, as her sole owner. The test oath to that claim was made by Charles N. Dyett, the master of the schooner. On the same day, a claim was put in to the whole of the cargo of the schooner, by Samuel Isaac, on behalf of himself and Saul Isaac, as copartners and subjects of Great Britain, doing business in England under the firm name of S. Isaac, Campbell and Co., and claiming to be the sole owners of the cargo. The test oath to that claim was made by Samuel Isaac. On the 25th Oct. 1862 another claim to the schooner on behalf of Harris was interposed. In this second claim, Harris is described as late of Liverpool, England, and now of Sherbro', on the western coast of Africa, at present residing in England, merchant. This second claim sets up that he is the sole owner of the schooner, and is a subject of the Crown of Great Britain. In the test oath to the second claim of Harris, and which test oath is made by him, it is alleged that, on the 28th Sept. 1861, he agreed to become the purchaser of the schooner for 1750*l.*, to be paid 28th Oct. 1861; that it was afterwards arranged that the money should be paid on the 14th Oct.; that an abatement of 5*l.* 10*s.* 3*d.* was thereupon made from the purchase-money; that the balance of 1744*l.* 9*s.* 9*d.* was paid; that the vessel was at Bristol, England, at the time of her sale; that, after such purchase, she took a cargo from Bristol to London, and was then loaded, partly at London and partly at Erith, with a cargo of arms, ammunition and military clothing; and that such cargo was the sole property of S. Isaac, Campbell and Co. It is to be noted that this test oath does not state from whom he purchased the schooner, or to whom he paid the money, or whether he received any bill of sale. It is also silent as to any hiring or charter of the vessel to S. Isaac, Campbell and Co. It stated that the vessel "cleared for the port of Cardenas;" that it was not intended that she should "enter, or attempt to enter, any port of the United States;" that "her true and only destination with said cargo was Cardenas, where the same was to be delivered;" that the vessel was thence to sail to the claimant in Africa, if she obtained a suitable cargo for that country; and that the vessel and her cargo are British property. The test oath of Samuel Isaac to the claim on behalf of S. Isaac, Campbell and Co. to the whole of the cargo, alleges that the cargo was shipped by that firm, consisting of himself and Saul Isaac, on or about Dec. 2, 1861, partly at London and partly at Erith; that the vessel was bound for Cardenas in the island of Cuba; that the cargo consisted of arms, ammunition and military clothing, and is wholly the property of that firm; that its members are British subjects; that the vessel cleared for Cardenas; that the cargo was destined for Cardenas; that it was not intended that the vessel should "enter, or attempt to enter, any port of the United States, or that the cargo should be delivered at any port in the United States;" and that "the true and only destination was Cardenas, where the same was to be delivered, and the vessel was thence to sail to Africa, if she obtained a suitable cargo for that country." It does not set up any charter of the vessel. The testimony in *preparatorio*, consisting of the depositions of Charles N. Dyett, the master, Benjamin H. Chadwick, the first mate, John Leisk, the cook and steward, Charles Nellman, the second mate, and Robert Allen, an able seaman, was taken in Feb. 1862. The case was not submitted to the

judgment of the court until the term of July 1863. It was suggested at the hearing, in excuse of what seemed to be the great delay in the case, that said delay was owing to the pendency before the Supreme Court of the United States, on appeal until March last, of various prize suits, which it was supposed might dispose of material questions involved in this case. But, from such report of the decisions in those cases as this court has been furnished with, it does not appear that the main questions involved in the present case have been determined by the Supreme Court in any of the cases alluded to. Various interlocutory proceedings took place in the present case, a reference to some of which is necessary. Before the filing of the libel, and on the 14th Feb. 1862, this court ordered that so much of the cargo of the schooner as consisted of arms, powder and munitions of war, should be placed in the custody of the commandant of the Navy-yard at New York, and that the Prize Commissioners should make a full inventory of all the articles delivered to the commandant, and that they should be appraised, and the appraisement be filed with the inventory. In pursuance of this order, the appraiser appointed by the court, Mr. Orison Blunt, discharged the cargo of the schooner, and stored it in the ordnance stores at the Navy-yard. In his report, which was filed on the 25th of March 1862, he states that, in unloading the vessel, he did not have the benefit of any invoice; that he took an accurate account of every case, box and bale, and of their numbers and marks; that the vessel was stowed with great care, and the bales and cases pressed in with jack-screws, which made great precaution necessary in taking them out, for fear of an explosion of some of the ammunition loaded shell; that, upon opening the after hatch and taking out some of the cases, he discovered some four tons of powder, and also 1008 loaded shell with percussion primers affixed, and some 600,000 ball cartridges, or fixed ammunition for small arms which were all removed and placed in the magazine of the Navy-yard; that, after all the cargo had been placed in the ordnance stores without any loss or damage, he opened every entire case and bale and inspected and counted accurately every article and found them all to be in good condition, and that every article was of value for use in the army and navy of the United States, except a large quantity of "rebel buttons," manufactured in Great Britain and stamped with a "rebel device." The appraiser annexed to his report a catalogue of the cargo and his appraisement of each article. The following articles appear to have constituted the cargo of the vessel: 5740 long Enfield rifles, with triangular bayonets; 1260 short Enfield rifles, with sabre bayonets; 660 rifled Enfield carbines, with sabre bayonets; 2640 British rifled muskets, with triangular bayonets; 200 British smooth bore muskets, with triangular bayonets; 320 Brunswick rifles, with sabre bayonets; 375 cavalry sabres; 6800 gray blankets; 1750 white blankets; 4 of Blakeley's 2½ inch bore rifled cannon (six pounders) with 2000 cartridge bags and 1008 shell for the same, loaded and capped; 120,000 cartridges, fixed ammunition for Enfield rifles; 100,000 percussion caps; 2160 cartridge boxes; 4095 knapsacks; 400 ball bags and belts; 100,000 Brunswick rifle cartridges; 420,000 Minie rifle cartridges; 5000 cartridges for smooth bore English muskets, each cartridge consisting of a round ball and two buck shot; 1540 yards of gray army cloth; 11,453 yards of steel mixed gray army cloth for uniforms; 62 gross of brass buttons "for infantry, artillery and cavalry, for the rebel army, marked "C. S. A.;" 15,432 pairs of stockings; 2000 pairs of brogue shoes; 592 pairs of russet shoes, Blucher pattern; 762 pairs of black leather shoes, Blucher pattern

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20 water-proof covers for mess tins; 17 cases and boxes of trimmings for army clothes and uniforms, consisting of linings, cord, braid, lace, thread, buckles, &c.; 109 yards of scarlet cloth for army uniforms; 7500 yards of white twilled flannel for lining army overcoats; 2250 yards of brown holland for same purpose; 1040 gross of buttons for army uniforms and clothing; 7800 pounds of cannon powder, and a considerable quantity of cartridge paper, cones, and other appurtenances for small arms, gun slings, medicine, lint, bayonet scabbards, regiments' equipments, scissors, thimbles, hooks and eyes, shears, canvas lining, alpaca and tarpaulings. The appraisement of the entire cargo was 238,945 lbs. 37 cents. Under orders of this court of the 13th March and 16th April 1862, the Enfield rifles and certain other articles found on board of the schooner were delivered to the Navy Department for the use of the United States, at the appraised value of 169,467 dols. 50 cents. By another order of the court, made March 4, 1862, another portion of the cargo, amounting to the appraised value of 1,196 dols. 11 cents., was delivered to the War Department, the Ordnance Department and the Sanitary Department, for the use of the United States. Under an order of this court, made on the 15th May 1862, the schooner and the remainder of her cargo, which remainder amounted, at its appraised value, to 55,281 dols. 76 cents., were sold at public auction. The vessel was sold for 10,000 dols. The proceeds of the vessel and of her cargo, including the amounts paid by the Navy and War Departments for the articles taken by them, were paid into the registry of the court. After the cook and steward, John Leisk, had been examined on the 12th Feb. 1862, an affidavit made by him on the 25th Feb. 1862 was presented to the court, in which he stated that, in giving his testimony before the Prize Commissioners, he did not fully answer the 32nd interrogatory in relation to certain papers on board, and their description, and what was said on their being discovered, although he had testified to those facts on an examination made of him on board of the capturing vessel. An order was thereupon made by the court on the same day, that the motion of the district attorney, that the defendant's standing interrogatory be propounded anew to the witness Leisk, and that his additional answer thereto be received and added to his deposition, with the like force and effect as if the same had been taken at the time of his original examination. On the same day that interrogatory was again propounded to him, and his further answer thereto was read as part of the depositions in *preparatorio*. On the 24th Oct. 1862 the court, on the motion of the district attorney, made an order that Benjamin H. Chadwick, the first mate, who had been examined in *preparatorio*, on the standing interrogatories, on the 13th Feb. 1862, should be again examined by the Prize Commissioners on the standing interrogatories, and that the question of the admissibility of his evidence so to be given should stand over for future determination. This order was founded on an affidavit made by Chadwick on the 21st Feb. 1862, in which he stated that he was one of the persons captured on the *Stephen Hart*, and was relied upon her shipping articles as her first mate, though in fact he was entrusted with the virtual control of the vessel and cargo; that he had examined a copy of his testimony given by him on his examination on the 13th Feb. 1862, and found that his answers to the 11th, 36th and 39th interrogatories, well as to any others which asked for the destination of the vessel and her cargo, on the voyage on which she was captured, were incorrect, and did not disclose the entire truth in relation to the subject-matter inquired of, and that he desired the privilege of correcting the same

on a re-examination, by stating that he well knew that the real destination of the cargo of the vessel, if not of the vessel herself, was one of the blockaded "Confederate ports of the Southern States," and that the port of Cardenas in Cuba was to be used simply as an intermediate port of call and of transshipment of the cargo, if it was there determined by Charles J. Helm, an agent there of the "Confederate States," whose instructions the witness was directed to follow, that the cargo should be transhipped into a steamer, which could, with greater facility, be used in running the blockade; that the witness was employed for that purpose by reason of his knowledge of the southern coast, and of the navigation of the blockaded ports and harbours, and was so employed after his examination specially on that point at the counting-house of S. Isaac, Campbell and Co., the owners of the cargo, in London, where, at the time, were William L. Yancey and other persons interested in the "Southern insurrection;" that he, the witness, had been in no manner influenced to make such disclosure by the libellants or the captors, or any one in any manner connected with either of them, but had been induced to do so solely by the persuasions of his wife, who was a loyal woman then residing in Boston, and whose just reproaches had caused him to regret that he had ever lent his aid to such a cause, and to determine, as far as he could, to atone for whatever mischief he might have done. Upon the hearing of the motion for the further examination of Chadwick, the application was opposed by the claimants of the cargo, upon an affidavit made by Chadwick on the 6th May 1862, in which he stated that certain letters and papers belonging to him were seized by the captors, and retained by them until the 28th April 1862, when, without any application to the court, a portion of them were taken from the rest of the papers seized on board of the schooner, and handed over to him by Mr. Elliott, one of the Prize Commissioners; that the letters so handed to him were a part of the letters mentioned in the examination in *preparatorio* of John Leisk, and stated by Leisk to have been placed by him in a tea-pot at the request of Chadwick, and to have been afterwards discovered by the crew of the capturing vessel. The court was subsequently furnished with an affidavit made by Mr. Elliott, in which he stated that, after the arrival of the schooner at New York, one of the officers in charge of her placed in his hands some letters which he represented to be private papers belonging to Chadwick; that those letters were not presented by the prize master as a part of the papers seized with the schooner as her papers, but as private letters belonging to Chadwick; that, under the advice of the assistant district attorney, and at the request and with the consent of Chadwick, the deponent carefully read the letters, and found them to be only private letters to Chadwick from his wife, and that there was not in them one word relating to the schooner, or her cargo, or her voyage, or her destination; and that thereupon, on the further advice of the assistant district attorney, the letters were handed to Chadwick as his private property, several months before his re-examination, and with no reference thereto, and with no knowledge or suspicion that any such re-examination would ever occur. There were found on board of the schooner, at the time of her capture, her register and sundry bills, certificates, telegrams and letters, a clearance, two log-books, a copy of the United States Coast Survey for 1856, and sundry other papers, but no invoices, no bills of lading and no manifest. The register of the schooner is dated at Liverpool, England, Oct. 15, 1861. It represents her as having been built at Greenport, in the state of New York, in the United States, in the year 1853, and her foreign name as having been *Tomalipas*. Her tonnage is stated at 21,985 tons. Her

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owner is stated to be John Myer Harris, of Liverpool, merchant. The register contains the following printed memorandum at its foot: "Notice. A certificate of registry granted under the Merchant Shipping Act 1854 is not a document of title." On the back of the register is indorsed a certificate, made at the Custom-house in London on the 15th Nov. 1861, stating that Charles N. Dyett had that day been appointed master of the schooner. There were also found on board of the schooner a letter, signed "R. H. Leonard, ship *Alexander*, Confederate States," dated at Bristol, England, Oct. 29th, 1861, and addressed to Chadwick; and a letter from Leonard addressed "To Mr. B. H. Chadwick, alias Tommy, first officer *Stephen Hart*," purporting to be written at Bristol, England, but without date; and a letter signed "John Johnson, ship *Noami*, care J. P. Snell and Co., Bristol, England," and addressed "Mr. Benjamin H. Chadwick, schooner *Stephen Hart*, Surrey Canal, London," and dated at Bristol, England, Oct. 29th, 1861. The contents of these three letters will hereafter be specially referred to. By sundry certificates found on board of the schooner, it appears that she cleared from London on the 19th of Nov. 1861, for Cuba generally, neither the port of Cardenas nor any other port in Cuba being mentioned as her destination in any of her regular papers. There was also found on board of the schooner a letter in the following words:—"71, Jermyn-street, London, S.W., Nov. 19, 1861. J. Crawford, Esq., H. M. Consul-General, Havannah. Dear Sir: In confirmation of my last, permit me to ask your assistance and advice for Capt. Dyett, of the schooner *Stephen Hart*, should he need it during his stay at Havannah. Permit me to be yours, most faithfully, Saul Isaac." There was also found on board of the schooner a telegraphic despatch from S. Isaac, Campbell and Co., 71, Jermyn-street, London, to Lloyd's agent at Deal, received at Deal Nov. 23rd, 1861, in the following words: "Please detain schooner *Stephen Hart*, bound for Cardenas, for orders. We pay all expenses. Reply per telegraph. Letter per post." There was also found a letter dated "London, Nov. 22, 1861," in the following words:—"Captain Dyett, schooner *Stephen Hart*. Dear Sir: We require some matters arranged before the schooner leaves. You will receive this per Lloyd's agent. Attend to the orders, and wait until you hear from yours truly, S. Isaac, Campbell and Co." There was also found another telegraphic despatch from S. Isaac, Jermyn-street, London, to Lloyd's agent at Deal, received at Deal Nov. 24th, 1861, in the following words:—"Captain Dyett will proceed on his voyage at once, and make up for lost time. Wish him a successful trip." The shipping articles of the crew of the schooner, found on board, are dated Nov. 16th, 1861, and specify that the voyage is to be "from London to Cuba and Sierra Leone, and any port and [or] ports on coast of Africa, and [or] North and [or] South America and [or] West Indies, and back to a final port of discharge in the United Kingdom. Voyage not to exceed twelve months." On these shipping articles the name of Benjamin H. Chadwick is entered as chief officer, his signature appearing upon them, and he is stated to be an American, aged twenty-nine years, and to have last served on board the vessel called the *Tamulipas*, and to have been discharged therefrom at London on the 2nd Nov. 1861. The date of his joining the *Stephen Hart* is stated as Nov. 1st, 1861, although he is placed in a list under the head of "substitutes," with two others who are severally stated as joining the vessel Nov. 22nd and Nov. 29th, and no place is inserted as the place of his joining the vessel, although the place is inserted in the case of the other two substitutes. The wages of Chadwick are put down as 9l. per calendar

month, the wages of the mate, whose place he took, being stated at 6l. per month. In one of the two log-books found on board of the vessel, namely, the official log-book, the name of Benjamin H. Chadwick appears as mate of the vessel, and no other person is named as mate; and the date of the commencement of the voyage is stated in that log-book as Nov. 19, 1861. In the other log-book, which is an ordinary sea log-book, there appears, under date of Nov. 21, 1861, an entry in the handwriting of Chadwick, by whom that log-book purports on its face to have been kept, to the effect that the mate had not come to perform his duty, and the log-book then proceeds as follows: "Wherefore I, Benj. H. Chadwick, have this day engaged with Capt. Charles N. Dyett to proceed on the voyage, having been engaged as ship-keeper on board since the 2nd of the present month, the crew consisting of six seamen, cook and steward, captain, mate and boatswain—in all numbering ten persons." The shipping articles show eleven persons, there being seven seamen, one of the seamen, as appears by the official log-book, having been shipped at Gravesend on the 22nd Nov., and discharged because of illness, at Deal, on the 29th Nov., and another seaman having been shipped at Deal in his place on the last-named day. The name of one seaman which appears on the shipping articles does not appear on the official log-book, and there is a memorandum on the shipping articles that he deserted. This reduces the number of persons composing the crew to ten, including Chadwick. The entry on the title-page of the sea log-book is, that the schooner was on a voyage from London to Cardenas, Cuba, commencing Nov. 19, 1861, and that the log-book is kept by Benjamin H. Chadwick. It appears, from entries in that log-book, that the pilot took charge of the schooner "on a voyage to Cuba," on the 19th Nov., and that she was on that day "towed by steam from the Graud Surrey Dock to Erith, to take in the remainder of cargo," and that she arrived at Erith the same day; that, on the 20th Nov. she took in from lighters some sixty cases of cargo, and that, on the evening of the same day, she was towed to Gravesend; that she remained at Gravesend until the 22nd Nov., when she proceeded down the river, coming to anchor, in the afternoon, off the North Foreland Light; that, on the 23rd Nov. she proceeded to the Downs, where she came to anchor, and where the "captain received instructions from parties in London" to wait until further orders; that, on the 24th Nov. she received orders to proceed on her voyage; that she did not start until the 2nd Dec., her sea log commencing at noon on the 3rd Dec.; that she pursued her voyage through December and January, no particular occurrence being noted until the 15th Jan., when she passed eighteen miles to the north-east of Desirada Island, one of the Leeward Islands in the West Indies, and also between the Island of Gaudaloupe and the Island of Montserrat, in the latitude of about 16 deg. 30 min. N.; that, from this point she proceeded to the southward of Hayti and to the northward of the Island of Jamaica, passing the latter on the 21st Jan., and thence to the southward of the Grand Cayman Island on the 23rd Jan., and thence around the western end of the Island of Cuba, making Cape St. Antonio, the extreme western point of that island, at 3.30 p.m. on the 26th Jan., and seeing the last of Cape Antonio light, twenty miles distant, bearing south half east, at 10 p.m. of that day, her latitude, by observation at noon on the 27th Jan., being 23 deg. 24 min. north. There are no entries in the log-book after the latter hour. The "Coast Survey" found on board of the schooner, as before mentioned, is a report from Professor Bache, Superintendent of the United States Coast Survey, for the year ending

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Nov. 1, 1856, and contains, among other things, the following charts: A comparative chart of the entrance into Charleston Harbour by Maffit's Channel; a preliminary chart of the entrance into North Edisto river; a preliminary chart of the coast of South Carolina, from Charleston to Ybea, Georgia, with sailing directions; a preliminary chart of St. Simon's Bar and Brunswick Harbour; a preliminary chart of St. Mary's Bar and Fernandina Harbour; a comparative chart of the same; two charts of St. John's River; and a preliminary chart of the Florida Reefs. These charts, as folded in the book, have each of them written in pencil on the outside the nature of its contents, thus: "Maffit's Channel;" "North Edisto;" "Sailing directions for several So. Ca. and Ga. ports;" "St. Simon's;" "Fernandina;" "St. John's River;" "Florida Reefs." Capt. Dyett, on his examination in *preparatorio*, produced two letters, which are annexed to his deposition. One of them is a letter of instructions to himself from S. Isaac, Campbell and Co., and is dated "71, Jermyn-street, Military Warehouse, late 21, St. James-street, London, S.W., Nov. 19, 1861;" and the other is a letter from Saul Isaac to "Charles J. Helm, Esq., care of J. Crawford, Esq., Havannah," and is dated "71, Jermyn-street, London, Nov. 19, 1861." The contents of these two letters, and the circumstances under which they were produced by Captain Dyett, will be referred to hereafter. Before proceeding to a consideration of the merits of the case, it is proper to advert to the objections made to the second examination of the witnesses Leisk and Chadwick. The question of the admissibility of the second deposition of Chadwick was ordered by the court to stand over to be determined at the hearing of the main case. The question of the admissibility of depositions given on the re-examination of persons found on board of a captured vessel, is one resting in the sound discretion of the court, and no authority has been cited which decides that the practice is one that is not to be permitted under circumstances such as existed in the present case. The case of *the Pizarro*, 2 Wheat. 227, is not regarded as an authority against the course pursued in this case. While the court ought to guard the practice with care, lest it may be the means of introducing abuse and of leading to fraud and imposition, the present case seems, on the fullest consideration, to be one in which the propriety of admitting the re-examination of the witnesses Leisk and Chadwick cannot be questioned. If the case, upon the depositions as originally taken, without the re-examinations of the two witnesses, were a clear one in favour of the claimants, and free from all doubt, the court would hesitate, perhaps, to admit the re-examinations. But, upon the testimony without the re-examinations, the case is not only not one free from doubt, but one clearly calling for the condemnation of both the schooner and her cargo; and the matters testified to by those witnesses upon their re-examinations are not only entirely consistent in themselves, but are corroborated by the other testimony in the case, and by the documents and papers found on board of the schooner. The cases which were cited by the counsel for the claimants upon the point of the admissibility of depositions taken on re-examination *The Haabet*, 6 Ch. Rob. 54; *The Ostsee*, Spinks, art 1, 189; *The Leucade*, Ib. 227; *The Aline and Gony*, Spinks, part 2, 327 do not bear at all upon the question as to the admissibility of these re-examinations. They merely affirm the well-known principles of prize law, that affidavits of the captors are not to be admitted where, on the evidence of the persons on board of the captured vessel, there are circumstances of suspicion in the case; that the case is, in the first instance, to be tried on evidence

coming from the captured; that if, upon such evidence, no doubt arises, the property is to be restored; and that the privilege on the part of the captors of giving further proof is, in such cases, rarely granted. Within these principles, this court has endeavoured, in all proper cases, to exhaust the knowledge of the persons found on board of captured vessels. Thus, in the case of the *Peterhoff*, pending in this court at the same time with the present case, the deposition of Captain Jarman, the master of the captured vessel, had been taken on the 1st April 1863, he having intervened as claimant for the interest of his principals, the owners of the *Peterhoff* and her cargo, and having made the test oath to such claim on the 21st April 1863. Some of the other witnesses having deposed to the spoliation of papers in the case, the court, upon an affidavit made by Captain Jarman, and upon the application of the claimants, and notwithstanding the objections of the counsel for the libellants and the captors, permitted Captain Jarman to be re-examined upon one of the standing interrogatories, and to add to his answer thereto the explanatory statement contained in his affidavit. This explanation, and the matters deposed to by him on his further examination, were intended to relieve the owners of the *Peterhoff* and her cargo from the injurious effects of his concealment, on his first examination, of matters which ought to have been testified to by him in answer to the standing interrogatories, and of matters which were testified to by other witnesses. The court is entirely satisfied that it exercised its sound discretion in permitting the re-examination in the case of the *Peterhoff*; and the exercise of a like discretion calls for the admission in evidence of the depositions of Leisk and Chadwick, taken on re-examination in the present case. They are accordingly admitted in evidence. Very important questions of public law have been discussed before the court in the present case, and in the kindred cases of the *Springbok* and the *Peterhoff*, all of which, with the case of the *Gertrude*, have been pending before the court at the same time. In the latter case no claimant appeared for either the vessel or the cargo, she having been captured while on a voyage from Nassau, in endeavouring to run the blockade into a port of the enemy. Many of the principal questions involved in the present case, and in the cases of the *Springbok* and the *Peterhoff*, are alike; and, as the conclusion at which the court has arrived in all of those cases is to condemn the vessels and their cargoes, I shall announce, in this case, the leading principles of public law which lead to a condemnation in all the cases. On behalf of the libellants, it is urged in this case, first, that the *Stephen Hart* and her cargo were enemy's property when the voyage in question was undertaken, and when the capture was made; secondly, that the schooner was laden with articles contraband of war, destined for the aid and use of the enemy, and on transportation by sea to the enemy's country at the time of the capture; thirdly, that, with a full knowledge, on the part of the owner of the vessel and of the owners of her cargo, that the ports of the enemy were under blockade, the vessel and her cargo were dispatched from a neutral port with an intention, on the part of the owners of each, that, in violation of the blockade, both the vessel and her cargo should enter a port of the enemy. On the part of the claimants, it is maintained, first, that the transportation of all articles, including arms and munitions of war, between neutral ports in a neutral vessel, is lawful in time of war; secondly, that if a neutral vessel, with a cargo belonging to neutrals, be in fact on a voyage from one neutral port to another, she cannot be seized and condemned as lawful prize, although she be laden

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with contraband of war, unless it be determined that she was actually destined to a port of the enemy upon the voyage on which she was seized, or unless she is taken in the act of violating a blockade. It is insisted, on the part of the claimants, that the *Stephen Hart* was, at the time of her capture, a neutral vessel, carrying a neutral cargo from London to Cardenas—both of them being neutral ports—in the regular course of trade and commerce. On the other side, it is contended that the cargo was composed exclusively of articles contraband of war, destined, when they left London, to be delivered to the enemy either directly, by being carried into a port of the enemy in the *Stephen Hart*, or by being transhipped at Cardenas to another vessel; that Cardenas was to be used merely as a port of call for the *Stephen Hart*, or as a port of transshipment for her cargo; that the vessel and her cargo are equally involved in the forbidden transaction; and that the papers of the vessel were simulated and fraudulent, in respect to her destination and that of her cargo. A condemnation is not asked, if the cargo was in fact neutral property, to be delivered at Cardenas for discharge and general consumption or sale there, but is only claimed, if the cargo was really intended to be delivered to the enemy at some other place than Cardenas, after using that port as a port of call or of transshipment, so as to thus render the representations contained in the papers of the vessel false and fraudulent as to the real destination of the vessel and her cargo. It would scarcely seem possible that there could be any serious debate as to the true principles of public law applicable to the solution of the questions thus presented; and, indeed, the law is so well settled as to make it only necessary to see whether the facts in this case bring the vessel and her cargo within the rules which have been laid down by the most eminent authorities in England and in this country. The principles upon which the Government of the United States, and the public vessels acting under its commission, have proceeded during the present war, in arresting vessels and cargoes as lawful prize upon the high seas, are very succinctly embodied in the instructions issued by the Navy Department, on the 18th Aug. 1862, to the naval commanders of the United States, and which instructions are therein declared to be a recapitulation of those theretofore from time to time given. The substance of those instructions, so far as they are applicable to the present case is, that a vessel is not to be seized "without a search carefully made, so far as to render it reasonable to believe that she is engaged in carrying contraband of war for or to the insurgents, and to their ports directly, or indirectly by transshipment, or otherwise violating the blockade." The main feature of these instructions, so far as they bear upon the questions involved in this case, is but an application of the doctrine in regard to captures, laid down by the Government of the United States at a very early day. In an ordinance of the Congress of the Confederation, which went into effect on the 1st Feb. 1782 (5 Wheaton, Appendix, 120), it was declared to be lawful to capture and to obtain condemnation of "all contraband goods, wares and merchandise, to whatever nations belonging, although found in a neutral bottom, if destined for the use of an enemy." The soundness of these principles, and the fact that the law of nations, as applicable to cases of prize, has been observed and applied by the Government of the United States and its courts during the present war, was fully recognised by Earl Russell, Her Britannic Majesty's principal Secretary of State for Foreign Affairs, in his remarks made in the H. of L. on the 18th of May last. Earl Russell there stated that the judgments of the United States Prize Courts, which had been reported to Her Majesty's

Government during the present war, did not evince any disregard of the established principles of international law; that the law officers of the Crown, after an attentive consideration of the decisions which have been laid before them, were of opinion that there was no rational ground of complaint as to the judgment of the American Prize Courts; and that the law of nations in regard to the search and seizure of neutral vessels had been fully and completely acknowledged by the Government of the United States. On the same occasion Earl Russell remarked: "It has been a most profitable business to send swift vessels to break or run the blockade of the Southern ports, and carry their cargoes into those ports. There is no municipal law in this or any country to punish such an act as an offence. I understand that every cargo which runs the blockade and enters Charleston is worth a million of dollars, and that the profit on these transactions is immense. It is well known that the trade has attracted a great deal of attention in this country from those that have a keen eye to such gains, and that vessels have been sent to Nassau in order to break the blockade at Charleston, Wilmington and other places, and carry contraband of war into some of the ports of the Southern States." He added: "I certainly am not prepared to declare, nor is there any ground for declaring, that the courts of the United States do not faithfully administer the law; that they will not allow evidence making against the captors, or that they are likely to give decisions founded, not upon the law, but upon their own passions and national partialities." He also said, that in a case of simulated destination, that is, a vessel pretending that she is going to Nassau, when she is in reality bound to a port of the enemy, the right of seizure exists. The then Solicitor-General of England (Sir Roundell Palmer) stated, in the House of Commons, on the 29th June last, referring to the cases of the *Dolphin* and the *Pearl*, decided by the judge of the District Court for the southern district of Florida (those vessels having been captured while ostensibly on voyages from Liverpool to Nassau, and it having been held by the court that the intention of the owners of the vessels was that they should only touch at Nassau, and then go on and break the blockade at Charleston), that "if the owners imagined that the mere fact of the vessel touching at Nassau, when on such an expedition, exonerated her, they were very much mistaken;" that the principles of the judgment in the case of the *Dolphin* were to be found in every volume of Lord Stowell's decisions; that it was well known to everybody that there was a large contraband trade between England and America by way of Nassau; that it was absurd to pretend to shut their eyes to it; and that the trade with Nassau and Matamoros had become what it was in consequence of the war. The Foreign-office of Great Britain, in a letter to the owner of the *Peterhoff*, on the 3rd April last, announced as its conclusion, after having communicated with the law officers of the Crown, that the Government of the United States has no right to seize a British vessel *bona fide* bound from a British port to another neutral port, unless such vessel attempts to touch at, or has an intermediate or contingent destination to, some blockaded port or place, or is a carrier of contraband of war destined for the enemy of the United States; that Her Majesty's Government, however, cannot, without violating the rules of international law, claim for British vessels navigating between Great Britain and such neutral ports, any general exemption from the belligerent right of visitation by the cruisers of the United States, or proceed upon any general assumption that such vessels may not so act as to render their capture lawful and justifiable; that nothing is more

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common than for those who contemplate a breach of blockade or the carriage of contraband, to disguise their purpose by a simulated destination and by deceptive papers; and that it has already happened, in many cases, that British vessels have been seized while engaged in voyages apparently lawful, and have been afterwards proved in the prize courts to have been really guilty of endeavouring to break the blockade, or of carrying contraband to the enemy of the United States. The cases of the *Stephen Hart*, the *Springbok*, the *Peterhoff*, and the *Gertrude*, illustrate a course of trade which has sprung up during the present war, and of which this court will take judicial cognisance, as it appears from its own records and those of other courts of the United States, as well as from public reputation. Those neutral ports have suddenly been raised from ports of comparatively insignificant trade to marts of the first magnitude. Nassau and Cardenas are in the vicinity of the blockaded ports of the enemy, while Matamoros is in Mexico upon the right bank of the Rio Grande, directly opposite the town of Brownsville, in Texas. The course of trade, in respect to Nassau and Cardenas, has been generally to clear neutral vessels, almost always under the British flag, from English ports for those places, and, using them merely as ports either of call or of transshipment, to either resume new voyages from them in the same vessels, or to tranship their cargoes to fleet steamers, with which to run the blockade, the cargoes being composed, in almost all cases, more or less, of articles contraband of war. The character and course of this trade, and its sudden rise, are very properly commented upon in a dispatch from the Secretary of State of the United States to Lord Lyons, of the 12th May 1863. The broad issue upon the merits in this case is, whether the adventure of the *Stephen Hart* was the honest voyage of a neutral vessel from one neutral port to another neutral port, carrying neutral goods between those two ports only, or was a simulated voyage, the cargo being contraband of war, and being really destined for the use of the enemy, and to be introduced into the enemy's country by a breach of blockade by the *Stephen Hart*, or by transshipment from her to another vessel at Cardenas. It is conceded in the argument of the leading counsel for the claimants, that if the property was owned by the enemy, and was fraudulently on its way to the enemy as neutral property, it was enemy's property, and was liable to capture, no matter whence it came or whither it was bound; and that, if the vessel were really intending and endeavouring to run the blockade, the property was liable to capture, no matter to whom it belonged or what was its character; but that if it was neutral property, in lawful commerce, it was safe from seizure. The question whether or not the property laden on board of the *Stephen Hart* was being transported in the business of lawful commerce is not to be decided by merely deciding the question as to whether the vessel was documented for and sailing upon a voyage from London to Cardenas. The commerce is in the destination and intended use of the property laden on board of the vessel, and not in the incidental, ancillary and temporary voyage of a vessel, which may be but one of many carriers through which the property is to reach its true and original destination. If this were not the rule of the prize law, a very wide door would be opened for fraud and evasion. A cargo of contraband goods, really intended for the enemy, might be carried to Cardenas in a neutral vessel sailing from England with papers which, upon their face, import merely a voyage of the vessel to Cardenas, while, in fact, her cargo, when it left England, was destined by its owners to be delivered to the enemy, by being transhipped at Cardenas into a swifter vessel. And such,

indeed, has been the course of proceeding in many cases during the present war. Nor is the unlawfulness of the transportation of contraband goods determined by deciding the question as to whether their immediate destination was to a port of the enemy. Thus it is held that, in order to constitute the unlawfulness of the transportation of contraband goods, it is not necessary that the immediate destination of the vessel and cargo should be to an enemy's country or port; for, if the goods are contraband, and destined to the direct use of the enemy's army or navy, the transportation is illegal. If an enemy's fleet be lying, in time of war, in a neutral port, and a neutral vessel should carry contraband goods to that port, not intended for sale in the neutral market, but destined to the exclusive supply of the hostile forces, such conduct would be a direct interposition in the war, by furnishing essential aid in its prosecution, and would be a departure from the duties of neutrality: (Halleck on International Law, chap. 24, sect. 11, p. 576.) The proper test to be applied is, whether the contraband goods are intended for sale or consumption in the neutral market, or whether the direct and intended object of their transportation is to supply the enemy with them. To justify the capture, it is enough that the immediate object of the voyage is to supply the enemy, and that the contraband property is certainly destined to his immediate use. While it is true that goods destined for the use of a neutral country can never be deemed contraband, whatever be their character, and however well adapted they may be to the purposes of war, yet, if they are destined for the direct use of the enemy's army or navy, they are not exempt from forfeiture on the mere ground that they are neutral property, and that the port of delivery is also neutral: (1 Duer on Insurance, 630; *The Commercen*, 1 Wheaton, 388, 389.) If the contraband cargo of the *Stephen Hart* had been destined for the use of the fleet of the enemy, lying in the harbour of Cardenas, there could be no doubt that it might lawfully have been captured as prize of war on its way to Cardenas. And, if the contraband cargo was really destined, when it left its port of departure in England, for the use of the enemy in the country of the enemy, and not for sale or consumption in the neutral port, no principle of the law of nations, and no consideration of the rights and interests of lawful neutral commerce, can require that the mere touching at the neutral port, either for the purpose of making it a new point of departure for the vessel to a port of the enemy, or for the purpose of transshipping the contraband cargo into another vessel, which may carry it to the destination which was intended for it when it left its port of departure, should exempt the vessel or the contraband cargo from capture as prize of war. If it was the intention of the owner of the *Stephen Hart*, or of the owners of her cargo, having control of the movements of the vessel, that she should simply touch at Cardenas, and should proceed thence to Charleston, or some other port of the enemy, her voyage was not a voyage prosecuted by a neutral vessel from one neutral port to another neutral port, but a voyage which was, at the time of her seizure, in course of prosecution to a port of the enemy, although she had not as yet reached Cardenas, and although her regular papers documented her for a voyage from London to Cuba. Such a voyage was one begun and carried on in violation of the belligerent rights of the United States to blockade the ports of the enemy, and to prevent the introduction into those ports of arms and munitions of war. The division of a continuous transportation of contraband goods into several intermediate transportations, by means of intermediate voyages by different vessels carrying such goods, cannot make a transportation which is, in

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fact, a unit, to become several transportations, although, to effect the entire transportation of the goods, requires several voyages by different vessels, each of which may, in a certain sense and for certain purposes, be said to have its own voyage, and although each of such voyages, except the last one in the circuit, may be between neutral ports. Nor can such a transaction make any of the parts of the entire transportation of the contraband cargo a lawful transportation, when the transportation would not have been lawful if it had not been thus divided. The law seeks out the truth, and never, in any of its branches, tolerates any such fiction as that under which it is sought to shield the vessel and her cargo in the present case. If the guilty intention, that the contraband goods should reach a port of the enemy, existed when such goods left their English port, that guilty intention cannot be obliterated by the innocent intention of stopping at a neutral port on the way. If there be, in stopping at such port, no intention of transshipping the cargo, and if it is to proceed to the enemy's country in the same vessel in which it came from England, of course there can be no purpose of lawful neutral commerce at the neutral port, by the sale or use of the cargo in the market there; and the sole purpose of stopping at the neutral port must merely be to have upon the papers of the vessel an ostensible neutral terminus for the voyage. If, on the other hand, the object of stopping at the neutral port be to tranship the cargo to another vessel, to be transported to a port of the enemy, while the vessel in which it was brought from England does not proceed to the port of the enemy, there is equally an absence of all lawful neutral commerce at the neutral port; and the only commerce carried on in the case is that of the transportation of the contraband cargo from the English port to the port of the enemy, as was intended when it left the English port. This court holds that, in all such cases, the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that, if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture, as well before arriving at the first neutral port at which she touches after her departure from England, as on the voyage or transportation by sea from such neutral port to the port of the enemy. These principles were laid down and applied by the District Court for the Southern District of Florida, in the cases of the *Dolphin* and the *Pearl*, and the views of that court are fully adopted by this court, and are to be regarded as a part of the settled law governing prize tribunals. It is laid down in Halleck on International Law (c. 21, s. 11, p. 504), that the ulterior destination of the goods determines the character of the trade, no matter how circuitous the route by which they are to reach that destination; that even where the ship in which the goods are embarked is destined to a neutral port, and the goods are there to be unladed, yet if they are to be transported thence, whatever may be the mode of conveyance, to an enemy's port or territory, they fall within the interdiction and penalty of the law; that the trade from an enemy's country through a neutral port is likewise unlawful, and that the goods so shipped through a neutral territory, even though they may be unladed and transhipped, are liable to condemnation; that it is an attempt to carry on trade with the enemy by the circuitous route of a neutral port, and thus evade the penalty of the law; that the law will not countenance any such attempt to violate its principles by a resort to the shelter of neutral territory; that any such voyage is illegal at its inception; and that the goods shipped are liable to seizure at the instant it commences. The same

doctrines are asserted in 1 Kent's Commentaries, 85, note "a," 8th edit.; in 1 Duer on Insurance, 568, sect. 13; and in *Jecker v. Montgomery*, 18 Howard, 110, 115. The same principles are maintained by the English authorities. In 1 Wildman's International Law, 20, it is asserted, that no exemption from the consequences of sending goods to the enemy will be gained by sending them through a neutral country; that the interposition of a prior port makes no difference; that all trade with the enemy is illegal; that the circumstance that the goods are to go first to a neutral port will not make the trade lawful; and that it is not competent, during a war, for a British subject to send goods to a neutral port, with a view of sending them forward on his own account, to an enemy's port, consigned by him to persons there, as in the ordinary course of commerce. These principles were laid down by Sir William Scott, in the *Jonge Pieter*, 4 Ch. Rob. 79. The particular doctrine thus asserted had reference to the trading of British subjects with the enemy of Great Britain. But the reason of the doctrine makes it equally applicable to the case of a neutral attempting to send contraband goods to an enemy of the United States through the interposition of a neutral prior port. In the case of the *Richmond*, 5 Ch. Rob. 290, an American vessel was seized in the port of St. Helena, and proceeded against as a prize, on the ground that she was going, under a false destination, to the Isle of France, an enemy's port, with contraband articles concealed on board, and with a view of selling the vessel there, as a vessel well adapted for a ship of war, and for the service of privateering. Sir William Scott, in his judgment in the case, says: "It is difficult not to consider the Isle of France as the possible port of destination of this vessel, according to the original intention. I say, as the possible port, at least, if not the principal and absolute port of destination of the original voyage. It cannot be denied that an American ship might go to St. Helena, and from thence to the Isle of France, or any other port of the enemy, provided the cargo was of an innocent nature. If, on the contrary, it was of a noxious character, the circumstance of merely touching at an English port would not alter the nature of a voyage in itself illegal." He then comes to the conclusion, that the vessel had on board articles contraband of war—pitch and tar—and holds that there are strong grounds to presume that the original destination of those articles was absolutely to the Isle of France. "But," he adds, "supposing that it was only of a shifting nature, and that it was merely eventual, that, in law, would be quite sufficient, and that, at least, must be taken to have been the design of the parties." "If the intention was no more than this, 'I will go and sell pitch and tar at St. Helena, if I can; and if I cannot, I will go with them to the Isle of France, and sell them there,' that is an unlawful purpose, and every step taken in the prosecution of such a design is an unlawful act. The interposition of an English port would not make it innocent." "The pitch and tar were going with an original destination, either positive or eventual, to the Isle of France." In the case of the *Maria*, 5 Ch. Rob. 325, Sir William Scott says: "It is an inherent and settled principle, that the mere touching at any port, without importing the cargo into the common stock of the country, will not alter the nature of the voyage, which continues the same in all respects, and must be considered as a voyage to the country to which the vessel is actually going, for the purpose of delivering her cargo at the ultimate port." The doctrine here laid down is equally applicable to the cargo, where it is carried to the ultimate port in a different vessel from the one in which it is carried to the intermediate port. In the case of *The William*, 5 Ch. Rob.

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49, on appeal before the Lords Commissioners of Appeal in Prize Cases, Sir William Grant, in delivering the judgment of the court, says: "Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change because a party may move arbitrarily, by the ship's papers or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore sends the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible; but, when it is discovered, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been attended with trouble and expense, cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence to show the purpose for which the acts were done; but, if the evasive purpose be admitted and proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operative, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance." The cases of *The Nancy*, 3 Ch. Rob. 22, and *The United States*, Stewart's Adm. Rep. 116, were cases in which a voyage, consisting of different parts, was held to be not two voyages, but one entire transaction, formed upon one original plan, conducted by the same persons, and under one set of instructions; and it was held that, in cases of contraband, especially when there is anything of fraud or concealment, a return voyage is to be deemed connected with an outward voyage. It is equally well settled, that the inception of the voyage completes the offence; that from the moment that the vessel, with the contraband articles on board, quits her port on the hostile destination, she may be legally captured; that it is not necessary to wait until the ship and goods are actually endeavouring to enter the enemy's port; and that, the voyage being illegal at its commencement, the penalty immediately attaches, and continues to the end of the voyage, at least so long as the illegality exists: (Lalock on International Law, chap. 24, sect. 7, p. 3; 2 Wildman's International Law, 218; 1 Duer Insurance, 626, sect. 7.) The same doctrine is laid down by Sir William Scott, in *The Imvina*, 3 Ch. b. 167; and in *The Trende Sostre*, 6 Ch. Rob. 1, note. In *The Columbia*, 1 Ch. Rob. 154, Sir William Scott says that the sailing, with an in-

tention of evading a blockade, is beginning to execute that intention, and is an overt act constituting the offence, and that from that moment the blockade is fraudulently invaded. The same view is maintained by him in *The Neptunus*, 2 Ch. Rob. 110. Such being the well-settled principles of public law in reference to the carriage of contraband goods to the enemy, it only remains to be seen whether the *Stephen Hart* and her cargo are liable to condemnation according to those principles. If she was, in fact, a neutral vessel, and if her cargo, although contraband of war, was being carried from an English port to Cardenas, for the general purposes of trade and commerce at Cardenas, and for use or sale at Cardenas, without any actual destination of the cargo, prior to the time of the capture, to the use and aid of the enemy, then most certainly both the vessel and her cargo were free from liability to capture. The *Stephen Hart* was laden with a cargo composed exclusively of arms, munitions of war and military equipments. It is urged, on the part of the claimants, that the vessel was a neutral carrier of the products of her own country, and of the property of neutral merchants, from one neutral port to another. A strong appeal has been made to the court not to permit the United States, as a belligerent, to stop the manufactures and commerce of all other nations, or to dictate the mode in which their trade shall be carried on. It is said that a peaceful neutral may quicken his industry and his commerce, and multiply his gains, by the high prices caused by the demands of those belligerents who have exchanged the character of producers for that of consumers and destroyers; that British merchants may lawfully seek to supply the quickened demand at the new price, or become the carriers for those whose ships are exposed to capture; that if, for any reason, they may not sell to the enemy of the United States directly, then they may sell to others who may sell to him; that if they are unwilling to run the blockade, they may sell to those who are willing to take the risk; that if they may not sell to Charleston, they may sell to Cardenas, without troubling themselves with the question, whether Cardenas will sell freely to those who may come from Charleston to buy; and that the national wealth of the United States has been largely increased, during the warfare of other nations, by the employment of its citizens as neutral carriers in just such lawful commerce. But a neutral merchant ought not to forget that the duties which the law of nations imposes on him flow from the same principle which ought to control the action of his Government as a neutral Government; that where he supplies to the enemy of a belligerent munitions or other articles contraband of war, or relieves, with provisions or otherwise, a blockaded port, he makes himself personally a party to a war, in which, as a neutral, he has no right to engage; that, under such circumstances, his property is justly treated as the property of an enemy; and that the observance of those rules which the law of nations prescribes for his conduct, is a high moral duty: (1 Duer on Insurance, 754, 755, sect. 24.) It is contended, on the part of the libellants, that the voyage of the *Stephen Hart* was originated and prosecuted with the illicit purpose of conveying to the enemy articles contraband of war, and of violating the blockade of a port of the enemy. It will conduce to a better understanding of the case to trace the previous history of the vessel, so far as we learn it from the evidence. She was built in the United States, and had been previously called the *Tumaulipas*. At the time the war broke out, she was owned in New Orleans, which place she left in June 1861, while that port was under blockade, although she was allowed to proceed on her voyage after her papers had been

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examined by a blockading vessel. Before she left New Orleans, and while that port was a port of the enemy, and was under blockade, she was sold there, about May 1861, to an English owner residing there. Chadwick testifies to this. He also says, that he understood that this English owner, a person named Allen, gave a power of attorney to Captain Ackley, the then master of the vessel, who was in the employ of Allen, and who took the vessel to Cuba and thence to England, authorising him to sell her; and that she was sold in England to the claimant, Harris. All this appears upon the first examination of Chadwick. But no bill of sale of the vessel is produced either to Allen or to Harris; and there is no mention anywhere of the existence of any, not even in the test oath of Harris. Nor is there any proof of the payment of any consideration on either sale, other than hearsay evidence and the test oath of Harris. All the knowledge that Chadwick has on the subject of the sale to Harris is (Ints. 14, 37) that Captain Ackley, the former master of the vessel, told him that he had sold the vessel to Harris for 2000*l.*, and had got his money, or the drafts for it. Captain Dyett says (Int. 14) that the only way he knows that Harris is the owner is by seeing his name in the register as owner. Neither Captain Dyett nor Chadwick (Int. 15) know anything about any bill of sale of the vessel. Although, in the certificate of registry, which is dated at Liverpool, Oct. 15, 1861, Harris is named as the owner, yet it is expressly stated in the certificate that that paper is not a document of title. Captain Dyett says (Int. 7) that he was appointed to the command of the vessel on the 15th Nov. 1861, he thinks, which was four days before she was cleared at the Custom-house in London; that he was appointed to such command by Messrs. Isaac, Campbell and Co., of London; and that Mr. Saul Isaac, of that firm, delivered the vessel to him. No charter-party, chartering the vessel to the owners of the cargo, was found on board. Captain Dyett says (Int. 19), that there was no charter-party for the voyage, and Chadwick says (Int. 19) that he does not know of any charter-party. The only evidence of any payment by Harris for the vessel is his test oath to his claim. But, in that test oath, he does not state to whom he paid the purchase-money, nor does he state that any bill of sale of the vessel was delivered to him, nor is the power of attorney from Allen, under which the sale is alleged to have been made by Captain Ackley, produced, or its absence accounted for. In the case of *The Christine*, 1 Spinks, 82, during the recent war between England and Russia, where a vessel was claimed by one Schwartz, her master, as a citizen of Lubeck, and a neutral owner, he alleged that he had purchased her, just before the commencement of the war, from her Russian owners. Dr. Lushington says, in delivering the judgment of the court, after noting the fact that the master had been master of the vessel, under Russian colours, for eight months before the time of the alleged purchase: "This contract is a very suspicious one, not only on the ground that it was immediately antecedent to the war, but also on the ground that it was a purchase by the master." "A party coming forward under such circumstances, and claiming the ship in a neutral character, is bound not only to produce, but to have on board, sufficient documents to satisfy the court that he possesses a *bonâ fide* title. I do not say that the court would bind him down to the production, in the first instance, of all the papers which it might ultimately deem necessary to induce it to pronounce for a restitution; but I do say that it ought to be a contract of that nature in itself, supported by such documents found on board as would give the court good reasons to suppose that, if the opportunity of

aducing further proof were allowed, it would give

him a title to restitution; otherwise further proof is a mockery." "There must be proof of payment in all cases where any suspicion arises as to the validity of the contract at the time of sale. It is quite vain to say, 'Mine is a *bonâ fide* valid contract.' The money must have been paid before the master assumes the command, or ventures out on the high seas during war; otherwise the ship would be liable to be condemned." "The title on which the master claims—the bill of sale—is not here. Now, this may be a *bonâ fide* claim. I do not decide whether it is or not, but I decide that it is not legal, according to the usage and practice of the court, and the law which regulate the court in matters of prize. If this important paper, which is the sole title-deed, is not produced, what satisfaction can the court have? The title-deed to the ship should be on board of the ship. If further proof were allowed in this particular case, could the court feel satisfied that it would receive a genuine document? The case is teeming with suspicion throughout. Is there any one document whatever produced, that can satisfy the court that the transaction was *bonâ fide*, independently of all the circumstances I have mentioned? Certainly there is one document." That document was a certificate, showing that a ship's clearer appeared at Lubeck, and swore that he was lawfully authorised by the claimant, by power of attorney, and that the vessel commanded by the claimant solely and *bonâ fide* belonged to him. Dr. Lushington proceeds: "So that this gentleman makes oath, by virtue of, a power of attorney from Captain Schwartz, which power of attorney is not produced. I have simply this document, which is no degree corroborates the claim." He then adds, that in a case where the question in dispute is the *bonâ fides* of the sale, it has always been held that proof of actual payment was essential, and decides that he cannot allow further proof in the case, and that the vessel must be condemned. In the case of *The Sisters*, 5 Ch. Rob. 138, Sir William Scott says: "A bill of sale is the proper title to which the maritime courts of all countries would look. It is the universal instrument of transfer of ships in the usage of all maritime countries, and is no degree a peculiar title-deed or conveyance known only to the law of England. It is what the maritime law expects, and what the Court of Admiralty would, in its ordinary practice, always require." As the *Stephen Hart* was built in the United States, she must on the evidence be held to have belonged, at the commencement of the war, to a citizen of New Orleans, and her transfer, after the blockade was established, to a British subject, a resident of New Orleans, not being in any manner proved by competent evidence, she was still, in judgment of law, enemy's property, and liable to capture as such. But, in addition to this, even if it were shown that she had, in fact, been legally transferred to Allen, a British subject, residing in New Orleans, yet, as the domicile of Allen was in the country of the enemy at the time of the transfer, his status follows the character of that country in war, and the law of nations pronounces him an enemy: (*The Pizarro*, 2 Wheaton, 227; Opinion of the Supreme Court U. S., in the Prize Cases, by Grier, J., December Term, 1862, 11 Am. Law Rep. 334.) Moreover, the transfer by Allen to Harris, even if that were sufficiently proved, having been made under a power of attorney, must, in judgment of law, be regarded as having been made at New Orleans by Allen, a resident of New Orleans, at as of the time when the power of attorney was given and thus, as having been made in a blockaded port of the enemy, in time of war, by a British resident there, and as leaving the vessel equally liable to capture as enemy's property: (*The General Hamilton*, 6 Ch. Rob. 61; *The Two Brothers*, 1 Ch. Rob. 13.

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There is, therefore, abundant ground for condemning the vessel, irrespective of any of the reasons connected with the traffic in which she was engaged at the time of her capture, and the proofs justify the same conclusion in respect to the cargo. The cargo of the vessel, composed of arms, munitions of war and military equipments, is claimed as the sole property of S. Isaac, Campbell and Co., of London, who appear to be dealers in military goods. It is alleged by the claimants of the vessel and cargo, that the real destination of the vessel and cargo was Cardenas, in the island of Cuba. But it is to be noted, that the shipping articles specify the voyage as a voyage from London to Cuba (Cuba generally, not Cardenas, or any other port in Cuba), and Sierra Leone, and any port and [or] ports on coast of Africa, and [or] North and [or] South America and [or] West Indies, and back to a final port of discharge in the United Kingdom." All the other official papers found on board of the vessel, such as the receipt for the Dover harbour duties, the certificate of the shipping-master for the clearance, the receipt for light duties at London, the receipt for harbour duties at Ramsgate, the certificate from the searcher's office of the London Custom-house, and the victualling bill, speak of the voyage as one from London to Cuba. The telegraphic dispatch of the 23rd Nov. 1861, from S. Isaac, Campbell and Co., to Lloyd's agent at Deal, speaks of the schooner as bound for Cardenas. The title-page of the ordinary log-book speaks of the voyage as one from London to Cardenas, Cuba. The label on the outside of that log-book has the blank for the place at which the voyage commenced filled up with the words, "London, England," but the blank for the place of destination is not filled up at all. The blanks at the tops of the pages of that log-book are only filled up on one page, although sixty-two pages of that log-book are occupied with entries of the progress of the voyage from the 19th Nov. 1861, to and including noon of the 27th Jan. 1862. The page referred to has, at the top, the voyage entered, as "from London towards Cuba." On the first page of that log-book under date of Nov. 19, 1861, there is an entry that the pilot took charge of the schooner *Stephen Hart*, on a voyage to Cuba." The title-page of the official log-book speaks of the voyage as being one to "Cuba and Sierra Leone." None of the letters found on board are addressed to any person at Cardenas. But there was found on board a letter from Saul Isaac to Mr. Crawford, the British Consul-General at Havannah, asking his "assistance and advice for Captain Dyett, of the schooner *Stephen Hart*, should he need it during his stay at Havannah." The letter of instructions to Captain Dyett from S. Isaac, Campbell and Co., produced by Captain Dyett on his examination, directs him to proceed "to Cardenas, Cuba," and to report, on his arrival there, "to Charles J. Helm, Esq., to whom you will consign yourself and vessel, and from whom you will receive all orders for your future actions with reference to the schooner and cargo, and you will be pleased to implicitly obey all orders given by Charles J. Helm, Esq. . . . Mr. Helm may require the schooner for use at Havannah. Should he do so, you will at once make the best arrangements for the immediate return to England of yourself and crew. Should, however, any one wish to remain in the employ of Mr. Helm, we have no objection to his doing so. In case Mr. Helm has no use for the vessel, after discharging the cargo, you will receive full instructions from Messrs. Isaac, Campbell and Co., by mail leaving this on the 2nd proximo, for proceeding to the West Coast of Africa." The letter then directs Captain Dyett to deliver, without delay, on his arrival the letters which he has for Mr. Helm and Mr. Crawford, and

also, immediately on his arrival at Cardenas, to telegraph "to Cahuzac Brothers, Havannah, who will, on receipt of message, communicate with you." The letter to Mr. Helm, thus referred to, was also produced by Captain Dyett on his examination, and is from Saul Isaac, and is addressed "Charles J. Helm, Esq., care of J. Crawford, Esq., Havannah." It says: "The bearer of this is Captain Dyett, of the schooner *Stephen Hart*, for whom I ask the favour of your good offices. Should he require assistance or advice during his stay at Havannah, he will hand you his instructions from my house to read, and I feel assured that you will in all matters find him a good man." It is very manifest from these documents, that Mr. Helm, Mr. Crawford and Cahuzac Brothers, the only parties named as having any concern in Cuba with the vessel or her cargo, were all of them to be found at Havannah, and none of them at Cardenas, and that no person in Cardenas was consignee either of the vessel or the cargo; that it was contemplated that the vessel should go to Havannah, if Mr. Helm required it, and be given up for use to Mr. Helm, at Havannah, if he required it; that Captain Dyett was to obey the orders of Helm in all his actions with reference to the vessel and her cargo; that Captain Dyett and his crew were authorised to remain in the employ of Mr. Helm, if any of them desired to do so; and that Mr. Helm was to have the control of the discharging of the cargo of the vessel, and the right to use the vessel after the cargo was discharged. It is also to be noted that these instructions to Captain Dyett were not from Harris, the alleged owner of the vessel, but were from S. Isaac, Campbell and Co., who claim to be the owners of the whole of her cargo. No instructions whatever from Harris to Captain Dyett were found on board, nor is it pretended that he had any from Harris. Harris appears to have given up the entire control of the vessel and of her movements to S. Isaac, Campbell and Co.; and, for these reasons, independently of all other considerations, the owner of the vessel must be held to have involved her in any illegality of which S. Isaac, Campbell and Co. or Captain Dyett have been guilty in respect to the cargo of the vessel, especially in view of the facts which Captain Dyett states, that he was put in command of the vessel by that firm, and that there was no charter-party for the voyage: (*Jackson v. Montgomery*, 18 Howard, 110, 119.) The conclusion is irresistible, from the contents of the three letters referred to, that there was no intention whatever of discharging the cargo of the vessel at Cardenas; and that, if discharged at all in Cuba, it was to be discharged at Havannah. As no manifest, bills of lading or invoices, or any other papers (except the letter of instructions to Captain Dyett), giving any information as to the character of the cargo, or its owners, or its consignees, were found on board of the vessel, the conviction is forced on the mind that the cargo had a single ownership and a single destination; that that ownership was one represented by Mr. Helm as its agent; and that that destination was to the place where his principals resided, and where they would derive the most benefit from the cargo. Who was Charles J. Helm? Captain Dyett (Int. 16) calls him "Major Helm," and says that he resides in Havannah. Chadwick, on his second examination, says (Int. 11) that Helm was the agent for the "Confederate States," in Cuba. This being so, it may very well be inferred that this cargo of arms and munitions of war was destined to be carried into the enemy's country, as we find the vessel and her cargo placed, by the orders of S. Isaac, Campbell and Co., within the entire control and subject to the orders of Helm. But, independently of this, the evidence is irresistible, that the cargo was destined for the enemy's

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country. The test oaths, both of Harris and of Samuel Isaac, when examined carefully, fall far short of a frank and clear statement of an innocent destination for the vessel and cargo. The test oath of Harris says, that the true and only destination of the vessel, with the cargo, was Cardenas, "where the same was to be delivered." This oath would be satisfied by a delivery of the cargo in bulk at Cardenas to Helm, and its transshipment there to another vessel, to be carried to a port of the enemy, in pursuance of such an original destination. It does not state that the destination of the cargo was not to a port of the enemy. And it states, in very suspicious language, that it was not intended that the vessel should enter, or attempt to enter, any port of the United States, but it does not state that it was not intended that the vessel or her cargo should enter, or attempt to enter, any port of the enemy of the United States, or any port blockaded by the naval forces of the United States. In all these particulars, the test oath of Samuel Isaac to the claim for the cargo holds the same suspicious language, and is wanting in the same averments. The court searches in vain through these test oaths to find those full and honest allegations which should characterise the test oath to a claim made by a neutral really engaged in lawful and innocent commerce. I shall now review the evidence in the case, in order to see to what conclusion it leads. Captain Dyett says (Int. 4), that he does not remember seeing any "Southern flag" on board of his vessel, although he says, that if the "Southern flag" were put before him, he should not know it. He admits, however, that besides the English colours, under which the vessel sailed, and the American flag, "that is, the stars and stripes," there were other flags in the vessel's bag. Chadwick says (Int. 4), that they had the "Confederate" flag on board, and cut up the American flag to make a burgee of it. A "burgee" is defined by lexicographers to be "a distinguishing flag or pennant." Leisk says (Int. 4), that the vessel had an American flag on board, and another flag that looked similar to the American flag. Nellman says (Int. 4), that she had the American ensign, which was cut up on the voyage to make a burgee of, and also "a flag of the Confederate States of America;" that he saw that flag a few days before the capture, in the sail cabin, in a bag with the burgee; and that, on the day of the capture, he found the burgee on the floor in the main cabin, and made thorough search for "the Confederate flag" but could not find it. Allan says (Int. 4), that they had the American colours on board, and another flag with stars and stripes, "but not as many stars as the old American flag;" and that he does not know whether that was the "Confederate flag" or not, as he never saw one to know it, unless that was one. Chadwick, on his re-examination (Int. 39), says, that after the capture of the vessel, and while the captors were in charge, he took this "Confederate flag" from where it was hid in his clothes bag, and threw it overboard; and that this flag was intended to be displayed in connection with a peculiar one called the "Isle of Man's flag," or signal, "which was adopted by the Southern States as a signal for a friendly vessel wishing to enter, and which should be protected, as far as possible, by them." This signal flag was probably the burgee of which the witnesses speak. Captain Dyett says (Int. 3), that the schooner was captured about eighty-two miles from Point de Yecos, in Cuba. Chadwick says (Int. 3), that the capture took place between Cuba and Key West, near the coast of Florida. Nellman and Allan say (Int. 3), that the capture took place about thirty miles from Key West. Capt. Dyett says (Int. 19), that the capture took place about twenty-five miles from Key West, and (Int. 36) about eighty-two miles

from Cardenas. Captain Dyett says (Int. 11), that the vessel was bound for Cardenas; that the contents of her cargo were unknown to him, except that he saw some cases marked "long Enfield," which he supposed contained "long Enfield guns," and he thinks he saw a few bales, marked "socks;" and that at Erith, below London, on the Thames, some packages were taken in stamped "ball cartridges;" but, he says, "she had no goods on board which were contraband of war, or otherwise prohibited by law." He also says (Int. 39), that he cannot state anything further in regard to the real and true property and destination of the vessel and cargo, except that, after he had discharged his cargo, he was to proceed to Sierra Leone, as stated in his letter of instructions. Chadwick, on his first examination (Int. 11), says that they were bound to Cardenas: that the cargo consisted of powder and munitions of war; that (Int. 39) he understood from the captain and the shipping articles that they were bound to Cardenas, and from there to Sierra Leone; and that he knows nothing beyond that. Leisk says (Int. 11), that the vessel was bound to Cardenas and Sierra Leone; that he knew that her cargo, consisting of arms, powder and soldiers' equipments, was contraband of war; and (Int. 39) that he knows nothing about the destination of the vessel and cargo, except that they were bound to Cardenas. Nellman says (Int. 11), that the vessel was bound to Cuba, Sierra Leone, or the West Indies, or some port in North or South America; and that he does not know to which of those several ports or places they were bound first. In this particular, he confirms the very ambiguous and alternative language in the shipping articles. He also says (Int. 11), that the cargo consisted of Enfield rifles, powder, cartridges, shot, shells, soldiers' accoutrements, such as knapsacks, belts and pouches, and some heavy boxes, which he thinks contained small cannon; and that the lading consisted entirely of warlike stores and articles. He thus manifests a knowledge of the cargo, which is in striking contrast with Captain Dyett's ignorance. Nellman says (Int. 11), that he thinks that these goods are contraband of war. Captain Dyett, however (Int. 11), says, that Enfield rifles and ball cartridges are not contraband of war. Allan says (Int. 11), that the vessel was bound to Cuba; and that the captain said he was going to Cardenas, and from there to the coast of Africa. As to the cargo, Allan says (Int. 11), that he had seen boxes marked "long Enfields," which he took to be guns, and had heard there was powder, and had seen bales of blankets and other military equipments, and believes that she had a general cargo of arms and munitions of war. Captain Dyett says (Int. 14), that he does not know who owns the cargo, but his impression is that it belongs to Isaac, Campbell and Co.; that (Int. 16) he does not know who were the laders of the cargo, or for whose risk and account the goods were, or what interest Major Helm had in them; and that he does not know to whom they would belong, if restored and delivered at their destined port. Chadwick says (Int. 14), that he heard in London that Isaac, Campbell and Co. owned the cargo. Nellman says (Int. 14), that he believes the cargo is owned "in the Confederate States of America;" that he heard Chadwick say so; that he never heard anything further concerning the cargo and its owners, except that Mr. Chadwick told him that the cargo was going to some place in "the Confederate States," and professed to know all about it. He also says (Int. 16), that Mr. Hughes, who he believes is an agent for "the Confederate States," put the cargo on board, and was the lader thereof, and seemed to be the principal man, and had the most to say about the vessel and cargo; that the goods were to be delivered in the

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outhern States, at some port therein, and he links for the account or benefit of some person in those States; and that he believes, from what he heard on board the vessel, that the cargo was destined for some port in the Southern States, rather to be carried there in that vessel, or to be unshipped and put in another vessel for the same purpose. He also says (Int. 24), that he thinks that the vessel was in reality bound to Cuba, and that, after arriving there, she would have received instructions as to what particular port or place she should go to in the Southern States, or as to whether the cargo should be transhipped and put on board another vessel; and that Chadwick told him that a steamer would receive the cargo at Cuba very probably, and would carry it thence to some Southern port. Captain Dyett says (Int. 17), that he signed four bills of lading for the cargo, which were prepared by the broker and laid before him to sign; that he signed them without reading them, and does not know their contents; and that he had no bill of lading on board when he sailed, or at any time before his capture. He also says (Int. 31), that he signed a manifest before the Collector of London, and left it at the office of the brokers, Speyer and Haywood, in London, and has not seen it since; that the manifest was in the usual form, and made from the bills of lading; and (Int. 17) that the bills of lading and manifest were to be forwarded to him at Cardenas. He also says (Int. 18), that there were no invoices on board of the vessel. Captain Dyett, on the capture of the vessel, did not give up to the prize-master the letter of instructions from S. Isaac, Campbell and Co. to him, or the letter from Saul Isaac to Charles J. Helm, of Nov. 19, 1861. He only produced them on his examination in *preparatorio*, after his arrival at New York, in answer to the searching inquiries of the standing interrogatories. He says (Int. 20), that he did not give up those letters to the prize-master, because he did not know that he was bound to give them up. Yet he says (Int. 18), that he gave to the prize-master his ship's log-book, his official log-book, and his desk, with all the papers therein, being his private papers and in no way relating to the vessel; and, among the papers which he so gave up, is found the comparatively unimportant letter from Saul Isaac to the British Consul at Havannah, and the telegraphic dispatches and official papers of the vessel, which were calculated, on their face, to show a fair and honest voyage from London to Cuba. The two letters which he did withhold, namely, the instructions to himself and the letter to Helm, were the only documents on board which in any way connect Mr. Helm with this vessel and her cargo. This withholding or temporary suppression of those two letters, whose character and contents I have already commented upon, is one of those circumstances which is always regarded with suspicion, particularly where the suppression is made by a master. I shall have occasion to refer to this point hereafter, in connection with the attempted suppression of important papers by Chadwick. That the suppression of these letters by Captain Dyett was premeditated, is shown by the testimony of Nellman, who says (Int. 18), that Captain Dyett had a letter with him directed to some one, and that he heard him and Chadwick talk about it an hour or so before the capture, just when the capturing vessel was firing her first shot. Chadwick says (Int. 18), that he had some private letters from his wife and friends, which he gave to Leisk, the cook, to take care of, and that Leisk gave them up to some of the capturing officers. Leisk says (Int. 32), that he had some papers belonging to Chadwick which he, Leisk, put into a teapot, where they were found by the searching officer; and that they were put there

by the orders of Chadwick, to keep them out of sight. Nellman says (Int. 20), that Chadwick, a few minutes before the capture, gave some papers to Leisk, with directions to put them into a teapot in the galley, for the purpose of concealing them, but that they were found by the United States officers. Allan says (Int. 12), that he saw a bunch of papers taken out of the teapot by the boarding officer, and that, when they were found, the officer asked Leisk what they were, and Leisk said he thought it was tea. On his re-examination (Int. 32), Leisk says, that some papers were given to him by Captain Dyett on the evening of the day they were captured, which Captain Dyett had put at the foot of his berth. Leisk says: "He told me, if he sent for these papers, I should know where to find them. He then went on board the *Supply*. When he returned, I asked him if he wanted those papers. He said he had already got them. This conversation was between us, there being no other person within hearing. We were in his state-room at the time, with the door closed." We have no explanation from any witness as to what those papers were. As to the papers which Leisk received from Chadwick and put into the teapot, where they were found by the boarding officer, Leisk says, on his re-examination: "When the first officer handed me those papers, he seemed anxious and uneasy, and, when he returned to the schooner to get his clothes, the first thing he said to me was, 'Have you got those papers?' I told him they were found by the officer. He then said, 'Why in hell did you not destroy them?' and likewise, 'By God, I am done!'" Three of the papers which were concealed in the teapot, and which Chadwick speaks of as private letters, are letters to Chadwick containing some very important matter. One of them is dated at "Bristol, England, Oct. 29, 1861," and is addressed to Chadwick by a person who signs himself "R. H. Leonard, ship *Alexander*, Confederate States." Leonard expresses his pleasure that he is able to furnish Chadwick with "the book required," without price. He refers to it as a book which Chadwick had written for, says that it belongs to him, Leonard, and that, if it were worth 50*l.*, he would willingly give it to an enterprise of Chadwick's, and hopes it may be of valuable service to him. This book is the copy of the United States Coast Survey that was found on board of the vessel, containing charts, as has been seen, for entering very many of the blockaded ports of the enemy. In his testimony, given on his re-examination, Chadwick refers particularly to this book of charts as one which he recommended to his employers to purchase, and which they told him to purchase at any price. He says that he obtained one, which was presented to him by "R. H. Leonard, the mate of the ship *Alexander*, then lying in Bristol." Those employers, Chadwick states, in his deposition on re-examination, to have been Mr. Hughes, "the commercial Confederate agent for purchasing arms and ammunition for, and shipping the same to, the Confederate States," "William L. Yancey, of the United States," a South Carolina captain, named Connor, and Mr. Saul Isaac. In the same letter, Leonard says: "Captain Johnson will mark out the chart; also the route, with some information; also write a letter, which he will wish you to deliver or forward. Mrs. Bain will also have a letter for you to take, and forward to Virginia, if you arrive safe. I hope you may be successful. If so, report the old *Alexander* laying up at Bristol, with the palmetto tree constantly flying, and that her captain and officers are ready to aid the South in any enterprise. Tommy, I will not ask you to disclose the secret of your voyage. Be whatever it may, I believe it is true to the South. My heart and well wishes are

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with you, hoping you may be successful, and I may hear of the consequences. If that book prove serviceable to you, it will afford me more pleasure than its weight in gold in return. . . . I shall send the book by express this evening. I wish you to write me two or three mails before you put to sea, as Mrs. Bain will have some other letters to send. If you should fail, destroy." Chadwick, on his re-examination, states that he received a letter from Captain Johnson, of the ship *Naomi*, of Charleston, S.C., giving him a description of the entrance to Charleston, and also received from him letters for his wife, and for other persons residing in the "Confederate States." In confirmation of this, we find that another of the three letters, being one dated at "Bristol, England, Oct. 29, 1861," and signed "John Johnson, ship *Naomi*," and addressed to "Mr. Benjamin H. Chadwick, schooner *Stephen Hart*, Surrey Canal, London," says: "Mr. Leonard, chief officer of the ship *Alexander*, and I, had some private conversation this morning concerning some things, which I need not now repeat." Johnson then proceeds to give specific directions as to the mode of entering the harbour of Charleston, and adds: "The chart of Charleston Harbour, in the book called the United States Coast Survey, will be your best guide." He also says: "Enclosed is a letter, and I beg that you will, in case you succeed in safely reaching any Southern port, forward the same to its destination. At the same time, do not let its incumbrance in any way interfere with your enterprise. Destroy it, if need be; but, if it could be managed to forward it safe to my wife, I should feel very grateful towards you for your kindness. I hope and trust that you will succeed in your undertaking. Observe secrecy by all means, and I can assure you that no information as regards the *Stephen Hart*'s whereabouts or movements shall be gained from me by any one here or elsewhere. . . . May the God of Justice guide you in safety to your port of destination is the fervent wish of one who loves the South, its institutions and its people." The remaining one of the three letters is from Leonard, and is addressed "To Mr. B. H. Chadwick, alias Tommy, 1st officer, *Stephen Hart*," and is written at Bristol, England, but without date. It says, among other things, "Give me the particulars of your voyage, what your cargo consists of, and if you have got any guns on board." The suppression by Captain Dyett, until his examination in *preparatorio*, of the letter of instructions to him from S. Isaac, Campbell and Co., and of the letter from Saul Isaac to Helm, and the attempt by Chadwick to conceal the letters from Leonard and Captain Johnson, are circumstances of great importance, as tending to show the illicit and fraudulent character of the entire transaction connected with this vessel and her cargo, and that Captain Dyett and Chadwick were concerned in carrying out the unlawful purpose, and endeavoured to promote that end by attempting to conceal the evidence which they had in their possession. The spoliation of papers is a strong circumstance of suspicion: (1 Kent's Comm. 157.) It is not, however, either in England or in the United States, held to furnish, of itself, sufficient ground for condemnation, but is a circumstance open to explanation: (*The Hunter*, 1 Dodson, 480; *The Pizarro*, 2 Wheaton, 227.) But, if the explanation be not prompt and frank, or be weak or futile, if the cause labours under heavy suspicions, or if there be a vehement presumption of bad faith or gross prevarication, it is ground for the denial of further proof, and the condemnation ensues from defects in the evidence, which the party is not permitted to supply: (1 Kent's Comm. 158; *The Pizarro*, 2 Wheaton, 227; *Bernardi v. Motteaux*, Doug. 554, 559, 560.) In the case of the *Two Brothers*, 1 Ch. Rob.

131, the master had burned some letters, before capture, which he said were only private letters. Sir William Scott says, in commenting upon that circumstance: "No rule can be better known than that neutral masters are not at liberty to destroy papers; or, if they do, that they will not be permitted to explain away such suppression by saying, they were only private letters. In all cases it must be considered as a proof of *mala fides*: and, where that appears, it is a universal rule, to presume the worst against those who are convicted of it. It will always be supposed that such letters relate to the ship or cargo, and that it was of material consequence to some interests that they should be destroyed." In the case of the *Rising Sun*, 2 Ch. Rob. 104, Sir William Scott says: "Spoliation is not alone, in our Courts of Admiralty, a cause of condemnation; but if other circumstances occur to raise suspicion, it is not too much to say of a spoliation of papers, that the person guilty of that act shall not have the aid of the court, or be permitted to give further proof, if further proof is necessary." The withholding by the master of the two letters, in the present case, until his examination, while he gave up to the captors the letter to the British consul at Havannah, and, as he says, all his own private papers, would have been a complete suppression of the two letters in question, if their production had not been compelled by the stringent character of the standing interrogatories. In the case of the *Concordia*, 1 Ch. Rob. 119, the master withheld his instructions until the time of his examination. Sir William Scott says: "This was certainly incorrect. It is a master's duty to produce all his papers, and, least of all to withhold his instructions, which are very important papers to be communicated for the interest of both parties." So, also, the concealment by Chadwick of the letters to him, which showed the true character of the enterprise of the *Stephen Hart*, would have been as effectually a destruction of those papers, for the purposes of this case, if they had not been found upon the search, as if they had been actually thrown into the sea and lost. And the suspicion which the law attaches to a spoliation of papers arises with equal force from an attempted spoliation. That Captain Dyett and all of his crew knew of the blockade of the enemy's ports, is abundantly established by the evidence. Neilman states (Int. 21), that "all on board knew that the Southern States, including Florida, were in a state of war with the United States, and the Southern ports blockaded by the United States Navy." "It was a matter of conversation on board during the voyage." Captain Dyett says (Int. 21): "I knew of the rebellion in the Southern States, and that some of the Southern ports were blockaded." Captain Dyett says (Int. 36), that the vessel was steering for Cardenas when she was captured, and that her course was not altered upon the appearance of the capturing vessel. Chadwick, on his first examination (Int. 35), says the same thing. Neilman says (Int. 36), that when they first saw the capturing vessel, about six o'clock in the morning, the *Stephen Hart* was standing towards Key West, and continued on that course until about twelve o'clock, when she tacked and steered towards Havannah, and was steering towards Havannah when captured; that their course, at all times when wind and weather permitted, was towards Cardenas, except in the instance mentioned, and except when obliged to pursue another course on account of head winds; and that the latter was the reason why the vessel was steering towards Havana at the time of her capture. Neilman says that he had the watch when the capturing vessel was first seen; and that Chadwick had the watch from eight a.m. until noon, and he, Neilman, again from noon to four o'clock. Neilman (Int. 19), and

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Allan (Int. 3), say that the capture was made about two o'clock p.m. Although Captain Dyett, and Chadwick, on his first examination, say (Int. 36) that the course of the vessel was, at all times when wind and weather would permit, towards Cardenas, yet it is apparent that she set out from England with the intention of running the blockade, if she could, and she was captured in a position consistent with that intention. The evidence which has been reviewed establishes, beyond reasonable doubt, that the cargo of the *Stephen Hart* was intended, on its departure from England, to be carried into the enemy's country, for the use of the enemy, by a violation of the blockade of some one of the enemy's ports, either in the *Stephen Hart*, or in another vessel into which the cargo was to be transhipped, for the purpose of being transported by sea to the enemy's country. This is clearly established without the aid of the testimony given by Chadwick on his re-examination. Some portions of that testimony have been incidentally alluded to. The other main facts detailed by Chadwick on his re-examination are entirely consistent with all the rest of the evidence in the case, and are corroborated by that evidence. Some of the points of corroboration have been already alluded to, and I shall refer to others. Chadwick says, on his re-examination (Int. 11): "The vessel was bound to Cardenas, in Cuba, but the destination of her cargo was certainly to one of the Confederate States, and the vessel was, in like manner, so destined if Charles J. Helm, the Confederate agent at Cuba, should so direct. That voyage began in London, and was to have ended at Cardenas, or any port in the Confederate States which the aforesaid Confederate agent should direct." He also says (Int. 36): "The vessel was steering for Cardenas, but that port was to be used only as an intermediate port of call, and of transhipment of the cargo, if necessary, or ordered by Charles J. Helm." He also says (Int. 39), that after he had gone in the vessel, then called the *Tamulipas*, from New Orleans, by the way of Havannah and Matanzas, to Falmouth and Bristol, England, and thence in the same vessel to London, he was requested to go to No. 71, Jermyn-street, London. He adds: "I accordingly went, and was there introduced to Mr. Isaacs, the head of the firm of Isaacs, Campbell and Co., and also to a Mr. Hughes, whose first name I did not learn, who told me he was the commercial Confederate agent for purchasing arms and ammunition for, and shipping the same to, the Confederate States. He asked me how I would like to run the blockade of the Southern States in the *Stephen Hart*. I answered, 'That I would sooner go in a steamer.' There was no definite arrangement made at that time. I was again sent for, and went to the same place, where I met Mr. Isaacs, the same Captain Hughes, and William L. Yancey, of the United States. There was also a South Carolina captain there. I was taken by Captain Hughes and this South Carolina captain (whose name was Connor) into another room, and there fully examined in regard to my knowledge of the southern coast of the United States. I was then employed by Captain Hughes as a pilot agent, and to leave the *Stephen Hart* and go on board of a steamer which he had chartered, and which was then taking in a cargo of arms and ammunition for the Confederate States. I was to leave the *Stephen Hart*, go ashore and take lodgings, and observe secrecy until I was called, which I did. About a week afterwards I was told to go on board of the steamer *Gladiator*, then lying in the Thames, and examine and see if she had proper boats for landing her cargo in the surf on the Southern coast, if required, and report to Hughes. I did so, and reported that she had, with the exception of one boat.

I was then ordered to take my things on board of that vessel (the *Gladiator*), and proceed in her to Nassau, and there either obtain a pilot for her, or else pilot her myself into some Southern port of the Confederate States between Cape Carnival, in Florida, and York River, Virginia. I went aboard accordingly. That vessel was loaded with arms, ammunition and army outfits. After I got aboard, it was found that she could not carry all the cargo which had been bought for her, and accordingly, what portion thereof could not be taken by the *Gladiator* was put aboard of the *Stephen Hart*, together with other like cargo to fill her up. I was ordered to proceed from the *Gladiator* and take charge of the loading and fitting out of the *Stephen Hart*, which I did. On my recommendation to Captain Hughes, Captain Dyett was appointed master of the *Stephen Hart*, while I was to go in her nominally as mate, but really in charge of the cargo, consisting of arms and munitions of war. The vessel proceeded down the Thames several miles, and there took aboard a quantity of powder." Nellman testifies (Int. 30) to the same effect as to the place where the powder was taken on board. Chadwick proceeds: "Before the *Stephen Hart* left, I was instructed by Capt. Hughes to proceed to Cuba, that is, to Cardenas, and there to work under the instructions of Charles J. Helm, the agent for the 'Confederate States' at that place. He said the cargo was to be transhipped into a steamer, which could be used with greater facility in running the blockade, or she might be ordered to proceed herself." The connection of Hughes with the transaction, and his being an agent for "the Confederate States," and the lading of the cargo on board of the *Stephen Hart*, are also testified to by Nellman (Int. 16). The contents of the letter of instructions to Captain Dyett confirm all that Chadwick says, on his re-examination, as to the connection of Helm with the matter, and as to the certain destination of the cargo and the contingent destination of the vessel being to a port of the enemy. It is stated by Nellman (Int. 14), that he heard Chadwick say that the cargo was going to the enemy's country, and (Int. 24) that a steamer would receive it at Cuba very probably, and would carry it thence to a port of the enemy. And it is apparent, from what Nellman says (Int. 14), that it was understood, on board of the *Stephen Hart*, that the cargo was destined for a port of the enemy, and was to be carried there in that vessel, or to be transhipped to another vessel for the same purpose. Chadwick proceeds: "The agreement was, that I should have 45 dols. a month for all the time I was employed, including any time I might be detained or imprisoned in consequence of any attempt to run the blockade; and, if I had gone in the *Gladiator*, I was to have received a bounty of 500 dols.; and in the *Stephen Hart*, if ordered by Helm to cross the blockade, I was to have a bonus, to be agreed upon with him." The shipping articles confirm this statement of Chadwick's to a certain extent, as they show that his wages were to be 9l. per month. They also show that the wages of the mate, whose place he took, were only 6l. per month. He then goes on to state, as he had already stated in his affidavit upon which the order for his re-examination was made, that he was induced to state these facts, not by any persons in any way connected with the libellants or captors, but solely by the persuasions of his wife, "who is a loyal woman, and now residing in Boston." The absence from on board of the *Stephen Hart* of the bills of lading and manifest, to whose existence the master testifies, and of all invoices of the cargo, has been already referred to. The absence of these papers, in time of war, is a suspicious circumstance, as affecting the question of the neutrality of the cargo and the

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honesty of the trade: (1 Kent's Comm. 157; Halleck on International Law, c. 25, s. 25, p. 622.) It has been strongly urged upon the court, in the present case, that as Harris, the alleged owner of the vessel, is not shown to have any interest in any of the cargo, the vessel can be visited with no greater penalty for carrying contraband articles, even though they were intended for the enemy, than the loss of freight and expenses. But, even on the assumption that the grounds already set forth in respect to the real ownership of the vessel are not sufficient for her condemnation, the court is of opinion that her condemnation must, under the circumstances, follow the condemnation of the cargo, the latter being contraband of war, and intended, on its departure from England, to be carried into the enemy's country by a violation of the blockade. The contingent destination of the vessel to a blockaded port would be sufficient, under the authority of the case of the *Richmond*, before cited, to warrant her condemnation. But, even if her destination was only to Cardenas, yet, as her cargo was intended, on its departure from England, to be introduced into the enemy's country, by being transhipped from the vessel at Cardenas, condemnation must equally follow, because of the employment of the vessel in this unlawful enterprise under the circumstances disclosed in this case. As testified to by Captain Dyett, there was no charter-party for the voyage. He says that he was put in charge of the vessel, not by Harris, her alleged owner, but by S. Isaac, Campbell and Co., the claimants of the cargo. No instructions from Harris to Captain Dyett are found, but only instructions to him from S. Isaac, Campbell and Co. Harris, therefore, surrendered the entire control of his vessel to that firm, and her master must be regarded as their agent, and the claimant of the vessel must be held responsible for the use to which the master and the claimants of the cargo put the vessel: (*Jecker v. Montgomery*, 18 Howard, 110, 119.) That use was the carrying, for a portion of the distance on its way to the enemy's country, of a cargo contraband of war, intended for the use of the enemy, and to enter the enemy's port by a violation of the blockade. This use of the vessel was, under the authorities before cited, unlawful in its inception, and, the entire transportation of the cargo from England to the enemy's country being unlawful, the vessel must be condemned for having been permitted, by Harris, to be used, at the pleasure of S. Isaac, Campbell and Co., in carrying out a portion of the unlawful purpose. Such use was, under the circumstances, in judgment of law, with the knowledge and assent of Harris. Chadwick, on his re-examination (Int. 39), states that Harris wished him to continue in the *Stephen Hart* as mate, "that either she would go to, or else he would put me on board of another vessel to go to the Confederate States." In the case of *The Ringende Jacob*, 1 Ch. Rob. 89, Sir William Scott says that, under the ancient law of Europe, the carrying of a contraband cargo rendered the vessel liable to condemnation; but that, in the modern practice of the Courts of Admiralty of England, a milder rule has been adopted, and that the carrying of contraband articles is attended only with the loss of freight and expenses, "except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravated circumstances." And he cites as an exception, a case attended with particular circumstances of falsehood and fraud, both as to the papers and the destination of the voyage, and in which there was an attempt, under colourable appearances, to defeat the rights of the belligerent. The same doctrine is laid down in the case of *The Jonge Tobias*, 1 Ch. Rob. 329.

In the case of *The Franklin*, 8 Ch. Rob. 217, a neutral vessel, ostensibly bound to a neutral port, and whose cargo consisted of several articles which were contraband if going to the enemy, was held, by Sir William Scott, to have been captured while really on her way to a port of the enemy. He says: "I have had frequent occasion to observe that it is very difficult to detect a fraud of this species in the particular instances. Pretences and excuses are always resorted to, the fallacy of which can seldom be completely exposed; and therefore, without undertaking the task of exposing them in the particular case, the court has been induced (and I hope not unwarrantably) to hold generally in each case that the certain fact shall prevail over the dubious explanations." "I am satisfied, on the facts of this case, that it was the plan of this voyage to carry the ship fraudulently, under a false destination, into a Spanish port. The consequence will be, that this fraudulent conduct, on the part of those who are concerned in the ship, will justly subject her to confiscation. Anciently, the carrying of contraband did, in ordinary cases, affect the ship, and, although a relaxation has taken place, it is a relaxation, the benefit of which can only be claimed by fair cases. The aggravation of fraud justifies additional penalties." He then announces it as the settled rule of law, "that the carriage of contraband, with a false destination, will work a condemnation of the ship as well as the cargo." In that case the owner of the ship was not the owner of the cargo, but, being himself a neutral, had entered into a charter-party for a voyage of the vessel from one neutral port to another neutral port. In a note to the case, these very appropriate remarks are made: "The relaxation of the old rule has been directed, in its practical application, as well as in its origin, only to such cases as afford a presumption that the owner was innocent, or the master deceived. Where the owner is himself privy to the transaction, or where his agent interposes so actively in the fraud as to consent to give additional cover to it by sailing with false papers, all pretence of ignorance or innocence is precluded, and there seems to be no further ground, consistent with equity and good sense, upon which the relaxation in favour of the ship can any longer be supposed to exist." The same principles are laid down in the case of *The Mercurius*, 1 Ch. Rob. 288; *The Edward*, 4 Ch. Rob. 68; *The Neutralitet*, 8 Ch. Rob. 295. In the latter case, Sir William Scott says that, where a vessel is carrying contraband articles under a false destination or false papers, those circumstances of aggravation constitute excepted cases out of the modern rule, and continue them in the ancient one. In *The Ranger*, 6 Ch. Rob. 125, which was the case of an American vessel with a cargo which was documented for a neutral port, but was going to the enemy's port, and was condemned as contraband, Sir William Scott says: "I also condemn the vessel, as employed in carrying a cargo of sea stores to a place of naval equipment, under false papers. It is described, I perceive, as an American vessel. But, if the owner will place his property under the absolute management and control of persons who are capable of lending it, in this manner, to be made an instrument of fraud in the hands of the enemy, he must sustain the consequence of such misconduct on the part of his agent." In the *Oster Risoe*, 4 Ch. Rob. 199, Sir William Scott held, that a master could not be permitted to aver his ignorance of the contents of contraband packages on board of his vessel; that he was bound, in time of war, to know the contents of his cargo; and that, if a different rule could be sustained, it might be applied to excuse the carrying of all contraband. One important circumstance, to show that the cargo of the *Stephen Hart* was intended for

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the enemy, is the fact that a part of it consisted of 90,000 buttons, marked with the initials "C. S. A.," which it is well understood stand for the words "Confederate States of America," or "Confederate States' Army," the buttons being such as are used on army clothing for the three services of an army. This review of the facts in this case leads to the conclusion that the vessel and her cargo must both of them be condemned. No doubt is left upon the mind that the case is one of a manifest attempt to introduce contraband goods into the enemy's territory by a breach of blockade, for which the vessel must be held liable to forfeiture, as well as her cargo. Chadwick was evidently employed by reason of his being a citizen of the United States, familiar with the enemy's country, and qualified to conduct the vessel into one of the blockaded ports. The vessel was captured in a position convenient for running the blockade. The cargo consisted of arms, munitions of war and military equipments, and, among them, a large quantity of military buttons, stamped in such a manner as to render them capable of no appropriate use save for the infantry, cavalry and artillery of the enemy's army, thus showing that the enemy's country was their only appropriate destination. The absence of the manifest and bills of lading is not satisfactorily accounted for, and the want of any invoices and of any charter-party is a circumstance of great weight against the lawfulness of the commerce. The attempt, by the master, to suppress his letter of instructions and the letter to Helm, the agent of the enemy in Cuba, and the attempt of the mate to conceal the letters which show that the design was, that the *Stephen Hart* should, under his guidance, enter a blockaded port of the enemy, and which also contain specific directions for entering the harbour of Charleston, justify the conclusion that Charleston, or some other port of the enemy, was the real destination of the vessel and her cargo. The absence of any charter-party, and of any instructions from Harris to Captain Dyett, and the entire surrender by Harris of the control of the vessel to the loaders of the cargo, and to the master as their agent, involve the vessel in all the guilt which attaches to the cargo. The object of carrying the flag of the enemy could only have been that it might be used for the purpose of entering the enemy's ports—a conclusion strengthened by the fact that it was thrown overboard at the time of the capture. The charts found on board are charts of such a character as to enable a vessel to enter many of the blockaded ports. The letter concealed by the mate, which contains directions for entering the harbour of Charleston, is one which he had a motive to preserve by concealing and not to destroy, because, upon the regular papers of the vessel, he must have indulged the hope that she would have been permitted, after a search, to proceed upon the voyage indicated by her papers, and thus, that the letter in question would afterwards become useful on a further voyage to the port of the enemy. There is an absence of all papers and circumstances to warrant the conclusion that there was any intent to dispose of the cargo at Cardenas in the usual way of lawful commerce. The consignee of the entire cargo was the agent of the enemy, and the cargo was laden on board by the agent of the enemy in London. The asserted ignorance of the master, as to the contents of his cargo, and as to the fact that arms are contraband of war, and the ambiguous destination set out in the shipping articles, are circumstances which, with many others, go to swell the volume of suspicion attaching to the enterprise. In addition to all this, there is the positive evidence which has been referred to, particularly of Chadwick and Nellman, as to the actual destination of the cargo. All the material

facts of the case, which lead to a condemnation, are proved without any resort to the re-examinations either of Leisk or of Chadwick. This is not a case for further proof, and no application has been made on the part of the claimants to supply any further proof as to any point. There must, therefore, be a decree condemning both the vessel and her cargo.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,
Barrister-at-Law.

Thursday, June 30, 1864.

(Present—The Right Hon. Lord KINGSDOWN, Sir
E. RYAN and Sir J. T. COLERIDGE.)

BLACK v. ROSE.

*Ship—Charter-party—Delivery of cargo—Freight—
Lien of master.*

By charter-party R., the master of a ship, undertook to load and take a cargo to Galle, at so much per bag, the cargo to be taken alongside, and to be taken from the ship's tackle at the port of discharge free of risk and expense to the ship:

Held, that the master was bound to deliver, and the merchant to receive, at the ship's side, and the master was entitled to be paid freight each day for the quantity delivered; for his lien would be given up on delivery of each bag.

This was an appeal from two judgments of the Supreme Court of Ceylon.

The first action was brought by the app. against the resp. for not delivering a portion of a cargo of rice pursuant to charter-party. The libel alleged that the deft., master of the ship *Alpine*, received from the plt.'s agent at Calcutta a cargo of rice, to be delivered at Colombo, and that deft. delivered part only, and refused to deliver the whole, though plt. was ready and willing to pay the freight.

The charter-party was as follows:

Galle, 16th April 1861.
It is this day mutually agreed between John Black, of Galle, and James Rose, master of the A 1 ship *Alpine*, of 1164 tons register, that the said vessel being tight, staunch, strong, and in every way fitted for the voyage, shall, after the discharge of her cargo of salt in Calcutta, load there, from charterer's agents, a full and complete cargo of rice, not to exceed sixteen thousand bags, and the balance to complete her loading to be of light freight, and being so loaded, shall sail and proceed to Colombo. For instructions as to whether the said cargo shall be delivered in that port or in Point de Galle, or part in Colombo and part in Galle; freight to be paid at and after the rate of one rupee and four annas per bag of rice of two maunds, and light freight at 2l. 10s. per ton, as per Calcutta scale of tonnage on the quantity safely delivered; twelve working days for loading in Calcutta, and fifteen working days for discharging at Galle or Colombo, including both ports, but exclusive of time occupied in changing ports, to commence from the time the master gives notice that he is ready to load and discharge cargo, or demurrage to be paid at the rate of 30l. sterling per day for every day over and above the said working days the cargo to be taken alongside, and to be taken from the ship's tackle at the port of discharge, free of risk and expense to the ship. Five per cent commission on the gross amount of freight laden in the vessel to be paid to Messrs. Jardine, Skinner and Co., Calcutta, on account of John Black. The act of God, the Queen's enemies, fire, and all other dangers of sea, rivers and navigation excepted. Penalty for non-performance of this charter-party, estimated amount of freight.

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Witness, J. W. Morel.

The deft. pleaded:—1. That he was always ready and willing to deliver the remaining portion of the said cargo, the plt. paying freight on the quantity safely delivered and taking it alongside the ship, according to the charter-party, and the deft. tendered the cargo to the plt. and requested him to remove it, paying freight for the same; but the plt. refused to pay freight. 2. That the deft. had a lien on the cargo for the freight due thereon.

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3. That the alleged deposit in the hands of the collector of customs was insufficient, and was no payment or tender to the deft.

The plt. replied:—1. That he was always ready and willing to receive the cargo and pay freight for the same, but the deft. would not deliver it. 2. That the deft. had no right to detain the cargo to the prejudice of the plt., he being ready to pay freight, which was secured in the hands of the collector with the deft.'s knowledge and consent, to be paid over to him after the due landing of the cargo into the Queen's warehouse. 3. That the deposit made in the hands of the collector was sufficient to answer the claim for freight.

The evidence was in substance as follows:—The deft. stated that he arrived at Galle on the 2nd Sept. 1861, and thereupon caused a letter to be sent to the plt., stating that the freight must be paid according to the quantities delivered at the ship's side, and received an answer from the plt. to the effect that freight would be paid on due delivery of the cargo into the Custom-house; that plt. refused to pay freight alongside the ship; and afterwards the deft. proceeded to deliver the cargo without being so paid, and proposed that the money should be lodged with the collector of customs; that deft. afterwards learned it had been so deposited, but (as he alleged) under such restrictions that he could not touch it, and he thereupon required the freight to be delivered on the quantities delivered safely to the plt.'s agents on board; that the plt. replied to the effect that the custom at Galle, and every other British port, was to take delivery of cargo when landed, and that the charter-party, as usual, only provided that the boats should be sent at the plt.'s expense, and that, if more agreeable to the deft., he was ready to pay freight on each day's landing, as delivery was taken at the Custom-house, and would send a man on board to see the bags carefully placed in the boat, and to give a receipt for them; that the deft. consented to receive freight on the quantity of cargo delivered daily, instead of demanding freight on each parcel delivered, and began to discharge the cargo on such terms, the payment being made on shore at the close of each day; but on the fifth day of unloading there was no one at plt.'s office to pay the freight, and the deft. did not receive it until the middle of the next day; that he thereupon refused to deliver any more of the cargo unless the plt. paid freight on receipt of the cargo at the ship's side; that the plt. thereupon informed the deft. that freight would be paid according to the custom of the port, on due delivery of the entire balance of cargo, for which the deft. could hold a lien until the claim for freight was satisfied, unless he continued to receive freight on daily landings; that the deft. refused to deliver any more of the cargo except on the terms of payment of freight on receipt of cargo at the ship's side; that the plt. proposed again to pay, and did in fact pay the freight into the hands of the collector of customs, to be held by him until the cargo should have been delivered at Her Majesty's warehouse in the port of Galle, and informed the deft. thereof, and that freight would be duly paid by the said collector on the quantity of cargo delivered as per charter-party, and that no stop would be put on the freight so deposited; that the deft. then stated to the plt. that he had been informed by the collector that the freight had been forwarded by him to the Treasury, and that the payment thereof to the deft. could not be immediate, to which the plt. replied that the amount had been forwarded to the Treasury, not by his instructions, but according to the rules in the customs, for safe keeping, and there would be no delay in the deft. receiving immediate payment *after the delivery of the cargo*; that the plt. *authorized the collector to pay the full amount of*

freight due to the deft. on balance of the cargo immediately after delivery of the same, but the deft. refused to deliver any other portion of the cargo unless the freight was paid on receipt of the cargo at the ship's side. The plt. stated that he had, before the refusal by the deft. to deliver the rice, resold it to native merchants, and that he had chartered a great many vessels since he had been trading at Galle, and had never before paid freight at the ship's side.

Evidence was given to the effect that freight was never paid for each boat load at the ship's side, but in the lump, on delivery of the whole cargo.

The judge of the district court dismissed the plt.'s claim, and on appeal the Supreme Court affirmed the judgment.

A cross-action was brought for demurrage, and the judgment was given for the respe.

In both cases the following judgment was delivered by

CREASY, C.J.—These were cross-actions between a shipowner and a merchant, and the main point in dispute was, whether the shipowner was entitled to require payment of freight as the goods were delivered into the merchant's boats over the ship's side, or whether he was bound to deliver the whole cargo into the boats, and wait till it was brought on shore before he had his freight. The merchant had by a charter-party dated 16th April 1861, chartered the ship to fetch a cargo of rice from Calcutta to Colombo, to be unladen there or at Galle, wholly, or in part at such place according to instructions. The dispute arose about the part which (as was agreed) the ship was to deliver at Galle. The parts of the charter party material for the decision of these cases are as follows: "Freight to be paid at and after the rate of one rupee and four annas per bag of rice of two maunds, and light freight at two pounds and ten shillings per ton, as per Calcutta scale of tonnage on the quantity safely delivered. Twelve working days for loading in Calcutta, and fifteen working days for discharging at Galle or Colombo, including both places, but exclusive of time occupied in changing ports, to commence from the time the master gives notice that he is ready to receive and discharge cargo, or demurrage to be paid at the rate of twenty pounds sterling per day for every day over and above the said working days. The cargo to be taken alongside, and to be taken from the ship's tackle at the port of discharge free of risk as expense to the ship." The ship proceeded to Calcutta and took in her cargo. The master drew and sent bills of lading to the merchant, which the merchant received, and which stated that freight was to be per charter-party, but which contained the following stipulation as to the delivery of the cargo: "To be taken from the ship's tackle at the risk as expense of the consignees and a receipt to be granted on board." The ship delivered part of her cargo at Colombo, and then proceeded to Galle, by instruction to deliver the residue. Various quarrels took place between the parties, into which it is unnecessary to enter; but at last, after some cargo had been delivered, the master required the merchant to pay daily the freight for the amount of cargo delivered each day over the ship's side into the merchant's boats, and refused to deliver more cargo on the merchant's refusing to pay on delivery as required. The question is, was the master justified in such requirement and refusal? and we think that he was. As a general principle, when there is no express stipulation as to the time and manner of payment of freight, the master is not bound to part with the goods until his freight is paid. This is expressly laid down in *Abbott on Shipping*, the highest authority on the subject, and the same doctrine is laid down in perhaps the next highest authority, *Kear*

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Commentaries, vol. iii. p. 298. It was urged on behalf of the merchant in this case, that where the time and mode of paying freight are left uncertain by the contract, the custom of the port of delivery is to prevail; and some evidence, though very feeble, was given, that it is not usual at Galle to pay freight till the whole cargo is brought on shore. Smith's Mercantile Law was cited on this point. His words are: "The manner of delivering up the goods, and consequently the period at which the master ceases to be responsible for them, depends, in the absence of agreement, on the custom of the place." Mr. Smith cites a case from Espinasse which by no means bears out his text; but even if it did, that text has no application here. In this case the charter-party provides that "the cargo is to be taken alongside, and to be taken from the ship's tackle at the port of discharge free of risk and expense to the ship," and the bills of lading provide that "the cargo is to be taken from the ship's tackle at the risk and expense of the consignee, and a receipt to be granted on board." It is further in evidence, that an agent of the merchant was on board of the vessel during the days on which delivery went on, and that he gave receipts, though the form of those receipts does not appear on the face of the proceedings before us. We think it clear that in this case it was intended that the master should deliver, and the merchant receive, at the ship's side; that on such delivery and receipt the master ceased to be responsible for the goods, and also ceased to have any lien on the goods. It is clear on all authority and common sense that he had a right to be paid before he gave up his lien. It has been said on the other side, that it was impossible for the merchant to examine the condition and weight of the bags of rice as they came out of the ship. No evidence was given of this. The contrary would appear to have been the case, from the fact of the merchant having for several days before the quarrel sent his agent on board to superintend the delivery and acceptance of the cargo from the ship into the boats. And even if there had been any difficulty of the kind, it was one which the merchant brought upon himself by the mode in which he contracted. As we hold that the merchant's refusal to pay freight on delivery was wrongful, we must hold that his omission to unload and receive the cargo on the proper terms was wrongful also, and that the part of the judgment which fixes him with demurrage is correct. Objection has been made to that part of the judgment which gives interest on the demurrage, and it is urged that demurrage is in the nature of damages, so that interest is not to be given on it. We think that this objection is well founded. The verdict in the case of *Rose v. Black* is therefore to be reduced by the disallowing interest on the demurrage. In other respects the judgments of the district court in both cases are affirmed.

Macnamara (with him *Denman*, Q. C.), for the app., contended that the judgment was against the true construction and against evidence. It could never have been intended by the charter-party that the rice should be weighed on board ship, for such a course would be inconvenient and impracticable. It must have been intended that the cargo should be taken from the ship at the risk and expense of the app., but that the owner should be allowed a convenient time to ascertain the quantity before payment. The custom of the port was in favour of this construction. The master's lien might have been preserved by landing and warehousing the goods till the lien was satisfied.

Mellish, Q. C. and *Brown*, for the resp., were not heard.

Sir J. COLERIDGE.—This case has been extremely well argued, and almost everything that could have been said in favour of the app. has been brought before us by Mr. Macnamara. But after all this has been heard, including the evidence as to the custom of the port, it certainly is not difficult to come to a conclusion. Their Lordships are of opinion that the judgment of the C. J. was founded on the right ground—the construction of the contract between the parties. The view taken by the C. J. was, that as the goods were to be discharged at the ship's side, their delivery was to entitle the master to his freight, and to take from him his lien. In that view we concur. This being so, in both cases we must affirm the decision of the Supreme Court.

Judgment affirmed.

App.'s attorneys, *Chapman and Clarke*.

Resp.'s attorneys, *Cotterill and Sons*.

Saturday, July 23, 1864.

(Present—The Right Hon. Lord KINGSDOWN, Sir E. RYAN, and Sir J. ROMILLY, M.R.)

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Ship—Collision—Admiralty regulation lights—Position of lights.

The Admiralty regulations as to sailing lights do not require the lights to be fixed in any particular manner or part of the ship, all that is required being that they should be fairly visible.

Where, therefore, the lights of a brig were placed in-board and not on the outside, and only six feet above deck:

Held (reversing the decree of the Admiralty Court), that the lights were not improperly placed, having regard to the size of the brig.

This was an appeal from a decree of the Court of Admiralty in a cause of damage, promoted by the owners of the brig or vessel the *Thomas Snook* against the owners of the ship *City of Carlisle*.

The cause arose out of a collision which occurred between the two vessels on the 30th June 1862, off Hastings.

The collision happened at about 1.45 a.m. of the said 30th June, the *City of Carlisle* making about 5½ knots an hour, the wind being from the west, and the weather thick and dark with fine drizzling rain.

The *City of Carlisle* had her proper Admiralty regulation lights burning, and a good and proper look-out was kept on board her.

The *Thomas Snook* had no light whatever visible to those on board the *City of Carlisle*, and when seen bore about two points on the starboard bow of the *City of Carlisle*, and distant about a cable's length only, and rapidly approaching.

On account of the close proximity of the *Thomas Snook*, it was found to be impossible for the *City of Carlisle* to avoid her, the port bow of the *Thomas Snook* coming in contact with the starboard bow of the *City of Carlisle*, and the *Thomas Snook* shortly afterwards sank.

The present apps. brought an action in the court below against the *City of Carlisle* and her freight, to recover for the loss of the *Thomas Snook* and her cargo.

The cause was heard on the 20th July 1863, when the learned judge of the court below was assisted by Capt. William Elisha Farrer and Capt. Mark Currie Close, two of the elder brethren of the Trinity Corporation. The learned judge of the court below came to the conclusion that the *Thomas Snook* had not complied with the Admiralty regulations of the 1st Oct. 1858 with respect to sailing lights, and that such non-compliance contributed to the collision.

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and he pronounced against the damage proceeded for, and dismissed the resps. and their bail from the suit, but made no order as to costs.

The following observations were addressed to the Trinity Masters by

Dr. LUSHINGTON.—Gentlemen,—If you please, in the consideration of this case, we will throw away all that which is immaterial to the issue on which the case is put. We will assume, if you please, that the lights of the *Thomas Snook* were burning, and were burning well. We will assume that, if a proper look-out had been kept on board the *City of Carlisle*, they would have seen these lights, provided they were properly placed, and burning. We will assume these two matters, and the single question for your consideration will be, whether these lights were properly placed in compliance with the directions which are given in the Admiralty Regulations. Now, beyond all doubt the burden of proof is upon those who allege that they carried the lights. There is no doubt about it in law, nor is there a doubt about it in common sense, because of course those who are on board the vessel herself must be able to give the best evidence of what was the state of things on board that vessel, and those who never saw the vessel at all until they came into collision with her can only say that they did not see the lights. The burden of proof is thus upon those who allege the affirmative that the brig had at the time her lights properly fixed and brightly burning. Our sole consideration is, were they properly fixed? This averment is denied on the part of the *City of Carlisle*. With respect to the evidence as to how they were fixed, it is principally to be found in the evidence of the carpenter, a person of the name of Morcombe. Now with respect to the regulations themselves, I must draw your attention particularly to them. "All sea-going sailing vessels, when under way or being towed, shall, between sunset and sunrise, exhibit a green light on the starboard side and a red light on the port side of the vessel." Now my understanding of these directions is, not that there is any positive order that the lights shall be fixed on the actual sides of the ship itself, but that the green light shall be exhibited on the right hand and the red light on the left hand, so as to be visible, as the regulation goes on to prescribe: "And such lights shall be so constructed as to be visible on a dark night with a clear atmosphere, at a distance of at least two miles, and shall show an uniform and unbroken light over an arc of the horizon of ten points of the compass, from right ahead to two points abaft the beam on the starboard and on the port sides respectively." Then follow further directions: "The coloured lights shall be fixed, whenever it is practicable, so as to exhibit them;" and "when the coloured lights cannot be fixed," then other things are to be done. Now it is not pretended on the present occasion that the state of the weather was such as to render it impracticable to fix the lights as directed by these regulations, but it is contended that they were so fixed. What, then, is the substance of these directions? It is that the lights shall be visible, fairly visible, as described; there is no order that the lights shall be fixed in any peculiar manner, or in any particular part of the ship. And the whole question for you is this—whether, taking the description of the manner in which those lights were fixed, collecting it from the evidence as far as you possibly can, you can come to the conclusion that they were so fixed as to be fairly visible. As far as I have any knowledge of the matter, lights are in some ships fixed in one way, and in other ships they are fixed in another way: but what the regulation requires is, that they shall be fairly visible. It would be ~~inappropriate~~ for me to read the evidence, you are much

better judges of the effect of it than I am, because you know from experience whether the statements given by the witnesses are such as to prove to your satisfaction that the lights were so carried as to be fairly visible according to the purpose of the regulation. I need hardly tell you that if the lights were not fixed in compliance, in fair compliance, with the regulation, and the collision was thereby in part occasioned, then the statute says that the owner of the ship so in default cannot recover. We will now go into the next room.

ON RETURNING,

Dr. LUSHINGTON.—The gentlemen who assist me are of opinion that the lights of the brig were not so fixed as to be fairly visible. That being so, there was a breach of the Admiralty regulation, and I am of opinion that the owners of the *Thomas Snook* cannot recover in this suit. I do not, however, give costs, because we consider the *City of Carlisle* was much to blame.

Dr. Deane.—Then the court considers that the position of the lights contributed to the collision.

Dr. LUSHINGTON.—Yes; but I do not give costs, because the *City of Carlisle* was grossly negligent. They had only one look-out, when they ought to have had two.

The *Thomas Snook* appealed to Her Majesty in Council.

The *Queen's Advocate* (Phillimore) and Dr. Deane, for the apps., contended that the lights of the brig were fairly visible, and their position did not lead to the collision, nor was any negligence attributable to her.

Brett, Q.C. and Clarkson, for the resp. the *City of Carlisle*, contended that the *Thomas Snook* had not complied with the Admiralty regulation as to sailing lights; that therefore a presumption arose that she had caused or contributed to the collision.

Cur. adv. vult.

Lord KINGSDOWN.—In this case, at about a quarter before two o'clock on the morning of the 30th June 1862, the brig *Thomas Snook*, the property of the apps., was run into and sunk by the barque *City of Carlisle*, the property of the resps. The evidence in the cause established that the Admiralty regulation lights of the brig were burning brightly. The question on the appeal is, whether the lights were fixed in a place which complied with the regulations; or, to use the words of the learned judge of the Admiralty Court, whether they were "so fixed as to be fairly visible." The gentlemen who assisted the judge of the Admiralty Court were of opinion that they were not so fixed, and in consequence the court determined that the owners of the brig could not recover; but, as they were also of opinion that the *City of Carlisle* was grossly negligent and much to blame, no costs were given to the resps. The learned judge of the Admiralty Court in his judgment in the court below, stated his understanding of the regulations to be, not that there is any positive order that the lights shall be fixed on the actual sides of the ship itself, but that the green light shall be exhibited on the right hand and the red light on the left hand, so as to be visible." He also stated that the substance of the regulation is, "that the lights shall be fairly visible as described. There is no order that the lights shall be fixed in any peculiar manner, or in any particular part of the ship." And the whole question is whether, taking the description of the manner in which these lights in the present case were fixed they were so fixed as to be fairly visible. With these observations their Lordships concur entirely

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They have, in consequence, carefully examined the evidence for the purpose of arriving at the means of giving a correct answer to the question so put. There is no dispute about the place where the lights were fixed. There was on the deck of the brig, just behind the foremast and nearly touching it, a galley, the length of which was about six or seven feet. It was about six feet high, and about seven feet broad. The lights were placed on the top of this galley, about six inches from the outer edge of it, and about three feet behind the foremast. At the time when the collision took place the brig was close hauled on the starboard tack, heading south south-west, and proceeding at the rate of $5\frac{1}{2}$ knots an hour, with the wind in the west blowing a fresh breeze. The *City of Carlisle* was close hauled on the port tack, heading about north north-west, and making about $5\frac{1}{2}$ knots an hour. The vessels were therefore approaching at the rate of eleven knots an hour. The *City of Carlisle* struck the brig just before the fore-rigging on the port side, cutting right into her, when she filled rapidly, and went down with the master, steward and one of the crew, the mate and eight of the crew having just time to save their lives by getting on board the barque, who thereupon returned to London for repairs, and afterwards proceeding on her voyage to Bombay. There is no question but that it was the duty of the *City of Carlisle*, who was on the port tack, to give way, and if therefore the lights of the brig were properly placed so as to be fairly visible, the collision must be attributed solely to the negligence of the barque. The objections made by the resp. to the place where the lights were placed on board the brig resolve themselves principally into this, that they were placed on board, and not on the outside of the vessel, and that by reason thereof they were not, as the resp. contend, fairly visible. The breadth of the brig at this spot is not very accurately ascertained, it was not measured. Morecombe, the carpenter, supposes it to have been about 26 feet. Of the other witnesses Richard Swift, the mate, supposes it to have been 18 or 20 feet; Matson supposes it to have been from 18 to 21 feet. Their Lordships are informed by the nautical gentlemen who assist them, that having regard to the size of the brig, which was 249 tons, it is probable the breadth of the brig at this spot where the lights are fixed did not exceed 20 feet. If this be so, the distance from each light to the side of the vessel was about seven feet. The lights were properly secured, so that only one light could be seen at the same time, unless by a vessel exactly ahead. The foresail was set, and was just in front of these lights. The dimensions of the foresail are given by Isomonger, who made it; it was 17 feet 4 inches deep, 34 feet across the head, and 34 feet across the foot, and 19 feet 4 inches depth of leach. The foot of the foresail was about $11\frac{1}{2}$ feet or 12 feet above the deck, from the clew of the foresail to the deck was about 9 feet or $9\frac{1}{2}$ feet. The brig had two foresails, but their Lordships consider it to be proved that the foresail, the dimensions of which are given by Isomonger, was the foresail set at the time of collision. It was made to be used in going out of the Channel, and Isomonger saw it bent on the day before the vessel went out of dock on her last voyage. If this be correct, it establishes that the sail could not have interfered materially with the lights, which were only 6 feet above the decks, while the foot of the sail was from $11\frac{1}{2}$ to 12 feet above the deck, and therefore from $5\frac{1}{2}$ to 6 feet above the lights. The only material additional circumstance to be noticed is, that the brig was lying over on the port side, about three strakes from an even keel, and the height of the bulwarks above the deck were from three feet to four feet.

In this state of circumstances, the nautical gentlemen who assist their Lordships are of opinion that, the position in which the lights were placed was a fit and proper place for them, having regard to the size of the vessel. They are also of opinion, having regard to the fact that the vessel was lying over considerably on the port side, that if the lights had been fixed in the usual place, that is, on the top of the bulwarks, the red light on the port side would have been obscured by the spray, and would have been less fairly visible than on the top of the galley; and that if a proper look-out had been kept on board the barque, the red light would have been seen in sufficient time to avoid a collision. Their Lordships concur in the opinion expressed by the learned Judge of the Admiralty Court, that there was gross negligence on the part of the *City of Carlisle*. The persons on board that vessel were engaged in furling the foretop-gallant-sail; there was but one man on the look-out, and little attention seems to have been paid to anything except what the men aloft were engaged in. The brig seems to have been seen and reported simultaneously from aloft and by the man on the look-out, but not in sufficient time to avoid the collision. Their Lordships, after reading the evidence and considering the matter with the nautical gentlemen who assist them, have come to the conclusion that the lights were not improperly placed, having regard to the size of the brig; that they were placed in a position in which they were fairly visible, and in fair compliance with the regulation. Their Lordships are of opinion that, if a proper look-out had been kept on board the *City of Carlisle* the collision would have been avoided, and that that vessel was the sole cause of the collision. Their Lordships will, therefore, humbly advise Her Majesty that the decision of the Court of Admiralty be reversed, and that the resp. be condemned in damages and costs.

Decree reversed.

Apps.' proctors, Brooks and Dubois.

Resps.' proctors, Clarkson, Son and Cooper.

(Present—The Right Hon. Lord CRANWORTH, Sir E. RYAN and Sir J. T. COLERIDGE.)

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Ship—Collision—Commission to clear the mouths of of Danube—Regulations as to navigation—Negligence—Steamers in rivers.

The Treaty of Paris 1856, after putting the Danube as regards navigation on the same footing as other great European rivers were put by the Congress of Vienna, empowered a European commission, consisting of delegates from each country, to execute works below Isatcha, to clear the mouths of the Danube, and levy tolls to pay the expenses of making and keeping the river clear. This commission was expected to cease in two years, when a permanent river-rain commission was to regulate the navigation of the river:

Held, the European commission had no power to issue provisional regulations as to the navigation of steamers in the river:

Held, further, that such regulations were not valid merely because Turkey was one of the powers represented, and the river traversed the state of Turkey.

Where a steamer ascends a river with a strong current, common prudence requires that she should place herself out of the strength of the current, so as to allow full swing to the descending vessels.

This was an appeal from a decision of the Supreme Consular Court at Constantinople, affirming a judgment of the Consular Court at Galatz, in a suit by the apps. the Imperial Royal Privileged D^r

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bian Steam Navigation Company, against the resps. the Greek and Oriental Steam Navigation Company, to recover damage for a collision between the steamers *Mars* and *Smyrna*, their respective properties.

The plts. put in evidence, subject to objection by the defts., certain regulations, dated the 27th June 1860, made by the European Commission of the Danube, appointed under the 16th article of the Treaty of Paris of 1856, but not by the Riverain Commission, which, by the 17th article of the treaty, is empowered to make regulations for the navigation of the Danube.

The European Commission consisted of commissioners from Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey (but Bavaria, Wurtemberg and the Danubian Principalities were not represented on that commission); and, according to the provisions of the Treaty of Paris, the Riverain Commission, which was to be a permanent body, should consist of the delegates of Austria, Bavaria, Turkey and Wurtemberg, together with commissioners from the three Danubian Principalities approved of by the Porte.

The plts. further proved that the foregoing regulations of the 27th June 1860 were published at Sulina on the 24th Aug. 1860, but no evidence was given of any publication at the other places mentioned in the 44th article of the Treaty of Paris.

It was proved that at the time of the collision the master and pilot of the *Smyrna* were not aware of the so-called regulations of the European Commission; and it was further proved that such regulations were not generally known to the Danube pilots.

The defts. put in evidence the Treaty of Paris of 1856.

The Consular Court, on the 30th Sept. 1861, decided in favour of the defts., the *Smyrna*, giving credit to her statements, and holding that the regulations of the European Commission were *ultra vires*, and not binding.

The Supreme Consular Court, on appeal, affirmed the judgment on the same grounds, and adding the further ground that even if the regulations of the European Commission were valid, yet they had not been duly published. The *Mars* appealed from that judgment.

The *Attorney-General* (Palmer), *Bovill*, Q.C., and *Archibald*, for the apps., contended that at the time of the collision the regulations laid down by the European Commission were binding on all persons navigating the Danube, and by the 7th regulation the resps. were to blame; moreover, they were, independently of those regulations, guilty of negligence.

Lush, Q.C. and *Honyman*, for the resps., contended that the commission had not power to make the regulations in question, nor were the regulations properly published; and even if they were binding there was no negligence in the resps.

Cur. adv. vult.

LORD CRANWORTH.—Both the parties in this appeal were owners of steam-vessels navigating the Danube. The name of apps.' vessel was the *Mars*; that of the resps. the *Smyrna*. On the 6th Nov. 1860 the *Mars* was coming empty, or nearly empty, down the river, and the *Smyrna* was ascending it with a cargo, besides two vessels which she had in tow, one an English brig lashed to her port side, the other an Austrian vessel towed astern. At about twelve miles above the Sulina mouth of the Danube the river in its descent makes a sudden bend or sweep to the right, at nearly a right angle; concave, therefore, on the left, or, as it is designated, the *Russian side of the river*, and convex on the right or *Turkish side*. The reach for some miles above this bend is called the *Tavola di Ciamburla*, that below

it the *Tavola di Greco*. On the 6th Nov. 1860, at about half-past six p.m., it being then calm and moonlight, the *Mars* descending the river and the *Smyrna* ascending it, came into violent collision close to the Turkish side in the *Tavola di Greco*, a little below the point where the river makes its bend. The result was very disastrous. The *Mars* was nearly cut in two by the stem of the *Smyrna*, and she almost immediately sank. On the 23rd Jan. 1861 the apps. presented their petition to the Consular Court at Galatz, alleging that their vessel had been destroyed owing to the fault of the *Smyrna*, and praying the court to condemn the owner of the *Smyrna* to pay them a large sum, exceeding 42,000 Austrian ducats, by way of compensation for the loss they had sustained. The admission of this petition was opposed by the resps.; but, on hearing arguments on behalf of each party, the Consular Court admitted the petitions, and on the 17th Sept. 1861 declared that the issue to be tried was, whether the collision was caused by the fault or neglect of the *Smyrna*, and to this issue the parties agreed. The court then immediately proceeded to the trial of this issue, which lasted many days, and on the 30th Sept. 1861 the Court pronounced its judgment in favour of the resps., "being of opinion and deciding that the collision between the steamers *Smyrna* and *Mars* was not caused by the fault or negligence of the *Smyrna*." At the trial the captains and many of the crews of both vessels were examined, as well as several pilots and other persons who were considered qualified to throw light on the subject, and much documentary evidence, including, among other things, the General Treaty of Peace signed at Paris on the 30th March 1856, and also certain provisional regulations for the navigation of the Danube between Isatcha and Sulina, made by a commission appointed under the provisions of that treaty of peace, for clearing the mouth of the Danube from sand and other impediments. The Consular Court refused to attribute any binding force to these regulations, and gave its judgment on the merits of the case as if no such regulations had ever been made. The apps. were dissatisfied with this decision, and appealed from it to the Supreme Consular Court at Constantinople, where the case was argued by the learned counsel on both sides. The appeal failed; the Supreme Consular Court having concurred with the court at Galatz, both as to the invalidity of the new regulations and as to the merits of the case. From the latter decision the owners of the *Mars* appealed to Her Majesty, and the appeal was heard at great length before the Judicial Committee on the 23rd and 24th June last, and their Lordships are now prepared to state the conclusions at which they have arrived. The first point to be considered is, whether the apps. are right in their contention as to the effect of the regulation made on the 27th June 1860 as to the navigation of the Danube between Isatcha and Sulina. They contend that under the General Treaty of Peace of 1856 these regulations had the binding force of law on vessels navigating this part of the Danube. Whether they are warranted in so contending depends on the effect of the 15th and following articles of the treaty of peace. The 15th article begins by putting the Danube with respect to the rights of persons using it for purposes of navigation, in the same category as the in which the other great European rivers separate or traversing different states were placed by the Congress of Vienna. And then, it provides that navigation shall be subject to no impediment or charge not thereafter provided for, and that the regulations of police and quarantine to be established for the safety of the states separated or traversed by that river, shall be so framed as to facilitate the passage of vessels. The general objects of the parties to the treaty of peace having been thus laid

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down, the 16th article provides that a commission, in which Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey, should each be represented by one delegate, should be charged to designate and cause to be executed below Isatcha the works necessary to clear the mouths of the Danube, as well as the neighbouring parts of the sea, from sands and other impediments; and power was given to them to establish fixed duties to be levied in order to cover the expenses of the works as well as of the establishment intended to secure and facilitate the navigation at the mouths of the Danube. This commission, called in the treaty the European Commission, was to be temporary, the object being that it should endure only so long as the works with the execution of which it was charged were in progress; but the 17th article provides for the establishment of another commission, called the River or Riverain Commission, which was to be permanent, its duties being, first, to prepare regulations of navigation and river police; secondly, to remove all impediments which prevented the application to the Danube of the arrangements of the Treaty of Vienna; thirdly, to order and execute all necessary works through the whole course of the river; and fourthly, after the dissolution of the European commission, to see to the maintaining of the mouths of the Danube in a navigable state. The commissioners, who were to constitute this permanent commission, were to consist of delegates, not like the European Commission, from the great European powers, but from the states traversed by or bordering on the river along its whole line. Austria, Turkey, Bavaria and Wurtemberg were each to send one delegate, and there were to be commissioners from the three Danubian Principalities, to be approved, however, by the Porte. The 18th article, after stating that it was understood that in two years the European Commission would have completed its task, and the River Commission would have finished its duties under the first and second heads mentioned in the 17th article, proceeds to declare that the parties to the treaty would, after having been informed of that fact, pronounce the dissolution of the European Commission, from which time the permanent River Commission should enjoy the same powers with which the European Commission had been, up to that time, invested. It may be collected from the evidence that the European Commission was duly constituted; but there is nothing to show what works it executed under the powers conferred on it by article 16 of the treaty. On the 27th June 1860 the European Commission issued a document entitled, according to the English translation of it published afterwards in the *London Gazette* of the 10th May 1861, "Provisional Regulations for the Police of the Navigation on the Lower Danube between Isatcha and Sulina," in which part of the river it may be observed both the Tavola di Ciamburla and the Tavola di Greco are situated. These regulations were forty-five in number, and the seventh is in these words:—"Article 7th. When two steam-vessels, or two sailing vessels, sailing with a favourable wind, meet whilst proceeding in different directions, the one ascending stream must steer towards the left bank, and the vessel descending towards the right bank. Any captain or master breaking these regulations will be absolutely responsible for all accidents which may result. He is bound besides to give the signals prescribed by articles 8 and 9 following." The apps. contend that this regulation was binding on the *Smyrna*; that in ascending the river she ought therefore to have kept on the left or Russian side of the river; that she did not do so, but, on the contrary, crossed over to the right or Turkish side; and so that the collision

was wholly attributable to her neglect in not attending to the new regulation. The force of this argument depends on the question whether the European Commission had authority to make this regulation; and we are clearly of opinion that it had not. No functions were confided to that commission, except those of designating and causing to be executed the works below Isatcha necessary for clearing the mouths of the Danube and the neighbouring parts of the sea, and it is impossible to bring these provisional regulations within the scope of those functions. It was indeed argued that the mode in which vessels should navigate the river, where works were in progress, might be very important with reference to the due carrying on of those works, and that the commissioners must therefore, by necessary implication, be considered to have authority to prescribe such regulations as might assist them in the discharge of their proper duties. It is not necessary to consider how far this argument is sound, for there was no evidence as to any works being in progress to which the regulations promulgated would apply; and indeed, looking to the whole document, it was plainly intended to have reference to the general convenience of vessels navigating the Danube between the sea and Isatcha, and not to any special provisions rendered necessary by works then in progress. It is true that the regulations are described as "provisional," but that evidently had reference, not to any temporary circumstance connected with the clearing of the river's mouth, but to the fact that no such regulations had yet been made by the Riverain Commission. The European Commissioners probably felt that such a code as they promulgated would confer a great benefit on persons navigating the Danube. Whether this were so is a point on which we have no means of forming an opinion. All we can say is, that they certainly had no authority to issue such a code, and the regulations are therefore void. It was next contended that, even if the commissioners as a body had no power to make these regulations, yet that inasmuch as Turkey was represented in the commission, the regulation would have validity as emanating from the sovereign of the state traversed by the river. To this reasoning, however, we cannot accede. Turkey concurred with the other great European powers in naming commissioners by whose acts in performing certain defined duties she agreed to be bound, but it is impossible to hold that she is bound by the acts of her commissioner done beyond the scope of his commission. This is so clear that it becomes unnecessary to consider whether political relations subsisting between the Danubian Principalities and the Porte do not make it impossible for her, though enjoying a sort of suzerainty, to frame regulations for the navigation of the Danube without their consent. The necessity of such concurrence may perhaps be inferred from the express provision in the treaty of peace that no permanent regulations for navigation of the river can be promulgated without the concurrence of commissioners from the Principalities. We do not dispute the proposition, that such a code of navigation rules as was embraced in these regulations might, even though not emanating from any competent authority, by long usage or well-recognised practice, obtain the force of law. But there was certainly no usage or practice at the time when this collision occurred. On these grounds we are of opinion that this case must be decided on the laws and practice of navigation on the Danube as they existed before the publication of these regulations, and it is unnecessary for us to consider whether there had or had not been such a publication of them as was required in order to give them validity if there had been authority in the

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European Commission to make them. Looking then to the case, independently of the new regulations, and recollecting that the question is, whether the collision occurred through the fault or negligence of the *Smyrna*, the first question is, in what position ought she to have placed herself when she first became aware that she was meeting the descending steamer? The current at the part of the river between the two reaches is described on all hands as setting strongly towards the Russian or concave bend of the river, and not only the numerous pilots called by the resps., but also the English naval officer, Lieut. Crozier, who had been for two years on the Danube station, state it to be their opinion that a steamer ascending the stream at night, and being about to meet a steamer descending the river at the bend in question, ought to place herself on the right or Turkish side. The reason for this is obvious. The descending vessel will of course be moving with great velocity, and must also of necessity be carried, more or less, into the concave bend of the stream, where the current is much stronger than on the opposite or Turkish side. Prudence, therefore, must dictate what the great bulk of the evidence shows to have been the practice, namely, that in such circumstances the ascending vessel ought to place herself out of the strength of the current, in order to allow full swing to the descending vessel, which must necessarily be hurried along by its force. The naval officers whose assistance we had as assessors, informed us that, independently of any special regulations, this would obviously be the course which ought to be pursued. Indeed, they thought that no regulations for the general navigation could properly be so construed as to oblige an ascending vessel, at night, to prosecute her course on the left bank, at the bend of the river near which the collision occurred. Common prudence would require her to place herself out of the strength of the current. This brings us to consider what, in fact, was the position of the *Smyrna* at and immediately before the collision. On this point there is a conflict of evidence. The captain of the *Mars* deposed that this vessel was descending on the right or Turkish side of the river, and that the *Smyrna* was ascending the river on the left or Russian side, and that whilst the *Mars* was thus keeping the Turkish side, the *Smyrna* crossed over from the opposite side, and while she was across the stream, with her bows pointed towards the Turkish beach, ran into the *Mars* at full speed, striking her at the fore part of the port paddle-box. This was the account of the relative position of the vessels given by the master of the *Mars*; but the evidence of the master of the *Smyrna* was very different. He says that he was ascending the river on the Russian side, but that seeing across the land the *Mars* descending, being then about a mile and a half or two miles off, he, after consulting his pilot, crossed over to the Turkish side, and was proceeding up the stream in a line parallel to and distant about two ship's breadths from the bank, when he saw the *Mars* round the point close over on the Russian side; that she then crossed over to the Turkish side, and so came into a position in which the *Smyrna* unavoidably came into collision with her, catching her at the port paddle-box. If this latter account of the accident be the true one, it is impossible to say that the plt. has made out what, according to the issue on which both parties had agreed, he had undertaken to prove, namely, that the collision was caused by the fault or negligence of the *Smyrna*. She was, according to this evidence, steaming up on the side of the river on which the evidence satisfies us she ought at that point to have been when meeting a descending vessel. The question therefore is, which of these two accounts

of the accident is entitled to credit? Two successive courts, after long and elaborate arguments, have decided in favour of the resps., the judge of one of these courts having had the advantage of seeing and hearing the witnesses themselves. It would, therefore, be a strong thing to reverse such judgments on the facts of the case. It would be improper to do so unless it could very clearly be seen that a wrong result had been arrived at. So far, however, is this from being the case, that the weight of evidence seems to preponderate greatly in favour of the resps. The accounts which the resps.' witnesses gave as to the lights of the *Mars* which they saw from time to time, is in exact conformity with what they must have seen if their account of the collision is true. Hughes, the master, and Creak, the second officer of the *Smyrna*, both say that at the moment when the *Mars* rounded the point, they saw her mast-head light and her green light, that they then suddenly saw all three lights, the red, the green and the white, and in a few seconds shut in the green. This is exactly what would have happened if the *Smyrna* was, as these witnesses swear she was, ascending the river on the Turkish side; and if the *Mars*, descending at a rapid rate, swung round the point up to the concave bend on the Russian side, and from thence crossed over to the Turkish side. It may further be observed, that the evidence given by the captain of the *Mars* as to what he saw of the lights of the *Smyrna* is scarcely to be reconciled with the facts of the collision as put forward by the apps. He says, that before the collision they lost sight of the red light of the *Smyrna*. This could hardly have happened if the *Smyrna* had been, as the captain says she was, across the stream, with her bows pointed to the Turkish bank. But, on the other hand, if the *Smyrna* was ascending the river parallel and close to the Turkish bank, then it might well be that, just before the collision took place, the red light of the *Smyrna* would be shut out from the *Mars*. Their Lordships do not forget that the evidence of Abramovich, the pilot, and of Busdan the steersman of the *Mars*, on this point is a variance with that of the captain. They say that they continued to see all the three lights up to the moment of the collision. This discrepancy shows at all events, without imputing to the witnesses dishonesty, that they cannot be implicitly relied on for their accuracy. On one important point, at least, they are not agreed. And it is more probable that in the confusion and terror of the collision these two witnesses should have forgotten, or failed to observe, a change in the lights of the *Smyrna* than that the captain should have imagined that he discovered such a change if no such change occurred. The judge of the Supreme Consular Court at Constantinople points out several discrepancies in the testimony of the witnesses called on behalf of the *Mars*. The captain says, and several of the crew confirm him, that he called out to the *Smyrna* to keep to his right ("Tenetevi alla dritta—alla dritta.") But one of the seamen, Haiduco, deposes that the words uttered by the captain were not "alla dritta," but "alla sinistra," and that he understood them to be addressed to the *Smyrna* by the way in which the captain waved his hand. There are other minor discrepancies pointed out in the judgment. Their Lordships, however, are not inclined to attach much weight to them. It is possible they may be the result of a want of truth in the witnesses. It is, at least, as possible that they may arise from imperfect observation and recollection of what took place at a moment of great peril and confusion. But what their Lordships have to consider is, whether the evidence adduced by the apps. is such as to establish what they were bound to make out, namely, that the collision was occa-

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the fault or negligence of the *Smyrna*. It was incumbent on them to show that imony given on behalf of the owners of *Jane* was more trustworthy than that given on behalf of the *Smyrna*. This they failed to do. It might have been the result if they had their Lordships that the new regulations issued by the European Commission in 1860 the rules of navigation by which this case be decided, it is unnecessary to say. Even naval gentlemen who assisted their Lordships strongly inclined to think the course by the *Smyrna* was the proper course. But, we have already given our opinion that those regulations had no binding force, their Lordships only look to the same arguments and positions on which the Consular Court at London and the Supreme Consular Court at Constantinople rested their judgments. With the consideration at which those courts arrived their Lordships, and they must therefore advise Her Majesty that this appeal should be dismissed, with

Decree affirmed.

solicitors, *H. R. Hill and Son.*

solicitors, *Thomas and Hellams.*

—The Right Hon. Lord KINGSDOWN,
BRUCE, L. J. and Sir J. ROMILLY, M. R.)

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Collision—New sailing rules—Steamer meeting sailing vessel.

Steamer met the J. sailing vessel on the Atlantic night. The J. on first seeing the G. was two miles distant, and then ported her helm:

in conduct of J. being contrary to the 18th regulation, she was to blame for the collision, as she materially contributed:

rather, that the G. was also to blame for not increasing her speed in thick weather.

Steamer on meeting a sailing vessel is bound to slacken speed so as to make it possible, having regard to the state of the weather, to avert a collision.

was an appeal from the High Court of Admiralty of England.

The respondents were the Great Ship Company (Limited), owners of the steamship *Great Eastern*.

The appellants were shipowners of Liverpool, the owners of the late British ship *Jane*.

Court of Admiralty the respondents sued the appellants to recover damages for the loss of their ship, caused by a collision with the *Great Eastern*.

The collision took place about 2.15 a.m. of the night of the 18th of June, 1863, in the Atlantic Ocean, in latitude 41° 11' N. longitude 14° 11' W.

The *Jane* was a sailing ship, of 775 tons burthen, and at the time of the collision was bound from London to Quebec. She was sailing on the port tack.

The *Great Eastern* was on a voyage from New York to Liverpool with a general cargo and passengers.

She was going, according to her own log, at least 12½ knots an hour in thick weather and did not observe the *Jane* until very close to the collision, and failed altogether to give light of the *Jane* which was towards her, and, it was proved, was brightly burning.

The circumstances it was contended on behalf of the respondents, plaintiffs, in the court below, that the *Jane*, whose duty it was by the 15th article of the regulations to "keep out of the way," was to blame for the collision.

The respondents, plaintiffs, in the court below, on the other hand contended that the *Jane* was to blame in not having kept her course as prescribed by the 18th article. The respondents, plaintiffs, in the court below, gave evidence that the *Jane* did keep her course as long as it was reasonable and proper she should so do, and that her helm was only ported at last in order to avoid immediate danger, and especially to save life; and this question was, with the other questions, very clearly submitted by the learned judge in his summing up to the Trinity Masters.

The following were the regulations bearing on the case:

15. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

18. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article.

19. In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger.

The learned Judge, assisted by the Trinity Masters, found that the *Great Eastern* was solely to blame for the collision for going too fast, and not keeping a good look-out, and condemned her in damages.

Dr. LUSHINGTON (after adverting to other matters) made these observations as to the new rules:—Let us now see, with reference to these circumstances, how far the new sailing and steering rules apply, and as to the application of these rules to night navigation. I would observe, that the mere discovery of a strange light does not necessarily immediately bind a person in charge of a vessel to follow any particular rule, but as soon as he has opportunity of ascertaining by reasonable care and skill what the strange vessel is, and what course she is pursuing, then the rule which is applicable to the circumstances at once becomes binding upon him. Now, article 15 says: "If two ships, one of which is a sailing ship, and the other a steamship, are proceeding in such directions as to involve risk of collision"—that is to say, where there is a probability a collision would take place if both proceeded on their respective courses, then—"the steamship shall keep out of the way of the sailing ship;" she must keep out of the way, but may do so according to circumstances, either by porting or starboarding, all former regulations and rules being repealed. This article intimates, but does not define, the duty of the sailing ship, but the 18th article prescribes, "Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article." The purpose of this article is obviously this, that as an obligation is imposed on one vessel, say vessel A, to keep out of the way, with liberty to carry out that obligation either by starboarding or porting, the other vessel, vessel B, is directed to keep on her course, so that she may not interfere with any course or measure taken by vessel A. That brings us directly to the consideration of the present case. The *Jane* sees the white bright light of the steamer, and she sees that bright light approaching. If you are of opinion, looking at the facts of the case, that she unnecessarily ported, and contributed therefore to the collision, you will hold the *Jane* to blame; but there is a great deal to be said before we arrive at that conclusion. There is a qualification here of great importance, "subject to the qualifications contained in the following article" (article 19): "In obeying and construing these rules, due regard must be had to all dangers of navigation." Now, when a steamer is approaching a sailing vessel on such a course as would involve the risk of collision

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sion, how long is the sailing vessel to keep quiet and do nothing to avoid it? That she ought not hastily and without strong reason to deviate from the direction of keeping her course, we shall all agree; but under what circumstances for the salvation of life, or for the safety of the ship, such deviation may be allowed, is a question for your consideration generally, and more particularly under the given circumstances of this case. The 19th article then goes on to state, "and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary, in order to avoid immediate danger." Then, bearing this qualification in mind, let us consider what the evidence is with regard to the conduct of the *Jane*. I am sorry to say it is involved in some obscurity, but in this case, as in all others, we must not hastily depart from the statements which we find in the preliminary acts. Did or did not the *Jane* for a certain length of time continue her own course unchanged, and when she altered her helm, was it at a time of danger, was the danger imminent, was the measure taken for the sake of saving the lives of the persons on board?

The *Great Eastern* appealed against the decree.

James, Q. C., Hannen and Pritchard, for the apps., contended that the evidence showed the *Jane* did not keep her course as required by the 18th regulation, and so neutralised the navigation of the apps., which would have sufficed to avoid the *Jane*, if that rule had been observed.

Brett, Q. C. and Lushington for the *Jane*.

LORD KINGSDOWN.—The collision in this case took place in the Atlantic Ocean on the 18th September last, about 200 miles west of Cape Clear. The *Jane*, a vessel of 775 tons, was close hauled on the port tack, heading north-west, and making seven knots per hour. The *Great Eastern* is a steamship of unusual size, of 13,344 tons burden. She was heading east by south half south, going at full speed under both steam and sail, and making about thirteen knots per hour. The wind was west-south-west. The collision took place by the starboard-bow of the *Great Eastern* striking the port bow of the *Jane*. Two men on board the *Jane* were killed by the collision or falling of the spars. The rest of the crew escaped on board the *Great Eastern*. The blow was angular; that is, at the moment they were both going nearly in the same direction. The *Jane* was not sunk by the first collision; but she was, by it and the subsequent grinding down and rolling of the *Great Eastern*, reduced to a wreck and abandoned. The case comes within the new regulations issued in Jan. 1863. By those regulations it was the duty of the *Great Eastern* to slacken her speed, to stop and reverse her engines, and, if the weather was foggy, to go at a moderate speed. It was also the duty of the *Great Eastern* to keep out of the way of the *Jane*, and, by art. 18, where by the above rules one of two ships is to keep out of the way, the other shall keep her course subject to this qualification, that these rules need not be followed in any special circumstances which may render a departure from them necessary in order to avoid immediate danger. In this state of circumstances the duty of the *Jane* was to keep her course without alteration, unless the collision was so imminent when the *Great Eastern* was discovered as to render a departure from the above rules necessary for the purpose of avoiding danger. Both vessels were carrying their proper lights. This is disputed on behalf of the *Great Eastern*, which contends that if the *Jane* had carried her proper lights they would have been observed on

board the steamer, which they were not; but, as the evidence on behalf of the *Great Eastern* states only a bright light was seen, as if a lantern had been shown over the side of the vessel. In answer to this, on behalf of the *Jane*, it is replied that there could not have been a good look-out on board the *Great Eastern*, or that the red light of the *Jane* would have been observed. The evidence is distinct on behalf of the *Jane* that the lights were properly fixed and duly trimmed, and if they were not seen on board the *Great Eastern*, it appears to their Lordships that this could only have arisen from the circumstance, either that the look-out was not sufficient, or that the state of the weather prevented their being observed. Their Lordships first proceeded to consider the evidence relative to the *Jane*, for the purpose of ascertaining whether she adopted the course which, having regard to the position of the vessels and the new rules, it was her duty to take. It is established by the evidence that the white light of the *Great Eastern* at the foremast head was the light first seen by Andrew Mathie, one of the look-out men on board the *Jane*, states that he first saw the white light, and that he did not see the green light till they were about twenty or thirty yards off. William Phillips, the mate of the *Jane*, saw first a mast-head light, a bright light, and he did not see the green light until after he had given the order to port the helm. Verso, the man at the helm, saw one light and afterwards saw the green light. Law, the other look-out man, saw only one light, did not distinguish the colour, but thinks that it was about two or three miles off. Their Lordships consider it to be clear that the masthead light of the steamer was the light so seen. The distance it was off when first seen is variously stated. Phillips thinks it was about a mile and a half, but he corrects this in his answer to the next question, and says, from two or two and a half miles. Law thinks that it was about two or three miles. The other witnesses give no statement on this subject. Their Lordships consider that the distance at which the masthead light of the steamer is off when first observed, unless quite close, must be mere conjecture. Except the brightness of the light, the only indication is the angle above the horizon at which the light is seen and a more distant light might present the same angle as a nearer light if the elevation of the distant light were greater; and if the more distant light were in fact brighter than the nearer one, it might present the same appearance of distance. The only other criterion of distance is the time which elapsed before the collision took place; this is also necessarily vague, from the imperfection of the recollection of men under such circumstances, when anxiety of mind and the rapidity of events, crowded into a short space of time, have a natural tendency, on recollection, to make the time seem longer than it really was. On this point, however, there is much agreement in the evidence of the witnesses on board the *Jane*. John Law says, "It was about a quarter of an hour from the time we first saw the light till she struck." Andrew Mathie says: "Somewhere about ten minutes, to the best of my idea; between ten minutes and a quarter of an hour. It would be about nine minutes or so from the time when I reported the white light until I saw the green light." This estimate of time agrees well with the evidence given on behalf of the *Great Eastern*, which put the time which elapsed between the first observation of the *Jane* and the collision at about five minutes, it being obvious that the masthead light of the steamer would have been discerned on board the *Jane* a considerable time before from the deck or paddle-box of the steamer the light on the bows or the deck of the *Jane* could be observed. Phillips does not

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appear to have been asked the time which elapsed between the first observation of the light on board the *Great Eastern* and the collision taking place. As, however, the vessels were approaching each other at the rate of a mile every three minutes, the nine or ten minutes spoken of by the two witnesses Law and Mathie would agree with the evidence which puts the vessels at from two to three miles off when the *Great Eastern* was first seen on board the *Jane*. To arrive at the satisfactory conclusion as to the answer to be given to the next question is very important. Did the *Jane* on first observing the *Great Eastern* port her helm, or did she not do so till after the green light of the *Great Eastern* was observed, when it is admitted on both sides that it was proper to do so in order to save the lives of all on board? If the *Jane*, on the first observation of the masthead light of the *Great Eastern*, was ten minutes off, and from two to three miles distant, and if she then ported her helm, she was in the wrong, and acted contrary to the 18th article of the new regulations, which has been already mentioned. The evidence of Phillips, the mate who had charge of the vessel, on first examining it, seems to be confused and contradictory on the point. He says, "When I first saw it, I should say it was about a mile and a quarter." He is asked, At the time you gave the order could you see the other ship, or could you only see the light?—I could not see her green light then. Did you see the green light before you gave the order or not?—I never saw the green light till after I had given the order. Again, You say that after you had given the order to put the helm hard a-port, you saw the green light of the other vessel; is that so?—Yes. In cross-examination he says, "We ported our helm for the safety of our lives." In re-examination he says expressly that he ordered the helm to be put hard a-port after he had seen the green light. Now I want you to clear one thing which you answered in several ways, unfortunately. You have told me that you first saw the bright light?—I did. And that you watched it for some time?—Yes. Now tell me—just take time to consider about it—did you order your helm hard a-port before or after you saw the green light?—After I had seen the green light. How long was it after you had seen the green light that you ordered your helm hard a-port?—About a minute; or perhaps not so much. On examination of his evidence it does not appear that he was asked whether he gave two orders to port the helm or only one. If he gave two orders to port the helm, one when he first saw the masthead light of the *Great Eastern*, and afterwards gave a second order to put the helm hard a-port after he had seen the green light of the *Great Eastern*, this would make his evidence on cross-examination and on re-examination consistent with his evidence in chief which has already been referred to; and this appears to be the true solution of the apparent contradiction in his evidence. The clue to this solution is furnished by the evidence of Verso, the helmsman, whose evidence is quite positive and distinct on this subject. Was she sailing close hauled?—Yes; close hauled, laying north-west. Do you remember, shortly before the accident happened, getting an order from the officer of the watch?—Yes. What was that order?—To port the helm. Did you obey that order?—Yes. Did you get any order from the officer?—Yes; hard a-port a few minutes afterwards. Did you obey that order?—Yes; and the mate assisted me in putting the helm hard a-port. This explains that the evidence of Phillips respecting the order given by him after seeing the green light applies to the second order he gave to put the helm hard a-port, and which was subsequent to the former order he had given to the same effect,

and it also explains other parts of his evidence which relate to the stamping for the captain, and assisting Verso to put the helm hard a-port. It does not appear, in his evidence, that he anywhere says that he kept on his course until the green light of the *Great Eastern* was visible. In the preliminary act, filed in pursuance of the orders of Nov. 1859, the twelfth article of the statement on behalf of the owners of the *Jane* is in these words: "Upon the bright light being observed, and before the green light was seen, the helm of the *Jane* was put hard a-port." This statement was made 24th Oct. 1863, within six weeks after the collision had taken place, and while the facts were fresh in the memory of the witnesses. It agrees with the evidence of Verso, and also with the evidence of Phillips when so examined as to make it consistent with itself. The conclusion to which their Lordships have come is, that the evidence given on behalf of the *Jane* is not inconsistent with the statement made on her behalf in the preliminary acts, and that the case is taken out of the rules laid down in the report of the *Inflexible*, Swab. 35, and *Vortigern*, Swab. 518, referred to in the argument. If the view which their Lordships have taken of the evidence on behalf of the *Jane* be correct, it establishes the facts that the course of the *Jane* was in violation of the 18th article of the new regulations, and this violation, in the opinion of the nautical gentlemen by whom they are assisted, has materially contributed to the collision which took place. These gentlemen are of opinion that if the *Jane* had been kept on her course, hauling her a little closer to the wind, and thereby diminishing her speed, instead of falling off and thereby increasing her speed and accelerating the rate of approximation to the *Great Eastern*, the collision would have been avoided. Their Lordships, therefore, have come to the conclusion that the *Jane* was to blame in this case. Their Lordships, however, concur with the court below in considering that the *Great Eastern* was also to blame. Without expressing any opinion on the point whether the look-out on the *Great Eastern* was or was not sufficient, their Lordships consider it to be proved that the lights of the *Jane* were properly fixed and brightly burning. In truth this seems scarcely to have been capable of being contested on the evidence adduced. If the *Great Eastern* had a proper and sufficient look-out, the port light ought to have been seen, unless the state of the weather rendered it impossible to do so. What the light was which was first observed by the *Great Eastern*, assuming the evidence given on behalf of the *Great Eastern* to be completely accurate, it is difficult to explain. Their Lordships cannot admit the suggestion offered to them in argument, that it was the cabin light of the *Jane* seen from the *Great Eastern* impending over her just before the collision, and that it was first seen at the time when Phillips heard a bell on board the *Great Eastern*, and when the two vessels were within hailing distance, and when Phillips was desired to port his helm, and answered that it had been hard a-port a long time ago. The evidence is distinct, that the light was seen five minutes before the collision occurred. The evidence on both sides evinces that the way of the steamer was much diminished at the time of the collision, and that she was then going very slowly through the water. This is also confirmed by the evidence of the character of the collision. After they had struck, the *Jane* swung round under the starboard sponsors of the steamer, and, to use the expression of the mate of the *Jane*, "then she rolled and smashed our ship up, the *Great Eastern* sponson rolled into us." If the *Great Eastern* had not greatly diminished her speed, their Lordships are assured by the nautical gentlemen that she would have gone right over

the barque and away from her; and they are also assured, as, indeed, is sufficiently obvious, that if the first intimation of the proximity of the vessels had been at that time when the occurrence of the collision was obviously unavoidable, it would have been impossible to have diminished the speed of a vessel of the size and momentum of the *Great Eastern* in the time which elapsed before they actually struck. Their Lordships, however, are of opinion that the collision was, in a great measure, attributable to the state of the weather and the rate at which the *Great Eastern* was proceeding, which was not, in the opinion of their Lordships, justifiable in the circumstances. The rate at which she was proceeding is stated in the preliminary act as twelve knots per hour: the evidence states that, by the log, it was fifteen knots, and after allowing two knots for the current produced by the paddle-wheels, the rate cannot properly be put to less than thirteen knots an hour when the paddle-engines and the screw-engines were working full power and every sail was set that could be set to accelerate her pace. At the same time the state of the weather was this: in the preliminary act, on behalf of the *Jane*, it is stated to have been thick with showers of rain, and on behalf of the *Great Eastern*, dark and raining. The witnesses on both sides state that it was a dark night, hazy weather, and that a drizzling rain was falling. Their Lordships do not mean to lay down any rule beyond that expressed in the regulations themselves as to the occasion when a steam-vessel is bound to moderate her speed, or as to the rate which in the circumstances described in the evidence she ought not to exceed: but their Lordships are of opinion that it is the duty of the steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place. Here the evidence shows that from the moment the *Jane* was reported on board the *Great Eastern* everything was done to avert the collision, but without success. If the *Jane* had been wholly in the right, and by pursuing her course properly had been in the spot where the collision took place, the rate of speed at which the *Great Eastern* was advancing would have rendered their contact inevitable. Their Lordships are of opinion that it was the duty of the *Great Eastern* to proceed at no greater speed than having regard to the state of the weather, made it possible for them to avert the collision. Their Lordships, therefore, are of opinion that both vessels were to blame, and that the collision is attributable to both. That the *Jane*, by not holding on her course when she first saw the masthead light of the *Great Eastern*, got into a position which brought her directly against the *Great Eastern*; and that the rate of speed at which the *Great Eastern* was advancing made it impossible for her when she first observed the *Jane* to avoid the catastrophe which occurred. Their Lordships will humbly advise Her Majesty that the judgment of the court below be altered accordingly.

Judgment varied.

Apps.' proctors, *Fritchard and Sons*.

Resps.' proctors, *Tebbs and Sons*.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barrist

Monday, Jan. 11, 1864.

REG. v. SILLEM AND OTHERS.

Foreign Enlistment Act (59 Geo. 3, c. 69), s. 1.
Instruction—Equipment.

By the *Foreign Enlistment Act (59 Geo. 3, c. 6)* is enacted that, "if any person within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, shall, without the licence of His Majesty first had and obtained, furnish, fit out, or arm, or attempt to equip, fit out, or arm, or procure to be equipped, fitted out, or armed, or shall knowingly aid, be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, foreign colony, &c., or of any person or persons, or assuming to exercise, any powers of government in and over any foreign state, colony, or part of any province or people, as a merchant ship, or with intent to commit hostilities against any prince, state, or potentate, or against the persons exercising, against the inhabitants of any foreign colony, or part of any province or country, or against His Majesty shall not be at war, or shall, in the United Kingdom, issue or deliver any commission, or shall employ any ship or vessel to the intent that such ship or vessel shall be employed as aforesaid, every person so offending shall be deemed guilty of a misdemeanor, and every such ship or vessel, with the tackle, arms, furniture, together with all the materials, ammunition and stores which may belong to or be on board any such ship or vessel, shall be forfeited."

An information, filed by the Attorney-General, against the owners, builders, &c. of the *Alexandra*, alleged that the ship was for the purpose of her having been built for the service of the Confederate States of America:

It was proved that she was fitted for use as a transport ship, but not for mercantile purposes, being of unusual strength, and having no place for stowage of a cargo; that her bulwarks were lower and less than in merchant ships, and that preparatory arrangements were made for placing hammock racks on the bulwarks, usual with men of war. But at the time when she was built there were no traces of fittings for guns. It was proved that she was built by order and under the authority of agents of the Confederate States, and it was admitted that she was not fitted for a transport ship.

At the trial before Pollock, C. B., his Lordship directed the jury, that if they were of opinion that the ship or builders had endeavoured to equip, fit out, or arm the ship in an English port, in such a manner as would prepare her to commit hostilities, with intent prohibited by the statute, they would find her to be at war; but not otherwise.

The jury found for the owners against the Crown. On a motion for a new trial on the ground of misdirection, it was

Held, by Pollock, C. B. and Bramwell, B., that the equipment of a ship under the above statute must be an equipment for the purposes of war; such an one as would enable her, on leaving the port, to commence hostilities, and that there was no such equipment in this case:

Per Channell, B., that the equipment prohibited by the statute is an equipment for war, but that even if the intent with which she is furnished is admitted to be the intent to commit hostilities, it does not follow that an equipment that would otherwise be peaceful is really designed for war.

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Per Pigott, B., That any act of equipping, done with the intent prohibited, is within the statute.

This was the case of the *Alexandra*: (see 9 L. T. Rep. N. S. 261, 835.)

Sir H. Cairns, Q.C., Karlake, Q.C., Mellish, Q.C. and Kemplay appeared for the defence.

The Attorney-General, the Solicitor-General, the Queen's Advocate and T. Jones on behalf of the Crown.

The following were the principal cases and authorities cited:

The Santissima Trinidad, 7 Wheaton's Supreme Court Reps. 283;
The Twee Gebroeders, 3 Rob. Ad. Rep. 162;
Moodie v. The Ship Brothers, Bee's Reps. 76;
 Alison's Hist. of Europe, pt. 2, vol. I, sect. 95;
 4 Canning's Speeches, 154;
Reg. v. Russell, 23 L. J. 173, M. C.;
Fortescue's Rep. 388;
Vattel, bk. 3, c. 7, ss. 110, 111;
Hall v. Green, 9 Ex. 247; 23 L. J. 15, M. C.;
De Witz v. Hendrick, 9 Moo. 588;
Harbutt v. Wise, 9 B. & C. 712;
Naylor v. Taylor, 9 B. & C. 718;
Medeiros v. Hill, 8 Bing. 231;
The Richmond, 5 Ch. Rob. 325, 331;
The Flad Oyen, 1 Ch. Rob. 144;
The William, 5 Ch. Rob. 395;
Gibson v. Service, 5 Taun. 433;
Stewart v. Gibson, 1 Rob. Scotch Ap. 260;
Gras Para, 7 Whar. 471;
Kent's Com. 117, 124, 152;
Martin's Treaties, vol. 6, ss. 386, 386;
The Alexa, 9 Cranch. Amer. 355;
The Estrella, 4 Whar. 309;
Teslerden on Shipping, 8th ed. 184;
Cruz v. Olivier, 2 Q. B. 304, 305;
Langton v. Hughes, 1 M. & S. 593;
The Mermaid, Lees Rep. 69;
The Brothers, Ib. 76;
United States v. Guinet, Whar. State Trials, 95;
United States v. Quincy, 6 Peters. 445;
United States v. Gooding, 12 Wheat. 460;
Gregory v. Tuffe, 1 C. M. Q. 310;
Elliot v. South Devon Railway Company, 2 Ex. 725;
Jonge Margaretha, 1 Rob. Ch. 194.

The facts and arguments are sufficiently stated in the course of the following judgments:

FOLLOCK, C. B.—This was an information against the ship *Alexandra*, charging that the defts., with others, had been guilty of a violation of the Foreign Enlistment Act in respect of that vessel. The ship *Alexandra* had been built and partly rigged at Liverpool, and had been seized on the 6th April by an officer of the Customs, on the ground of a breach of the 7th section of the statute. The defts. claimed the ship, and pleaded that the ship was not forfeited. The information charged them with every possible violation of the Act as to equipping, furnishing and fitting out, but omitted to charge anything as to arming. The cause was tried before me on Monday, the 22nd June, and three following days. The evidence for the Crown clearly established the warlike character of the vessel. It was not at all adapted for commerce, but was capable of being adapted for warlike purposes; and though it might have been used as a yacht, according to the evidence of Captain Aglefield, it was, in all probability, intended to be used by the so-called Confederate States as a vessel of war, when adapted for that purpose by them with suitable equipments and fittings-up being furnished; and if the making, in pursuance of an agreement or order for that purpose, with intention to sell and deliver to one of the belligerents, the hull of a vessel suitable for war, but unarmed, and not equipped, furnished, or fitted out with anything that enabled her to cruise or commit hostilities, or to do

any warlike act, be a violation of the Foreign Enlistment Act, my direction to the jury was wrong in point of law, the verdict ought to have been for the Crown, and there ought to be a new trial. But if the commerce of this country in ships, whether ultimately for peace or war, is to continue, and provided a ship leaves the ports of this country in no condition to cruise or to commit hostilities, though she may be of a warlike character, there has been no violation of the statute, then the verdict was right. And, in substance, this is the question between the Crown and the defts., stripped of all technicality. The condition in which the vessel, unfinished when she was seized, was intended to leave this country, was, perhaps, not perfectly clear; but there was no direct evidence that she was to be made (at Liverpool or in any other British port) fit to cruise or commit hostilities. I told the jury, in substance, that the sale of a ship was, in my judgment, perfectly lawful, even of a ship so constructed as to be convertible into a ship of war; that the sale of arms and ammunition, and every kind of warlike implement was not forbidden by any law, either international or municipal; and that I thought a ship capable of being used for war might be made and sold, as well as sold, if made, provided she did not leave a port of this country either armed or equipped, or furnished or fitted out, within the meaning of the statute—that is, with intent or in order to cruise or commit hostilities against a State or Power with whom her Majesty was not at war. There was no direct evidence that she was intended to be armed at any British port, with intent on the part of any of the defts., or, indeed, any one, to cruise or commit hostilities; indeed, there was no charge in the information on the subject of "arming" at all; and there was no direct evidence of any intention to equip, furnish, or fit out the ships with intent to cruise or commit hostilities, according to what, I think, is the true meaning of the charge in the information. I, however, left the question to the jury, in the terms of the Act of Parliament; and upon this direction, with the evidence before them, the jury found a verdict for the defts. In Michaelmas Term the Attorney-General applied for a new trial, and obtained a rule to show cause, on the grounds stated in the rule, why the verdict should not be set aside, and a new trial had. Cause was shown during the term, and the argument lasted six days. We have now to deliver the judgments of the various members of the court. It is material, I think, first to call attention to the various charges contained in the information, which consists of ninety-eight counts. The ninety-seventh and ninety-eighth relate to an intent to employ the ship as a transport or storeship. These counts were given up at the trial by the then Attorney-General. The remaining ninety-six counts consist of the first eight counts repeated twelve times, merely varying the offence charged. The first eight counts charge, that the defts. did equip; the next, that they did furnish; the next, that they did fit out, and so on; then all the varieties of attempting or procuring, aiding, &c., were introduced—making the total eight times twelve, or ninety-six. The Attorney-General, at the trial, said: "The first eight counts are those only to which any attention need to be paid" (not meaning to abandon the rest, but intimating that the first eight represented all the rest). I propose to state in substance what those eight counts are. The first count charges that the defts. (without the leave, &c.) did equip the vessel with intent and in order that such ship or vessel should be employed in the service of the Confederate States, with intent to cruise and commit hostilities against a certain foreign State with which her Majesty was not then at war—to wit, the Republic of the United States. The second count resembles the first, but charges

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that hostilities were to be committed against the citizens of the foreign State. The third count charges that the defts. did equip with intent to cruise and commit hostilities against a foreign State with which her Majesty was not then at war. The fourth count is similar to the third, varying the description of the parties against whom hostilities were to be committed. The fifth, sixth, seventh, and eighth are similar to the first and second, varying only the description in the first and second counts of the belligerent parties. The charge, therefore, resolves itself into a charge of equipping, &c., with a certain intent; the intent being stated in two different ways—or a charge of attempting, endeavouring to equip, or procuring, &c., to be equipped, with the same two intents in different counts. If what was intended to be done would not when done amount to an equipping, &c., within the Act, then there would be no attempting or endeavouring, &c., contrary to the Act. The question then arises, what is the true construction of the Foreign Enlistment Act, particularly of the 7th section of that statute, upon which the information in this case is framed; and what is the meaning of the words “equip, furnish, or fit out” in that section; and also what is meant by the expression, “with intent to cruise or commit hostilities.” It is a highly penal statute, creating a new crime or misdemeanor, making those who commit it liable to fine and imprisonment, if found guilty, and the ship (the subject of the crime) liable to forfeiture. The attempt or endeavour to commit the offence, or the procuring it to be committed, or the aiding, assisting, or being concerned in the committing it are all made criminal, and liable to the same punishment and forfeiture. In order to have a comprehensive view of the whole subject it may be useful to become acquainted with the history of the statute and of the Act of the American Congress which is said to have given rise to it. It may be useful also to learn what have been the opinions (differing, it may be observed, widely from each other) of learned jurists and eminent statesmen (not always agreeing) on the subject of international law, belligerent rights, and neutral duties; but none of these can furnish even the semblance of authority for construing an English Act of Parliament, which creates for the first time an indictable offence, rendering the party found guilty of it liable to fine and imprisonment, and his property liable to forfeiture; and it should be borne in mind that the property is not forfeited unless the crime has been committed. If the statute, in terms reasonably plain and clear, makes what the defts. have done a punishable offence within the statute, we want not the assistance which may be derived from what eminent statesmen have said, or learned jurists have written, on international law or belligerent rights, or even the decisions of American courts, to see whether the case before us is within the statute. But if not, no opinions of jurors, no decisions of foreign courts, will enable us, or ought to induce us, to declare that the scope and object, the spirit and intention of the Act, include the case before us, though it be not plainly and clearly expressed by the Legislature. We have had in this country no court of criminal equity, so Lord Campbell called the Star Chamber, in a case tried before him (*The Emperor of Austria v. Day*, 30, L. J. 706, Ch.), since that court was abolished. Blackstone, J. well lays down the rule in 1 Bl. Com. 92, that the freedom of our constitution will not permit that in criminal cases a power should be lodged in any judge to construe the law otherwise than according to the letter. Our institutions were never more safe, in my opinion, than at the present moment; but we must not lose any of the grounds of our security—no calamity would be greater than to introduce a lax or elastic interpreta-

tion of a criminal statute to serve a special but a temporary purpose. And here I may notice, in order to dispose of the argument of the Attorney-General about construing the statute (even a penal statute) so as to suppress the mischief and advance the remedy—he cited Plowden, and the resolutions in *Heydon's case*, 3 Rep. 18; but all the penal statutes alluded to are those which create some disability or forfeiture; none of them are criminal statutes; and I think it is altogether a mistake to apply the resolutions in *Heydon's case* to a criminal statute, which creates a new offence. The distinction between a strict construction and a more free one has, no doubt, in modern times almost disappeared, and the question now is—what is the true construction of a statute? If I were asked whether there be any difference left between a criminal statute and any other statute not creating an offence, I should say, that in a criminal statute you must be quite sure that the offence charged is within the letter of the law; in some other cases the statute is to be applied unless you are sure that the case is not within the law. As to this particular statute having for its object prevention, not punishment, which was pressed on our notice more than once, that is not a matter peculiar to this statute I apprehend that it has that object in common with all other criminal statutes that were ever passed which are all intended not to punish guilt but to prevent crime; and as to the recital that the existing law was not sufficient, to which our opinion was particularly called, I presume that recital really belongs also to every statute, whether mentioned in it or not, for if the law be sufficient, the statute is a piece of superfluous legislation. So also, I think we have nothing to do with the political consequences of our decision, or the dissatisfaction it may create in any quarter anywhere. And I cannot help here expressing my regret, not unmingled with surprise, that the learned Attorney-General has more than once adverted to the consequences that may arise from our holding that what the defts. have done is not contrary to our municipal law. That it is not contrary to the law of nations he has distinctly stated, and indeed made it the subject of an “argument in another place,” as they call it, “that other countries have no right to complain of it as a violation of the law of nations.” On the first day of his argument he pointed out how the supply of ships would work practically between a powerful country and a weak one; and he imagined this country at war with France, and the dockyards in Sweden supplying, fitting out, and equipping vessels of war for France; and he suggested that we might say, as he says we always have done in the course of our history, “We will not endure it, and if this goes on we will rather go to war with you than let war be carried on practically against us from your shores, under pretence of neutrality. That we should do that with a weak power like Sweden can any human being entertain a doubt?” I venture to entertain a doubt, and to express a hope that this country would not sully its high character by adopting towards a weak State a line of conduct which it would not think prudent or politic towards a stronger one. He then goes on to suggest that a “great power like the United States would adopt the same views, would look broadly at the practical mischief, would care nothing for Vattel, Grotius, or Puffendorf, and would say, ‘It is in substance as noxious as war, and I will not endure it.’” I must say I doubt whether such views and such doctrines ought to be presented to us at all; I am sure that they ought not to influence our judgment, and I am inclined to suspect the soundness of any proposition of law which requires such a style of argument to support it; and I may add, that international law would be of little use if it were

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to govern the conduct of strong nations as well as of weak ones. I thought its object was, among other things, to state and define what acts, what conduct of any State, would justify war being made upon it by another State; but the Attorney-General seems to think, if one nation be strong and another weak, the strong will make war on the weak, though it has no violation of international law to allege against it and to complain of. Again, on the second day, he said, "The peace and welfare of the kingdom (perhaps of the world) is declared by the Legislature to depend upon this matter." When his attention was called to this, he said perhaps he was going too far in saying "the peace of the world," and no doubt he was, for there is not any declaration by the Legislature about the peace of the world at all; and the expression, "peace and welfare of this kingdom," which is in the preamble, believe, relates, as far as peace is concerned, only to that tranquillity which is in the care of the magistracy, and has nothing whatever to do with the relation of peace or war with respect to other countries. At the end of his address (no doubt conspicuous for its ability) he stated the grounds on which our decision ought to rest in a manner perfectly unexceptionable, and I wish the whole of his argument had corresponded with the dignified and eloquent conclusion of it. So, also, I think we have nothing to do with the question as to which construction of the clause is most for the interest of his country as a great maritime power. It is regarding the discussion to make it in any degree turn upon a question of advantage or benefit to be gained or lost, and on such a subject we might turn out to be quite mistaken. In the present enlightened state of the civilised world, it may be, that that doctrine and those principles which would make us prosperous in peace are to be preferred to those which would make us successful in war. In construing the statute it is our duty to ascertain the true legal meaning of the words used by the Legislature, and to collect the intention from the language of the statute itself (either the preamble or the enactments), and not to make out the intention from some other sources of information, and then construe the words of the statute so as to meet the assumed intention; and this appears to me to be the mistake of the counsel for the Crown. They say, "Here is a powerful State complaining that what you are doing is as bad as war, and saying 'We won't endure it:' and then they say that the welfare and peace of this country require that the Act should be construed so as to silence that complaint; but we cannot, and ought not, even if the matter before us seemed to be that the mischief which it is supposed the statute is meant to remedy, to deal with it as a crime, unless it be plainly and without doubt included in the language used by the Legislature. In my judgment it is not within the letter of the statute, nor within the spirit, nor was it at all contemplated by those who framed the law. The danger of travelling out of the statute itself, and looking elsewhere for the object of the Legislature in passing it, may be illustrated by the wide difference of opinion between the late Attorney-General and the present Attorney-General upon this point. The late Attorney-General, in opening the case to the jury, said, 'appears particularly to have been contemplated by framers of the Foreign Enlistment Act to ensure the observance of neutrality in the event of war,' which I certainly understand to mean, to command a compliance with the duties of neutrality as required by international law. But the present Attorney-General, in the beginning of his argument in support of the rule, took quite an opposite view. I own, I think a more correct one, and said, 'the whole argument of his speech "in another

place" was to establish the directly contradictory proposition; and his language is this: "I say that there was no such obligation, and that it is a total misinterpretation of the municipal law to say that there was any State in the world, which, according to the settled and established principles of international law, could have required this country to prohibit those things which were prohibited under that statute." And even with respect to the *Alabama*, he intimates, that though there had been a breach of the municipal law, there had been—and I think he is quite correct—no violation of international law, or anything of which a belligerent at peace with this country had a right to complain. In endeavouring to discover the true construction of the 7th section of the statute, the first matter to be attended to is, no doubt, the actual language of the section itself, as introduced by the preamble; secondly, the words or expressions which obviously are by design omitted; thirdly, the connection of the 7th section with other sections in the same statute, and the conclusions which, on comparison with other sections, may be reasonably and obviously drawn. I do not mean to exclude other considerations, but these appear to me to be the most obvious and safest. The learned Attorney-General, with apparent effect, asks, why do you try to explain a statute by words which are not to be found in it?—it is dangerous to adopt such a course. On the first impression, the objection seems not unreasonable, but the answer is obvious—in order to know what a statute does mean, it is one important step to know what it does not mean; and if it be quite clear that there is something which it does not mean, then that which it is suggested or supposed to be what it does mean must be consistent and in harmony with what it is clear that it does not mean. What it forbids must be consistent with what it permits. The 7th section contains the words "equip, furnish, fit out, and arm," but does not contain the word "build;" and I think no one can doubt but that that word was purposely omitted from the Act of Congress and from our own statute. I am not surprised that the Attorney-General was desirous of preventing this mode of investigation, because it leads, in my judgment, irresistibly to this conclusion, that whatever might be done in the way of mere building before the statute, may now be done notwithstanding the statute. In common honesty and candour, it cannot be suggested that the Legislature meant to suppress the mere building of ships for a belligerent, as it were, by a side wind, and to suppress their trade without exciting their alarm. I think, therefore, I may pronounce with confidence, that it is lawful now to build ships, and even to build ships for war. The shipbuilders of this country for above a century have built ships for almost every nation on the earth, some for warlike purposes and some for commercial. It is one of the most considerable of our industrial and commercial pursuits. Building ships is not prohibited, even building ships for war is not prohibited, provided they be not equipped, furnished, fitted out, or armed in our ports, with either of the intents stated in the 7th section; and the words "equip, furnish, fit out, or arm" with the intent stated in the 7th section, ought to be construed, if they can be so construed, as to leave the commercial interest of shipbuilders untouched. If the comparison of the 7th section with the other sections in the Act makes certain propositions clear and undoubted, the Act must be construed accordingly, and ought to be so construed, as to make it a consistent and harmonious whole. If, after all, it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail. I cannot understand how, in the same breath, it can be admitted that the question is far

from being free from difficulty, and yet a construction be called for to create a crime, and embarrass an important branch of British industry. A comparison of the 7th section with the 2nd leads me to a conclusion quite different from that at which the learned Attorney-General arrived. With respect to the 2nd section, it did not escape him, that the offence created by the 2nd section is, in a natural-born British subject, an offence everywhere (in the realm or out of it). To use his own expression, "the net is thrown as wide as the entire world," and enlistment anywhere is the matter forbidden. Not so the 7th section: the acts forbidden by it are forbidden to Her Majesty's subjects in Her Majesty's dominions only; elsewhere they are no offence at all; and the Attorney-General fails to draw the conclusion, which to my mind is irresistible, that neither the act nor the intention are so much considered as the place. It is the place, a British port here or abroad, that is made sacred. Let the shipbuilder, though a British subject, take his capital and materials elsewhere, and he may build what ship he pleases, and arm it and equip it as he likes, for the use of any belligerent not at war with this country; and with whatever intention he is actuated, if he commits no act of hostility, he neither violates international law, nor commits any breach of the Foreign Enlistment Act. The great object of the statute, therefore, was not to prevent the building of ships by British shipbuilders for one of two belligerents, with neither of whom we were at war, but to preserve the ports of this country from being made ports of hostile equipment against a friendly belligerent; but not in any way to fetter the commerce of this country, or the trade of shipbuilding, beyond what was necessary for that purpose. If it were important to prevent ships from being equipped, furnished, fitted out, or armed, with the intents mentioned in the 7th section, by British subjects, it might have been made the subject of universal prohibition as easily as enlisting; but the prohibition does not go beyond the ports of the British dominions. Again, a comparison between the 7th section and the 8th throws also some light on the meaning of the words used in the 7th section, and on the object with which it was framed. The 8th section of the British statute makes it a misdemeanor to add to the number of guns, or to change them for others, or, by the addition of any equipment for war, to increase the warlike force of any ship or vessel of war, or cruiser or armed vessel, which at the time of arrival was in the service of any foreign prince or government, or of any persons exercising the powers of government. In short, it forbids any one in this country to increase the warlike force of any vessel of war or armed vessel not belonging to the Sovereign of this country. In this it differs from the corresponding section in the Act of Congress (which is the 5th), and which forbids the increase of warlike armament to a ship of war only when it is at war with a State or people with whom the United States are at peace. But in this country the increase of the warlike armament of any foreign ship of war is not permitted at all. Whether it belongs to a State at peace or at war with those whom we are not at war is no question; our ports are not to be disturbed by a warlike armament at all; but then everything or anything else may be done for the purpose of mere navigation. Any sea damage to the ship or tackle may be repaired; if a vessel be capable of repair she may be equipped, furnished and fitted out. If a steamer, she may be supplied with coals, in order that she may reach a port of her own country in safety. One conclusion clearly to be drawn from this is, that whereas in the United States a foreign belligerent vessel was not allowed

to increase its warlike force, if the United States were at peace with the other belligerent, in the British dominions a foreign vessel of war is not allowed to increase its warlike force at all, under any circumstances. The one may be ascribed to some doctrine of neutrality, the other to a wish to preserve the peace of the British ports, and not to allow them to be made places of warlike equipment for foreign vessels at all. But there is another result, more worthy of observation. It is, I presume, conceded, that a Federal vessel of war damaged by storm may put into an English port, and may refit and repair so far as is necessary to make it again navigable, in order to reach its own country. The 8th section, by implication, permits all that it does not forbid. A Federal vessel of war coming into our ports would be allowed, no doubt, to repair sea damage, and to supply lost stores, in order to reach some other port; but the shipbuilder in one port would be equipping, furnishing, and fitting out that vessel, knowing that the commander might cruise and commit hostilities against the so-called Confederate States. But does the shipbuilder commit a misdemeanor, or is the vessel forfeited? If the argument for the prosecution be well founded, and the construction of the statute by the counsel for the Crown be correct, the shipbuilder who repaired any damage to a vessel of war belonging to either of the belligerents would be liable to a prosecution as much as any of the present defendants. I now come to the 7th section itself, and to the terms on which the statute enacts, that persons doing certain acts with a certain intent shall be deemed guilty of a misdemeanor. It is necessary carefully to separate the act itself from any attempt or endeavour to commit it, and to simplify the inquiry as to how the statute should be construed; I will take (as the information does) one of the prohibited matters—"equip," for instance—and examine that alone, without reference to the others, and without reference to attempting, procuring, aiding, assisting, &c. The clause would then run thus: "If any person within any part of His Majesty's dominions, in the United Kingdom or beyond the seas, without the leave and licence of His Majesty, shall equip any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign State or Government, as a transport or storeship, or with intent to cruise or commit hostilities against any State or Government with whom His Majesty shall not then be at war, every such person so offending shall be deemed guilty of a misdemeanor." Two questions obviously arise upon the construction of these expressions—first, whose intention is it which is meant by the Act? and, secondly, what is the meaning of the word "equip?" It is difficult to make out what was the intention of those who framed this clause, as to the manner in which it should be broken up into parts and then be put together, so as to present all the alternatives contemplated. Probably it could not mean, that "with intent and in order that such ship or vessel should be employed in the service of any foreign prince, state, &c., as a transport or storeship," should stand alone, without some subsequent matter being added, for that would make it a misdemeanor to furnish a transport or storeship to be equipped for any foreign prince, &c., without any regard to his being at peace or at war with any State or Government with whom the Sovereign of this country should not then be at war. It is probable that the words "against any prince, state," &c., should follow the word "storeship," and then the effect of the clause would be this—it would be a misdemeanor to equip a ship or a vessel with intent and in order that such ship should be employed in the service of any foreign prince, &c., as a transport or storeship, against any prince, state, &c., with whom

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er Sovereign should not then be at war, or with intent to cruise and commit hostilities against any prince, state, or potentate: and some twenty-two of the ninety-eight counts are founded on this part of the section. Or the alternative may be, as transport or storeship, or with intent to cruise or commit hostilities against, &c.; and then the effect of the clause would be, to make it a misdemeanor to equip a ship with intent or in order that she might be employed by one belligerent as a transport, or with intent to cruise or commit hostilities against another. It is certainly to be regretted that the wisdom and sagacity which the Attorney-General discovers in adjusting the verbal differences between the statute and the prior Act of Congress, were exercised in baffling the enemy of the Bill, who, by levelling it at transports and storeships as well as ships of actual war, has thrown the whole clause into confusion, which, I presume, it is suggested that he meant to do by speaking of him as "not originally a friend to the Bill," as having made the alteration in committee. But neither this court nor any other court can construe any statute, and least of all a criminal statute, by what counsel are desired to tell us were alterations made in committee by a member of Parliament who was "no friend to the Bill," even though the journals of the House should give some sanction to the proposition. This is not one of the modes of discovering the meaning of an Act of Parliament recommended by Plowden or sanctioned by Lord Coke or Blackstone. When two intents are mentioned, and they are put in the alternative thus with intent to do such a thing or with intent to do another, the obvious and grammatical mode of reading the clause would be to make the two intentions the alternatives, but most of the counts in the information (about seventy-two) combine the two intents together, and, in effect, turn "or" into "and," and charge the defendants with equipping, &c., the ship with intent that the ship should be employed in the service of one belligerent with intent to cruise and commit hostilities against the other belligerent with which Her Majesty was not then at war. If this mode of reading the 7th section be not correct, seventy-two of the counts are improperly framed, and the statute does not warrant any such charge; but, assuming it to be correct, then the question arises, whose intent does the information mean? Who is it that the information charges with an intent to cruise and commit hostilities? According to all the rules of pleading it must be the intent of the person committing the act, and this view would make all the counts in substance to mean much the same thing with reference to the intent. There was no direct evidence that the persons equipping, fitting-out, &c., aiding, assisting, &c., had any intention to cruise or commit hostilities at all, and, if so, the whole charge fails altogether. The Attorney-General would read "with intent to commit hostilities" as if the expression were with intent that hostilities should be committed by somebody; but that mode of reading the expression is contrary to the rules of pleading, and to all authority on the subject, and especially is it contrary to what was decided in the *United States v. Quincey*, of which a full report is given in the appendix to the trial. I wish to call particular attention to this case, and to the two answers of Mr. Jefferson, referred to by the Solicitor-General in the course of his argument. I think they lead to a construction quite different from that suggested by the counsel for the Crown. Mr. Jefferson's answers early show what was the opinion of the American Government, and the decision of the Supreme Court in the *United States v. Quincey* is the best authority to the state of the law. The first answer refers to arms and ammunition, not to ships at all. Mr. Jefferson says: "Our citizens have been always free

to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress those callings (the only means, perhaps, of their subsistence) because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice." Why, I would ask, should not this apply to ships and shipbuilders? In America it does, why not in England? The second answer relates to ships, but Mr. Jefferson does not express any disapprobation of a supply of ships, even ships of war. What he says is, "But the practice of commissioning, equipping and manning vessels in our ports to cruise on any belligerent parties is entirely disapproved of, and the Government will take effective measures to prevent it;" and accordingly, the 3rd section of the Act of Congress is directed against fitting out and arming, and also against commissioning. The 7th section is directed against equipping, furnishing, fitting out, or arming, and also against commissioning, but there is not a single syllable against shipbuilding, or selling, or making for sale ships, even of a warlike character. So with respect to the law and the construction of the American Act of Congress, the judgment delivered by Thompson, J., in the *United States v. Quincey* gives to the citizens of the United States a right to send armed vessels out of their ports, it aims at preventing the citizens themselves from committing hostilities against foreign powers at peace with the United States, but leaves them at perfect liberty to sell the vessel to one of the belligerents, and, provided hostilities are not committed by the citizens of the States, there is no breach of the law. The accompanying remark of the learned judge which immediately follows, proves that the Attorney-General is endeavouring to enforce against British shipbuilders a principle which the Supreme Court of the United States altogether repudiates as applicable to citizens of the United States. If our statute was passed to give to the United States the same advantage that their Act of Congress gave to us, there may be a reciprocity in words, but there is no reciprocity in reality and in construction if the argument for the prosecution is to prevail. Thompson, J. says, "All the latitude necessary for commercial purposes is given to our citizens, and they are restrained only from such acts as are calculated to involve the country in war;" which I understand to mean the citizens of the United States have a right to build what ships they please and dispose of them as they please, provided they do not themselves take part in the war, and the ships are not employed by them to commit hostilities. And what pretence is there for giving to our Foreign Enlistment Act, with respect to shipbuilding, a construction totally different from that which the Act of Congress bears, according to the judgment of the American judges themselves in their Supreme Court? There is, indeed, a difference of expression between the Act of Congress and our statute. They have merely the words "with intent," we have "with intent and in order." The Attorney-General says, he supposes the words "in order" were added to avoid some evasion or quibble. I believe they were added to leave no doubt as to the meaning. The expression "in order" is explained in Todd's Johnson to signify "means to an end," and Jeremy Taylor, Tillotson, and Swift are quoted as authorities. The passage from Swift is: "One man pursues power in order to wealth." Power is the "means," wealth "the end," and the 7th section forbids equipping a ship or a vessel as a "means" to "the end" of cruising or committing hostilities. In all common sense and understanding, if the nature of the equipment has no reference whatever to the commission of hostilities, it cannot be the "means

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to that end," and there is no breach of the statute by that sort of equipment. Webster's Dictionary gives the same explanation of the expression "in order," and this leads me to remark that even the word "intent" alone and without "in order" (put in, as I think, to explain it, and give it the true meaning which an English lawyer would assign) ought not to lead to a different conclusion. The Attorney-General seems to think that if there be an intent, and anything of whatever kind be done in pursuance of it, that is sufficient; with great respect for the opinion of so eminent a lawyer, in my judgment, that is not sufficient. If a statute simply made it a felony to attempt to kill any human being, or to conspire to do so, an attempt by means of witchcraft, or a conspiracy to kill by means of charms and incantations, would not be an offence within such a statute. The poverty of language compels me to say "an attempt to kill by means of witchcraft," but such an attempt is really no attempt at all to kill. It is true the sin or wickedness may be as great as an attempt or conspiracy by competent means, but human laws are made not to punish sin, but to prevent mischief. I am, therefore, of opinion that the 7th section should be construed as if the words were "if any person (in the places mentioned) shall without the leave, &c., equip as a means any ship or vessel to 'the end' that such ship shall cruise or commit hostilities," and then if, after all the equipping or furnishing or fitting out, the ship is incapable of cruising or committing hostilities, there has been no such equipping, &c., as the statute was intended to prevent; and this brings me to what is the meaning of the words "equip," "furnish," "fit out," or "arm," for they must all be considered together, and the question is not so much what did the Legislature mean, as what is the meaning of what they have said, of the words they have used. A clause admitted to be awkwardly framed, by no means free from difficulty, and of considerable doubt, was scarcely worth the very minute criticism and comparison it has received. On the part of the prosecution, it is contended that the 7th clause was meant to put ships constructed for war, or adapted to war, upon a footing different from any other munitions of war, to leave cannon of every description, arms of all sorts, gunpowder, and shot and shell to be freely supplied to either belligerent; but no ship or vessel of a warlike character was in any respect to be furnished to a belligerent with whom this country was not at war. If this had been the object it might have been accomplished by the simplest possible piece of legislation, instead of the awkward, difficult and doubtful clause which, it is admitted, we have to deal with. It cannot be suggested that the object was to conceal from the shipbuilders the ultimate effect of the clause, and so prevent a clamour on their part, that they were interfered with in a way which the casters of cannon and the makers of gunpowder were not. There is not a syllable in the Act of Parliament, nor in anything connected with it, nor in any contemporary proclamation, speech, or publication of any kind professing to put ships on a footing different from any other implement of war: and it was admitted that there was no foundation for any such distinction in international law. And what is the ground of this distinction between cannon, army ammunition, and other articles of that description, and ships? It was insisted upon, I think, without any foundation. The Attorney-General, as I understand him, says, as far as international law is concerned, there is no distinction between them; the distinction arises from our municipal law. He said, "I entirely subscribe to what fell from the Lord Chief Baron at the trial, that it could make no difference whether there was a sale of a thing ready-made, without a previous contract, or a

delivery and a contract." No doubt, if no legislation make a difference, there would be none; as he considers that the Foreign Enlistment Act made that difference. His reason is a singular one. He says Her Majesty has the power, whenever she pleases, to prohibit every other species of contraband trade, but she had no power to do with a ship, so that ships are left out, to be dealt with under the Foreign Enlistment Act. The present statute forbidding exportation of arms is the 16 & 17 Vict., passed in 1853, founded on statute, 3 & 4 Will. 4, c. 52, passed in 1833. I cannot find in the index to the statutes any earlier one, that the construction of the Foreign Enlistment Act passed in 1819, turns upon an Act passed in 1833. The result of the argument on the part of the Crown seems to be this: A shipbuilder may build a ship altogether of a warlike character, as may arm it completely to the latest and most successful and ingenious invention for the destruction of human beings, and may then sell it to one of two belligerents with a perfect fitness for immediate cruising and ready to commit hostilities the instant it is out of neutral territory, provided there was no contract or agreement for it. But if there be any contract it cannot be made to order with the slightest warlike character about it, though this be partly the accustomed and usual trade of this country, and though the ship leaves our shores a mere hull, utterly incapable of cruising or committing hostilities, and, as far as war is concerned, as innocent and harmless as the mere timber of which it is built, the means of evasion which it furnishes is obvious—a signal, a word, a gesture may convey an order wholly incapable of being proved. It is unnecessary to dwell upon this; it is at once perfectly obvious, and the real difference between a crime and an act of commerce almost disappears. To use an expression borrowed from one familiar in Westminster-hall about a coach and six, a whole fleet of ships might sail through as an Act of Parliament as this; and we are to believe that our legislators exhausted all the wisdom in settling the language of the 7th clause and had none left to perceive the enormous loophole they had left. Again, a British subject may buy a vessel of war rejected by our navy, fit it up, arm it, and sail with it to a port of either belligerent to sell it; but if either belligerent should by an agent purchase at a public sale by auction he cannot put a mast into it and hoist a sail, reach his own country, but an armed vessel either belligerent may come into our ports to obtain whatever mere naval, but not warlike stores that he may require, so as to enable him reach some other port—observe, coming into a port completely armed, he may refit and repair, being altogether unarmed, he cannot put in a mast or a sail merely to cross the ocean. I cannot believe that the sound construction of an Act of Parliament passed within fifty years of the present time can by possibility lead to such an amount of inconsistency and absurdity, and, I may add, injustice, is involved in the construction we are asked with so much earnestness to put upon this statute. It seems to me to amount almost to that degree of what is repugnant to common sense as our law according to the golden rule to defeat the effect even if words conveyed the meaning, which they do not. In my judgment, the Act was not formed in order to make any difference between ships of war and guns, ammunition and other implements of war, but to prevent our shores from being made points of departure of hostile expeditions, commissioned and equipped to commit hostilities against a belligerent not at war with us. The 7th section therefore, forbids the issuing or delivering a commission, as well as equipping in order to com-

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ilities (for without a commission any act of stility would be a clear and undoubted act of piracy, and there was no occasion for a new law against piracy). To suppose that the Legislature took to British shipbuilders the power and right to build ships for war, as before the statute, but that it meant by the words equip, "furnish and fit out" forbid them from sailing away, however harmless and innocent of war their condition might be, is, I think, an unworthy imputation on the good faith of those who made the law. There can be no doubt they did not mean to permit a ship or vessel to go away armed, for they have said so distinctly, but arming admits of many degrees, and a doubt might arise, if the word "arm" alone had been used, what degree of arming would constitute the offence. But the degree is settled and determined by taking the whole sentence—the ship is not to be equipped, &c., in order to cruise or commit hostilities; if the equipment amounts to that the law is broken; if it does not, no offence has been committed. With respect to the rule, I am of opinion that none of the grounds on which it was moved ought to prevail, and that the rule ought to be discharged.

BRAMWELL, B.—The law which governs this case is a written law—an Act of Parliament—which we must apply according to the true meaning of the words used in it. We must not extend it to anything not within the natural meaning of those words, but within the mischief or supposed mischief intended to be prevented. Nor must we refuse to apply it to what is within that natural meaning because not, or supposed not, within the mischief. In this, as in other cases of doubtful meaning, it is legitimate to resolve that doubt by ascertaining the general scope and object of the enactment; and, accordingly, international law has been referred to, certain propositions have been laid down in that necessarily vague science, and it has been argued that the Act was passed merely to enable the Crown to enforce the observance of that law by its subjects, and so it has been sought to find its meaning. But it is clear to me that the statute prohibits some things which are not, and I strongly incline to think permits some things which are, prohibited by international law. In the result I concur with the learned Attorney-General, that the question we have to answer cannot be solved by treating the statute as a mere enforcement of international law, or by referring to its origin. Again, it may be a legitimate mode of determining the meaning of a doubtful document to place those who have to expound it in the place of those who made it: and so, perhaps, history may be referred to to show what acts existed bringing about a statute, and what matters influenced men's minds when it was made. But we know that in our legislation an argument may be used in support of the principle of a Bill which is consistent with particular provisions of great variety, and we know that in all legislation there it is intended to prohibit a thing, it may be necessary to prohibit others under colour of doing which the thing intended to be prohibited may be done. This, therefore, affords no certain clue to the meaning of the enactment, nor would ascertaining the objects of the authors of the American Act, from the provisions of which in our Act there is a supposed difference. It becomes necessary, then, minutely to scrutinise the words of our statute, and interpret them with such assistance (if any) as can be got *extra* its four corners. Now it is, no doubt, a penal statute; but I think it ought to be construed laid down by the late Mr. Sedgwick in his book *Statutory Law*. He says (p. 326): "But the rule is that statutes of this class are to be considered strictly as far from being a rigid or unbending one

or, rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment: the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing, by any mere verbal nicety, forced constructions, or equitable interpretations, to exonerate parties plainly within their scope." And I must here record the well-founded remark of the Attorney-General, that whereas formerly statutes being extended equitably, as it was called, beyond their natural meaning, penal statutes were exempt from such extension, but now that such liberties are not taken with statutes, there is no reason for construing penal statutes on such different principles as were formerly applied. Nor, I confess, can I think that the interests of the shipbuilder or any other trade are so concerned in this matter as to afford an argument in favour of the defendants' construction. I now come to the very words of this much debated sect. 7. I leave out all which are needless to the matter in hand. I am satisfied that "equip, furnish, and fit out" are not limited to transport and storeships. The rule which interprets *reddenda singula singulis* does not apply, because all the words "equip, furnish, and fit out" are sensible in reference to vessels intended to cruise or commit hostilities. The section reads thus:—"If any person within any part of the United Kingdom shall equip, furnish, fit out, or arm any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince as a transport or store ship, or with intent to cruise or commit hostilities," &c. Now to ascertain the meaning. On the part of the Crown it is said that if there is an intent that the ship shall be employed in the service of any foreign prince with an intent to cruise or commit hostilities, any equipment with that intent is sufficient, however unfit to accomplish such intent; that the rigging, victualling, manning, and other parts of equipment are lawful or not, according to the intent with which the ship will be used by those for whom they are done. This is said to be according to the very words of the statute. Supposing it to be so, it seems to me that the difficulty is only shifted—that the question remains, what is the meaning of the words "with intent or in order that such ship shall be employed in the service of any foreign prince with the intent to cruise or commit hostilities? Does it mean with intent or in order that by means of such equipment she may cruise or commit hostilities, that she shall be in a condition for proximate hostilities, so that the port she leaves will be a "station of hostilities?" or does it mean, as contended by the Crown, that an intent is within the statute where the equipment is in order that she may be employed in the service of a foreign prince, though further acts on his part are necessary to enable her to cruise or commit hostilities. I think this is a correct statement of the question, and it seems to me that it must be answered adversely to the Crown's contention. I think the fair and natural meaning of the words is, that the equipment must be fit for cruising or the commission of hostilities. The word "intent" before "to cruise or commit hostilities" seems put there on purpose to show this. But I dislike relying on a single word. Let it then be repeated, and the statute read thus:—"If any person shall equip any ship with intent or in order that such ship shall be employed in the service of any foreign prince to cruise or commit hostilities." Now what would be the meaning if the words were "If any person shall equip any ship with intent or in order that such ship shall cruise or commit hostilities in the service of any foreign prince?" Surely that would require an equipment suited for

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such cruising. Do those words differ from the following:—"If any person shall equip any ship with intent or in order that such ship or vessel shall be employed to cruise or commit hostilities in the service of any foreign prince?" And do these latter words differ from those in the statute? I think not. Take Mr. Mellish's illustration. If the words were "equip with intent or in order that the ship shall be employed in the service of a merchant in the whale fishery," could it be said any equipment or intent would be within the Act, unless the equipment was or was meant to be fit for whaling? I think this the plain, fair, natural meaning of the words by themselves; but there are collateral considerations to the same effect. Building is not prohibited, selling is not prohibited. I don't agree with Mr. Mellish that if the statute does not prohibit building it must necessarily permit equipping. It is possible the Legislature meant you may build, which is harmless unless you equip, and that you may not. But it seems to me that the omission of "build" and "sell" shows that something beyond a harmless ship and equipment was meant to be prohibited. It may be said that selling an equipped, armed and manned ship is not prohibited in words, at least; therefore, no argument could be derived from the omission of "build" and "sell." My answer to that is—there are no ready-made ships armed and equipped for sale; they are done to order, and there was no need, therefore, to prohibit what never has happened or never could happen. Such a prohibition would be useless; but a prohibition of building and selling would not. Again, Mr. Karslake's argument comes in; a man has a ship for sale; he may sell it to a belligerent if he does nothing to it; he may equip it if the buyer means to use it as a packet ship, &c., but the same equipment is unlawful if the buyer's intent is different. So that the misdemeanor is committed or not, according to the intent, not of the equipper, but of his customer. Because, suppose the equipper says, and truly, "I equipped it that the buyer might do as he pleased with it, I cared not what that was;" what intent is there, then, in the equipper's mind that she shall be employed to cruise? Moreover, the words are "in order that," &c. Can there be an equipment in order that a vessel may be employed to cruise, unless the equipment is calculated to enable them to do so? Again, surely the equipment of a vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince as a storeship or transport, means an equipment as such, or an intent, should enable it so to be employed. Read the enactment without the word "employed," and can there be a doubt of the meaning? Does the use of that word make a difference? I think it cannot be properly said that a man does an act with intent, unless he intends the act to bring about the thing intended. Thus, if a man builds a ship in which he means to go a whaling voyage, he builds with intent the ship shall go a whaling voyage, though unfit for whaling. But if he builds her for another, he does not build her with an intent she shall go on a whaling voyage, unless he particularly adapts her to that service. In this case, if building, with intent to be employed to cruise, had been forbidden, I think the forfeiture would have been incurred, for by her build she is particularly adapted for that purpose, but the word "equip" is used, and there is no forfeiture unless there is equipment particularly fitting her for cruising, the equipper himself not intending to cruise in her. I now come to sect. 8. It ought to be a warning to those who indulge in confident opinions, that this is relied on by counsel of great ability on both sides as being in his favour. It seems to me strong for the defendants. It by implication permits any equipment to a vessel already armed,

provided it is not an equipment for war. If the *Alabama*, with her armament, could run into an English port, whatever was done to her in this country before in the way of equipment, could be done now lawfully, and she might sally forth armed and equipped, though it is said the equipment alone was unlawful. It is said, such ship must have been equipped before, but she may have lost her mast, or sails, or screw. According to the argument of the Crown, they may be replaced if she is armed already, but not if she is unarmed; or she may come here armed and have her equipment bettered to any extent—new masts, boilers, engines, &c.; but any one of these, if she is unarmed, is unlawful. Further, in sect. 2, British subjects are prohibited from serving in vessels fitted out or equipped, or intended to be employed in warlike purposes. Surely, the vessel in which serving is prohibited must be capable of fighting. Again, the title and preamble both show that the statute was directed against fitting out and arming for warlike purposes. Sect. 2 is in the same sense. It is said that this construction requires the vessel to be armed to be within the Act, and that so the words "fit out, furnish and equip" are superfluous. I agree that they are not to be so treated if it can be avoided, though I strongly incline to think that the persons who used them attached no very definite idea to them. In the title it is "fit out or equip" without "arm;" in the preamble it is "fit out equip and arm." In sect. 2 it is "fitted out, or equipped, or intended to be used for any warlike purpose." In sect. 7 the words are "equip, furnish fit out, or arm." Surely, no precise idea was in the mind of the author of the varying though similar expressions. The probable intent was to use sufficiently comprehensive words, and to avoid such a question as whether a ship was "armed" strictly speaking, and make it enough if she was equipped for warlike purposes. Such a case may well be that the ship, though not armed, is equipped for warlike purposes. By "armed" I suppose it would be mean ordinarily that she had cannon; but if she had fighting crew, muskets, pistols, powder, shot, cutlasses and boarding appliances, she might be well said to be equipped for warlike purposes, though not armed. On these grounds, independently of authority, and on the very words of the Act, I think the construction contended for by the Crown is wrong, and that of the defendants, prominently put by Mr. Mellish, is right, viz., that the section prohibiting that equipment only, which is itself such that by means of it the vessel can commit hostilities, and that no equipment which gives no means of attack and defence is within sect. 7. It may be said this is a lawyer's mode of dealing with this question—merely looking at the word. It is, and I think is right. A judge discussing the meaning of a statute in a court of law should deal with it as a lawyer and look at its words. If he disregards them, and decides according to its maker's supposed intent, he may be substituting his for theirs, and so legislating. As has been excellently said, "Better far be accused of a narrow prejudice for the letter of the law than set up or sanction vague claims to discard it in favour of some light interpretation more consonant with the supposed intentions of the framers or the spirit which ought to have animated them. Important as are the objects of this statute, it must be construed on the same principles as on regulating the merest point of practice or other trifling matter. But I am willing, as far as possible, to look beyond the mere words of the enactment, to look at its general scope and intent and to do what is called take a broader view. In my opinion, the statute was intended to prevent any of the subjects or territories of this country being belligerent; to prevent them being immediately or

in hostilities between foreign belligerents. This object it forbids British subjects to engage in foreign service everywhere, whether the service is in or out of the Queen's dominions. Any one, whether subject or not, to enlist in the Queen's dominions. It forbids the outfit of vessels of war in the Queen's dominions by all persons, whether the Queen's subjects or not. It thus forbids the British subject to engage in warlike service abroad, from fitting out a ship, nor, if here, from building or equipping it. Those provisions of the Act which forbid enlistment of British subjects everywhere go beyond the municipal law of international law; but as far as the Act, now in question, is concerned, intended to prevent the subjects of this country from causing a complaint of violation of international law, by making the country a station for the outfit of vessels of war.

I think a vessel departing neither equipped so as to be capable of attack or not a violation of international law, but that it may. No doubt the employment of a vessel as a transport is prohibited by this Act, but a vessel is not equipped for warlike service if it is the port from which she departs for hostilities. But, as I have said, I know that the statute goes beyond the municipal law; in the provision I think it does not. Historically, however, these words, inconsistent with the preamble, were introduced. Further, under the different matters brought for consideration in putting a construction on the Act, they all seem to confirm the view I have expressed. There is no doubt what the object of the statute—what the object is in view. It was to prevent the issuing of armed expeditions from British territory. It is to judge from its history and the preamble in reference to it to prevent the outfit of this country of vessels incapable of defence. So of the American statute. And the object immediately in view are the same. They were the same as in the case of the *Albatross*.

Now, we know from American authority intended not to prevent a commerce in arms. But the language of the American statute is decisive. In sect. 3 the words are "fit for war." It is true the section proceeds "or in furnishing, fitting out, or arming;" that means be concerned in any part of the outfit. There must be a fitting out and any person to be concerned in either. To suppose the statute should make it an outfit and arm, and also an offence, and hence to be concerned in fitting out where no arming. Besides, the same words in the matter—viz. "with intent, &c." Further, the American statute only applies to a ship built for warlike purposes, and the penalty consists of arms and munitions of war. A number of men or other circumstances observable that such ship is intended to be used by the owner to commit hostilities, &c. that the bond to be given under these conditions should not be required in the case of the vessel until she was armed or had a cargo of arms and munitions of war. So, again, if the rights and obligations created by international law. If a hostile expedition, fitted out by a citizen of this territory to attack another State, it is so, if the expedition is fitted out, not by the citizen with its sufferance, by a part of its citizens within its territories, it is war,

at least at the option of the assailed. They would be entitled to say, "Either you can prevent this or you cannot. In the former case it is your act, and is war; in the latter case, in self-defence, we must attack your territory, whence this assault proceeds." And this is equally true, whether the State assailed is at war or at peace with all the world. The right in peace or war is not to be attacked from the territory of another State, that territory shall not be made the basis of hostilities. But there is no international law forbidding the supply of contraband of war, and an unarmed vessel is, in my opinion, that, and nothing more. It may leave the neutral territory under the same conditions as the materials of which it is made might. The State interested in stopping it must stop it, as it would other contraband of war—viz., on the high seas. I have hitherto considered the case independently of the authorities. They are exclusively American, on the American statutes. I concur in the eulogium the Attorney-General has passed on American legislation and American judges on this matter. An English lawyer must rejoice to see that those who administer in America a law in great part our common inheritance, administer it on the same fearless and honest principles as, I venture to say, law is administered here. The way to show our sense of their example is not to consider what would be acceptable to their countrymen merely, and decide accordingly, nor to be influenced by the foolish threats which have been uttered, but to decide, as their judges have done, truly and honestly, to the best of our ability. Now, there are but three decisions to be noticed. The first is the case of the *Independencia*. It has not the slightest bearing on the present. The *Independencia* was an armed vessel. Being so, she came to Baltimore and had her fighting crew increased. Story, J. expressly states as a fact found that the court is driven to the conclusion that there was an illegal augmentation of the force of the *Independencia* in our ports by a substantial increase of the crew. This renders it wholly unnecessary to enter into an investigation of the question, whether there was not also an increase of her armament. As to the *Albatross*, he says there was an "illegal outfit, and an enlistment of her crew, within our waters for the purposes of war." He decides, then, on the ground of warlike equipment in the American port. I doubt if Mr. Jones was right when he cited this case to show it was not an authority against him. If a precedent of honest and eloquent indignation were wanted, I would refer to the judgment of Marshall, C.J., in another case, which, however, like the two I have mentioned, has no bearing on the present. The vessel was "completely fitted in our ports for military operations." She could have fought at the moment of leaving Baltimore. She might have been subjected to the penalties of piracy, but she was not the less equipped and armed for war. The next case is the *United States v. Quincey*. I say, with all respect, that the case was wrongly decided. The learned Attorney-General confessed it. It supposes that a person can assist in doing what nobody is doing or trying to do. It applies a pleading test—very little use in discussing a statute, and doubly misapplies it. In the first place it is bad enough to use the words of a statute in an indictment where, from their position in the statute, they would have a different meaning from what they would have standing alone. Then the objection is misunderstood. Supposing it taken to the indictment, it would be that the indictment should have said, "A. was fitting and arming, or attempting to fit and arm, and the deft. was assisting to fit." Further, this case does not say that if the principal in the transaction were indicted, anything less than a warlike equipment would suffice, and that is the

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only question before us. These authorities, to my mind, if anything, are in support of that view of international law and of the statutes which I have expressed. The history of our statute, the history of the American statute, the duties of international law, and the speeches and acts of jurists and statesmen, all point to the same conclusion. A like opinion was recently indicated in an important official statement, in which it was said, "England was preventing the departure of hostile expeditions from her shores." Whether this is a correct statement in point of fact I know not, but it is by implication a correct statement of what she is bound to do by international law, and what she has power to do by municipal law. I am aware of the consequences if this is the law. A ship may sail from a port ready to receive a warlike equipment, that equipment may leave in another vessel and be transferred to her as soon as the neutral limit is passed, or at some not remote port, and thus may the spirit of international law be violated, and the letter and spirit of the municipal law evaded. But, as the law stands, or as both laws stand, I see no remedy. I do not see what line can be drawn but the sharp line. As Sir H. Cairns said, "If it is unlawful to put a peaceful equipment on a ship because at three miles from the neutral territory she is meant to receive a warlike one, why is it not unlawful if the distance is to be 1000, or in this case one of the Southern ports? If she may not sail peacefully equipped to a Southern port, why would it be lawful to send there her parts ready to be put together? If not those, why the materials of which they could be made, and so on? I am aware, of course, that it would be easy to draw a line and make a law prohibiting the sending forth of a ship and permit the exportation of its parts, leaving that to be dealt with as contraband of war; and that such a law would make a broader distinction between what would and what would not be lawful than now exists, and that its evasion by sending forth the parts of a ship would be more difficult and less hurtful and irritating to the opposing belligerent. Whether such a law would be desirable I do not presume to suggest. What I wish is to show that, in considering this as a matter of principle, I have borne in mind, first, that the present law is capable of easy and mischievous evasion; second, that if it is sought to extend its construction it is impossible to stop short of the prohibition of the export of contraband, though a positive law so stopping would not be difficult of enactment. An argument I have partly dealt with already has been used—not, indeed, before us—that there may be an attempting or assisting by persons who do not commit the complete offence of equipping or arming. So there may be. But there can only be an attempt to commit an offence where, if the attempt succeeded, the offence would be committed. A person can only assist in doing an act where the act is to be done. Now there is one thing in this section clear beyond all doubt, viz., that there can be no offence against it unless that offence is committed within the Queen's dominions; that, therefore, no one can attempt contrary to the provisions of this Act, unless the equipment attempted be meant to be done in the Queen's dominions, and that no one can assist contrary to those provisions, unless some one is equipping or attempting to equip within the Queen's dominions. This, indeed, was admitted by the Attorney-General, and it is, to my mind, too plain for argument. Taking this view of the statute, I think a right direction to the jury would be, "If you are satisfied that the parties concerned were equipped or arming, or attempting to equip or arm the ship claimed, with intent that it should be employed in the service of a foreign prince to cruise or commit hostilities against others, as alleged, find

for the Crown; but such equipment or attempt at equipment must be of a warlike character, and that by means of it she is in a condition more or less effective to cruise or commit hostilities; otherwise find for the claimant." Holding this opinion, I think the direction of the Lord Chief Baron was substantially, if not verbally, correct. Still, in considering whether the jury has come to a wrong conclusion, whether the verdict was against evidence, or otherwise unsatisfactory, all that his Lordship had said must be taken in consideration. And though the proceeding is pending if there had been any evidence on which the jury could have acted, I should have thought there ought to be a new trial, considering that the defect was not pointed out of the box who must have known the whole truth. But, interpreting the statute as I do, I think the verdict was right. I have no doubt the vessel was building and equipping for the Confederates in order that they might use her, when armed as equipped, for hostilities against the Federals. This was being attempted, but I see no evidence that it was intended to arm or equip her in the Queen's dominions so as to be capable of attack or defence. On the contrary, I believe it was intended to evade not to infringe, the statute, not to commit a misdemeanour, nor to do, or attempt to do, what would cause a forfeiture of the ship. I believe, on the evidence, that it was intended to deal with this vessel as with the *Alabama*—get her out of the country and give her her armament and warlike equipments out of the Queen's dominions. It is worthy of remark that the information does not suggest it was intended to arm her here. I think, therefore, that this other ground for a new trial fails, and that the direction was right, and that on a right direction the verdict for the defendant was right on the evidence. Consequently, I am of opinion that the rule must be discharged.

CHANNELL, B.—This was an information filed by her Majesty's Attorney-General, insisting upon forfeiture of a ship called the *Alexandra*, under the provisions of the 7th section of the Foreign Enlistment Act. That section makes certain acts felonies with respect to a ship misdemeanours. It then proceeds to say that "every such ship or vessel shall be forfeited and may be seized" as therein provided for. In the present case a seizure has been made and this seizure had to be justified by the Crown at the trial of the information before the learned Lord Chief Baron. Upon that trial a verdict was given for the defendants, and the learned Attorney-General at last term obtained a rule nisi for a new trial upon five grounds. Those five grounds may be ranged under two heads—viz., those of misdirection, and of the verdict being against the evidence. The question as to the verdict being against the evidence necessarily depends in some degree upon the question whether there was misdirection or not, because we must see clearly what were the questions which the jury had to decide before we can apply the evidence and see whether it supports the finding of the jury. The consideration of the evidence would therefore, whatever view I were to take on the question of misdirection, come more appropriately after than before the consideration of the construction of the statute. But it will be unnecessary for me further to revert to the question of the verdict being against the evidence in the view which, after much anxious consideration, I felt compelled to take of the construction of the statute and of the effect of the Lord Chief Baron's direction—a view which differs in some respects from the opinions of the Lord Chief Baron and of my brother Bramwell, and leads me to a different conclusion from that at which they have arrived, and which for that reason, and on account of the great respect

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which I always have for their opinions, I express with the utmost diffidence. Now, under the head of misdirection I include an inadequate direction and also a direction which, though right in the main could be calculated to mislead a jury. Where the question turns upon the construction of an Act of Parliament, the judge is, I think, called upon to explain to the jury the sense in which any doubtful word or expression in the Act is to be understood: see *Elliott v. The South Devon Railway Company*, 1 Ex. 725. In the consideration of the question of misdirection it will be convenient first to endeavour to construe the Act, and see what direction ought to have been given, and then to consider whether the direction given agreed in substance with what ought to have been given. The Foreign Enlistment Act, particularly the 7th section, is very imperfectly worded. There is no doubt that it was a great measure, but with what appears to me to be important variations, penned from an Act of the United States passed in Congress—first in the year 1794, and re-enacted by Congress in the year 1818. This circumstance has given rise to a great deal of argument on both sides. Sir Hugh Cairns has suggested, apart from the language of the Acts of Congress, certain *a priori* views, tending to show why the American Act was passed and altered, and then treating the Acts of Congress with some exceptions identical with our own, he seeks to apply certain decisions in the Courts of America to the consideration and construction of our own statute. Into this very wide field of inquiry he has constrained the counsel for the Crown to follow him, and they have done so in the very order in which his argument was addressed to us. I do not say that any time was lost, or that in the course of the very long argument that was adduced to us any view was submitted not calculated to assist the court; but, having carefully considered the arguments, I cannot help thinking that the decision of this most important question should proceed on grounds less wide than those to which the attention of the court has been so ably called. Faulty and imperfect as may be the wording of the 7th section of the Foreign Enlistment Act—and more imperfect or faulty wording I can scarcely conceive—if, notwithstanding all this, the words of the 7th section, read with reference to the other parts of the Act, do, by a reasonably fair interpretation of our statute and the evidence, embrace the case of the *Alexandra*, then, in my judgment, it scarcely becomes necessary to consider what have been the decisions of the courts in America upon Acts of Congress, in the main much the same, but in not unimportant respects different from our own Act. Whether for the present purpose the Foreign Enlistment Act is to be considered as a penal statute, the Crown in this case proceeding for a forfeiture of the ship, or is to be considered as an Act for the first time creating a criminal offence, the rule to be applied in order to its construction is that which is so well expressed in the passage from the late Mr. Sedgwick's treatise quoted by my brother Bramwell, and to which passage need not advert in detail. But I may say that it serves, in my judgment, the high eulogium which my brother Bramwell has passed upon it, and is, I think, in perfect accordance with the American and English authorities which that late learned writer is cited in support of his view. Now, faulty and imperfect as the wording of our statute, particularly the 7th section, is, there are certain matters clear enough to be beyond all reasonable doubt. First, the statute is not a statute passed merely to define what shall be an offence, or to create an offence for the first time and define its punishment, but in its intent it aims at the prevention of the offence and of the completion of the offence, and not punishment merely. It is, therefore, in every sense a remedial statute. And

secondly, it is a statute intended to remedy a mischief, which, though forcibly expressed, is only contingent and possible, and not certain. The language of the preamble points to certain acts which may be prejudicial to and tend to endanger the peace and welfare of the kingdom; and, further, it goes on to recite that the laws in force are not sufficiently effectual for preventing the same. The statute has not, therefore, for its object solely the prevention of acts which if done must endanger the peace of the kingdom, but appears from the preamble to be aimed also at acts which may possibly excite such feelings in other nations as to have that effect. This inclines me to think that the equipment of ships to be employed at a future time for war, though not so complete in this country that the ship shall be at once able to commit hostilities, may be within the Act. I do not, of course, come to any conclusion from the preamble alone, that such an equipment is prohibited. What we have to look at are the enacting words. But I think the preamble is, as Lord Coke calls it, a key to unlock the meaning of the Act where it is doubtfully expressed. And I concur in the decisions which determined that the words of an enacting clause shall not be cut down or restricted by the preamble. So that if the case I have mentioned were clearly within the words of the 7th section, but not within the mischief as declared by the preamble, I should hold that it was prohibited by the Act. As my brother Bramwell has remarked, the Legislature often finds it necessary, in order to restrain certain acts, to prohibit other acts under colour of which the act to be restrained may be done. Now this Act has clearly two distinct and several objects in view: First, the enlisting or engagement, without licence, of British subjects to serve in foreign service. There I agree that the statute includes the whole world, provided the persons enlisting or engaging are British subjects; secondly, the fitting out or equipping in British dominions vessels for war purposes. The part of the Act which relates to the second of these objects includes all persons, British subjects or not, provided the offence prohibited by the Act is committed within the Queen's dominions. I am not insensible to the value of the arguments which have been addressed to us by the counsel for the claimants founded on these different objects. These arguments raise one of the many difficulties in the case. They do not, however, seriously affect my view as to the conclusion to which we ought to arrive. Prohibition and prevention of a mischief which may be prejudicial to and tend to endanger the peace and welfare of the kingdom were, as I have said, aimed at by the statute. By our municipal law every one, British subject or not, being within the dominions of our Sovereign, claiming protection of the Government of this country, may be bound. Out of her dominions the municipal law of this country could only bind the subjects of the realm. We ought not to lose sight of the first object contemplated by the Act, and provided for by the first six sections; but it is the part of the Act which relates to the second object that principally requires our attention. The last part of the Act, beginning at the 7th section, does by that section provide against equipping vessels with a certain intent, issuing or delivering any commissions for ships with the intent therein mentioned. And, lastly, for a forfeiture of that ship or vessel: I have said that the forfeiture clause following the clause creating certain misdemeanors applies to "every such ship." This is, certainly, rather clumsily expressed, but we must take it that every ship is forfeited with respect to which any of these misdemeanors have been committed. We have, therefore, to see what are the misdemeanors created. They are, first, equipping, fitting out, furnishing, or arming a ship with

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a certain intent or purpose; secondly, attempting or endeavouring to equip, &c., with the same intent; thirdly, procuring to be equipped, &c., with that intent; fourthly, aiding, assisting, or being concerned in equipping, &c., with that intent. Now, it is, I believe, the unanimous opinion of the court that the second, third and fourth of the offences here spoken of mean respectively the attempting, the procuring, and the assisting in such an equipment as is spoken of in the first, that is to say, that the secondary offences, as they have been called, are the attempting, &c., such an equipment as if completed would amount to the principal offence. If, therefore, we can arrive at any clear conclusion as to what is the principal offence, the question whether there was any attempt, &c., to commit that offence becomes a mere opinion of evidence. This being clearly understood, we may for the purpose of construing the Act disregard all the words about attempting and aiding and being concerned in and so on. We have, therefore, now reduced the main question in the case to this—what did the Legislature mean by the words “equip, furnish, fit out, or arm a vessel with intent or in order that she should be employed in the service of a foreign power as a transport or storeship, or with intent to cruise or commit hostilities against a power with whom we are not at war?” Arming is not charged in the present information; we may therefore leave out the words “or arm.” The words “transport or storeship” are also immaterial, now that the 97th and 98th counts, charging the *Alexandra* to be a transport or storeship, are abandoned, except that we must adopt such an interpretation of the words common to both clauses as they would be capable of bearing when combined with the words “as a transport,” as well as when combined with the words “with intent to cruise.” The words “equip, fit out and furnish,” seem to me to mean nearly the same thing. Throughout the whole course of the argument in this case little stress was laid upon any supposed difference between the words “equip, fit out and furnish.” We may, therefore, still further reduce the words we have to construe to these, “equip with intent or in order that the vessel shall be employed in the service of a foreign power, with intent to cruise or commit hostilities.” It is admitted, I think, on all sides, that these are the words upon which the main question turns. Now, it is clear that the offence created by these words is one consisting of an act done with a certain intent or purpose. The act and the intent must both be present to constitute the offence, and the act must be done and the intent must exist in the Queen’s dominions. It is also, I think, agreed on both sides that the intent spoken of must be the intent of some person who has control over the vessel so as to be able to carry out his intent or purpose. We now come to the points on which there is a difference of opinion. The Attorney-General contends that any equipment, however peaceful in its nature, will be an offence against the Act, provided there is an intent that the vessel shall be used at some future time in the service of the belligerent. He admits that where the equipment is clearly peaceful there will be much greater difficulty in proving the intent; but he says that assuming that you can prove the intent, then any kind of equipment will be within the case contemplated by the Act. On the other hand, the counsel for the claimants connect more closely the act and the intent—that is to say, they explain the general word “equip” by the subsequent words, “with intent or in order that the ship shall be employed in a given manner.” And they say that these words show that the equipment spoken of is an equipment suitable to the employment. Further, I understand them to go the length of saying that

it must be suitable only for that employment. It is remarkable that the words “or in order that” are not in the American Act, but have been added in ours. This will be a subject for remark by-and-by, when we come to consider the applicability of the American cases. Now, we have only to see what difference these words make. Do they enlarge the scope of the Act by mentioning another case, another kind of equipment which is also within the Act, which in the course of the argument I was much disposed to think was the right view? Or do they rather restrict the previous words, explaining them and throwing a light upon them, as suggested by Mr. Mellish? It seems to me now that the latter view is the right one, and that the words “or in order that” restrict and explain what is meant by “with intent,” rather than include any new case not before included. If I do an act which is entirely immaterial to the employment of the ship, as painting her name on her stern, I may do that, having all the time the intent that she shall be employed in a given manner, but I cannot do it in order that she may be so employed, for it has no reference or relation whatever to her employment, and does not further her being employed in one way more than another. Thus there may be an equipment “with intent that,” which is not an equipment in order that. But can there be an equipment in order that which is not “with intent that?” The Attorney-General has suggested that there may, or, at all events, that the framers of the Act thought there might. He argues that the words were inserted to meet the argument that builders and other tradesmen are not parties to the intent, but he says at all events they may be said to do it “in order that.” But is it clear that a man can do an act in order that a result may follow without intending that result? Does not every man intend to effect the object of his act? If, however, we do suppose such a case, where a man, without having the intent that the ship shall be employed in a given manner, yet equips her in order that she may be so employed, is not the inference as strong as possible that the equipment must in that case be of a nature suitable and appropriate for that employment? It seems, then, that if we are to give any force to the words “in order that,” it must be as explaining and illustrating the words “with intent that.” It may also be remarked that in this information the charge is that certain persons did equip the *Alexandra* “with intent and in order that,” &c. This shows that whoever drew the information supposed the two expressions to mean the same thing. I do not attach much importance to the last remark, for if we ought to decide them to be different, then I think the words “and in order” in the information might be rejected as surplusage. It seems, then, on the whole, that in order to justify the seizure the Crown must show an equipment (either completed or attempted) of the *Alexandra*, in order that she might be employed, &c.; and further, that this necessarily means an equipment enabling or tending to enable her to be so employed. This last conclusion I draw also from the nature of the words “equip, furnish and fit out.” I do not adopt the idea that any one of these words can include building. The Attorney-General at one time seemed disposed to contend that fitting out might include building. I do not think that he adhered to that throughout. If he still holds that opinion, I certainly differ from him upon the point. I do not pretend to say whether any particular act, as fixing the ship’s bulwarks, is part of the building or part of the equipping and fitting out. That, I think, might be a question for the jury. I do not even say that acts done to the structure of the vessel may not be equipments. I should say that you were equipping a ship for an Arctic expedition by strengthening her

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network in order to enable it to resist the pressure of ice. But I say that equipping, fitting out, and arming are all acts subsequent in their nature to building, and in speaking of which you contemplate the ship as already in existence. I think there is nothing contradictory to this view in the cases cited by the Attorney-General—viz., *The United States v. Guinet*, Wharton's St. Tr. 95; *The Ship Mersers* and *The Ship Mermuid*, both in Bee's Reports. What it seems to me that these words, "equip, furnish, or fit out" do all signify is this—emplating the subject-matter of the equipment already in existence, they express an idea of arming it for some purpose or another. That purpose may be either expressed or implied. When we speak of "equipping a ship" *simpliciter*, it may mean that means getting her ready for sea, use to go to sea is the natural and ordinary use to which a ship is put. If you state the nature of employment, then equipping means getting ready for that employment. I interpret the clause, therefore, as showing that the equipment mentioned in the 7th section must, as a matter of fact, be an equipment for the employment spoken of. We are left in doubt whether this is the right interpretation or not, I think, as I have said before. We may and ought to look at the preamble to the object of the Act. There we find that the chief to be remedied is one which may arise from fitting out and equipping and arming of vessels for warlike operations. This, then, is the very case which I have interpreted the 7th section to strike provided that the employment there mentioned is employment for warlike operations. What is the employment there mentioned? "Shall be employed in the service of a foreign prince with intent to raise or commit hostilities." It has been assumed the argument on both sides that this may be read if the words "with intent" were there omitted, they are in the American Act. Whether this is right or not, their insertion certainly causes great confusion. In the first place it provokes comparison with the other clauses commencing "with intent," being one, at first sight, to read them as showing separate intents, either of which would, with the existing act, constitute the offence. This, on looking into it, is agreed on all sides not to be the right construction. But they create a further difficulty. The intent now spoken of is necessarily, from the meaning of the words "shall be employed with intent," an intent of the employer, and not of the shipper, which is, as it were, engrafted upon the intent of the shipper; and it is very difficult to see how one man can intend that another man shall do something or other. It is probable this confusion which has prevented the counsel on either side from founding any argument upon these words. For this I should have thought it might have been argued that an employment with intent to be different from an employment to cruise in this, that it might include an earlier employment, and might cover the voyage in an unarmed state from port to some port where she was to be armed, from which she was to start to cruise. But even if we adopt the view taken by the Attorney-General, that an employment with intent to cruise may be construed the same as an employment to cruise, I think that an equipping in order that the vessel may be employed to cruise or commit hostilities means equipping for warlike purposes. So far, then, I think it is clear that there must be an equipment for war; that an equipment which cannot be used, is not useful for war, will not do. The conclusion at which I have so far arrived is drawn from the 7th section, with such light as is thrown upon it by the preamble and by the 2nd and 8th sections. drawing that conclusion I agree in a great measure with the argument of the claimants, and

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with the judgment of the Lord Chief Baron and my brother Bramwell. But another, and, to my mind, very important and difficult, question arises. Suppose there is evidence of some equipment or other either completed or attempted, but that the equipment does not in itself show whether it is an equipment for war or not, may we take into consideration evidence of the intent to prove that it is actually and in point of fact an equipment for war? Upon this question, after much anxious consideration, I have arrived at the conclusion that we may. I do so with the most sincere and respectful deference to the opinions of the Lord Chief Baron and my brother Bramwell, and with great distrust as to the correctness of my own judgment. It will be convenient, now that I am about to consider whether the character of the equipment where doubtful may be explained by the intent of the parties, to see what effect the clause "as a transport or storeship" has on the interpretation of the section, because it is especially in the case of a storeship that we see the absolute necessity of explaining the character of the equipment by the intent. Now, is there anything which militates against the view that the equipment with intent, or in order that the ship may be employed in a given manner, means an equipment suitable to that employment, in the fact that one of the employments spoken of is "as a transport or storeship?" It may well be that there is no equipment specially suited to a storeship. All equipments of an ordinary merchant vessel may be, and probably are, suitable to a storeship. But is there any reason for saying that the equipments struck at by the Act are not equipments suitable for a storeship, because, being so, they would also be equipments for another object? Is a gun the less an equipment for war because it may be used for firing salutes? But the counsel for the Crown deduce from the case of the storeship a very important argument—they say that in that case the jury must necessarily look at the evidence of the intent to enable them to say whether the equipments are for a storeship or not; and if so, why are they not to look at the evidence of intent to say whether certain equipments of a doubtful nature are for warlike purposes or not? I grant at once that they may, provided that the equipments as to which the doubt exists are such as can be directly used for war without further addition. They might, of course, if they were in doubt as to whether a gun was an equipment for war, look at the evidence of intent to satisfy themselves that it was not intended to be used simply for firing salutes. But the question is more difficult, supposing that the equipments are such as can only be used for war by some addition being made to them. Suppose a jury to find as a matter of fact that a certain vessel is intended to be sent to the West Indies and then to have guns put on board; that when her guns are on board, the mainsail with which she had been equipped in Liverpool may assist her in chasing an enemy's vessel, are they then justified in deducing from that, that the mainsail is an equipment, in order that she may be employed to cruise? I have, after giving the question my best consideration, come to the conclusion that the jury may so reason. I am supposing a case where an equipment is made, which, though not in itself sufficient to make the vessel a war-vessel, is still a necessary part of the equipment of a war-vessel. It would, as it strikes me, be a question for the jury to consider whether the equipments are in fact equipments for war. And they may decide that question for themselves by the nature of the equipments, if they sufficiently show it (in which case they will have to look to the intent and purpose only so far as to see that the vessel is to be employed against a power with whom we are at peace), or they may decide that certain equipments which are

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capable of being used for war are, as a matter of fact, equipments for war, on the ground of evidence being laid before them showing an intent so to use them. But I do not mean to say that if a jury found specially these facts, that A. B. had equipped a vessel which was in its structure capable of being converted into a war-vessel to the extent merely of enabling it to sail away from this country, that he knew that the purchaser intended to convert it into a war-vessel, but the jury also distinctly found that what A. B. did to it was done, not in order to convert it into a war-vessel, or in order to be useful to her when so converted, but simply in order to enable it to reach a port where the purchaser might, if he pleased, convert it; in such a case I do not say that A. B. ought to be convicted of a misdemeanor under this Act. That case would not, I think, be within the Act, because the jury would there, in effect, find that the intent with which the act was done was a different one from that mentioned by this section. So far, then, for what may be called the principal offence. There remains for consideration the attempting and the aiding and being concerned in, &c. I have said that the attempt must be to do the act which has been made an offence by the previous clause. The equipment attempted must, therefore, be an equipment in this country, and of the nature I have described. In this the counsel on both sides and all the members of the court are agreed. Where an attempt is charged we contemplate an equipment commenced, but interrupted. In that case the jury will certainly have still more difficulty in seeing whether the equipment is an equipment for war; but, in my judgment, they may so find upon evidence, not of the nature of the equipment, but of the intent of the parties, provided always that the nature of the equipment, so far as it appears, is such that it can be used for war. The same rule applies to the assisting and being concerned in equipping. It must, in the opinion of the jury, be an equipment for war. But I think that their opinion may be formed either from the nature of the equipment or from the intent. Having arrived at this construction of our statute, I will refer shortly to the cases cited from the American reports for the purpose for which, and for which only, I think we ought to notice them—that is, to see whether there is anything in the opinions of the learned judges of that country, for whose opinions I have the greatest respect, delivered in cases to some extent *in pari materia* with the present, which ought to make me pause or review the interpretation I have adopted on looking at the words of our Act. The cases cited are the cases on the point of what the meaning of equipment is, to which I have already referred. And besides these there are the cases of *The United States v. Quincey*, and *The United States v. Gooding*. In *Quincey's* case the portion of the decision which is material in our case was this: That it was not necessary that the jury should find that the vessel when she left the United States was armed or in a condition to commit hostilities in order to find the deft. guilty. They do not say that she need not be equipped for war, but only that she need not be completely equipped. This view, then, coincides with the view I have taken of our Act. It may be that some of the other points decided in that case are not very intelligibly reported, or even not accurately decided, but, at any rate, there is nothing decided but what is in accordance with my interpretation of our Act. Even if there had been, I think the insertion of the words “in order that” in the English Act—words to which I attach a certain importance, and which are not found in the American Act—and the omission in the English Act of any words corresponding with the 10th and 11th sections of the American

Act, might cause me to hesitate before acting on the authority of that case. I think that the 10th and 11th sections of the American Act tend to show that the 3rd section of that Act is less restrictive than our own. *The United States v. Gooding* was the case of a supposed slaver. The statute, on the construction of which the case turned, was very similar to the Act we are considering. It was held in the case that it was “an act combined with an intent, and not either separately, which was punishable.” It was decided that the equipment need not be a complete equipment, but that a partial equipment was sufficient. There are also words in the decision which would seem to show that the equipment must be an equipment for the purpose of a slave voyage, as a matter of fact, though it might be only a partial one. It is said, “Whether the fitting out is fully adequate for the purposes of a slave voyage, may, as a matter of presumption, be more or less conclusive; but if the intent of the fitting out be to carry out a slave voyage, and the vessel depart on the voyage, and her fitting out is complete, as far as the parties deem it necessary for their object, then the statute reaches the case.” That seems to amount to this, that there must be fitting out, as a point of fact for a slave voyage, but either the intent or the nature of the fitting may determine whether it was for that purpose. This agrees with the conclusion to which I have arrived. And now to see what questions ought to have been left to the jury. Disregarding any question as to the style of the Confederate States, which is no doubt sufficiently laid in the information, the question, in my views as before explained be right, should have been:—First, was there an intent on the part of any one having a controlling power over the *Alabama*, that she should be employed in the service of the Confederate States to cruise or commit hostilities against the United States? Secondly, if she was she equipped, fitted out, or furnished in a British port in order to be employed to cruise, &c. Thirdly, if not equipped, was there an attempt to equip her in a British port in order that she should be so employed? Fourthly, or did any one knowingly assist, &c. in such equipment in a British port? I do not, of course, mean to say that the questions should have been left to the jury precisely in the words I have stated. But I think that, in substance, these questions should have been put. Now, with great submission, I doubt whether the substance of these questions was so left to the jury that they would be likely to understand rightly the points they had to decide. The question finally left to the jury seems to me to be correct as far as it goes. The Lord Chief Baron says, “Was there an intention that in the port of Liverpool or any other port she should be equipped, furnished, fitted out, armed with the intention of taking part in any contest?” That, I think, so far as it went, was right, but, in my opinion, it ought to have been accompanied by some further explanation than was given of the words “equip, &c., in order that.” Further, I think the jury ought to have been directed that they might form their opinion as to whether she was to be equipped with the intention of her taking part in any contest, either from the nature of the equipment or from any evidence before them as to the intention of the parties with respect to such equipment, if they thought it *anticipatis usus*. I think further, that, though there may have been no equipment completed, the question whether there was an attempt at such an equipment as would, if completed, have been within the Act, should have been distinctly left to the jury. This was not left to them as a separate question, though it may have been, and, on the whole, I think, was included in the question, “Was there any intention that she should

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quipped, &c." It has been contended by the Crown, that besides these objections to the sufficiency of the summing up, there are other expressions in it calculated to mislead the jury. The Lord Chief Baron remarked, in strong terms, upon the folly of selling gunpowder and other articles—in short, whatever can be used in war for the destruction of human beings—to a belligerent, and concludes a part of his observations, "Why should ships be an exception?" adding that, in his opinion, in point of law they were not. The question why should ships be an exception is repeated in another part. Now, if these observations were understood by the jury to apply to a state of things existing under the provisions of or with reference to international law, and quite irrespective of any municipal law, it would be, I think, unobjectionable; but they are, in my humble judgment calculated to mislead a jury, unless attention was distinctly drawn to the fact that this statute, whatever be its true connection, does certainly place equipped ships in a different position to other contraband of war. The Lord Chief Baron again uses expressions which it would have led the jury to understand him as drawing a distinction between equipping without an order and equipping in obedience to an order, instead of distinguishing between equipping and arming, which I now understand to be the meaning attributed to the words with respect to which this complaint is made, and it is a meaning which, I think, they may fairly bear, and would necessarily bear if the clauses were inverted as suggested by me in the course of the argument, and assented to by the Attorney-General. Again, the Lord Chief Baron, having stated that a man may sell an armed ship to a belligerent if he has it ready, which is I think correct, proceeds to draw from that a conclusion that he may make one to order; and possibly he may build a ship, but he may not equip it in order that it may be employed for war. Now, if the Lord Chief Baron is to be understood as saying that a man may make to order the same kind of vessel as he may sell when he has it ready, that is to say, a vessel equipped and armed, then such a direction, in my opinion, would be erroneous, and I cannot help thinking that a jury would understand the Lord Chief Baron to mean that. Again, the Lord Chief Baron said that he would not leave to the jury the question of what service she was intended for. This, I think, should have been put. It may be that the Lord Chief Baron thought, not that it did not arise become material in any event, but that it might be assumed in favour of the Crown as the facts were in evidence, for he proceeds to say that the question was whether the vessel was built or the course of building. If the jury thought, the Lord Chief Baron seems to have thought, that the ship was not completely built, and therefore no equipment or fitting out could have even commenced, the question of intent did not arise. But that was a question for the jury, and it was only in the event of their finding that question in one way that the question of service for which the vessel was intended became material. Further, it is complained that the Lord Chief Baron directed the jury that equipping, fitting out, and furnishing all meant the same as arming. This we now understand him to say he did not do, but only expressed his opinion that they

It is clear, however, the learned Lord Chief Baron did not direct the attention of the jury to the question whether there was an equipment (completed or attempted) of a character doubtful in itself, but capable of being used for war, which was to the satisfaction established to be an equipment for war by the evidence of the intent of the parties; this, I think, should have been left. I adopt the proposition stated by the counsel for the Crown,

that a summing up which, fairly considered, has on the whole a tendency to mislead a jury upon a question of law on which they ought to be guided by the opinion of the judge, and not to form their own opinion, is open to the objection of misdirection. As remarked by the Attorney-General in his able argument, that the learned Lord Chief Baron was obliged to deal on the trial with a difficult subject, and, as said by the Attorney-General, it is not wonderful if, in some things, his Lordship may have omitted to have made observations which he would have made, or may have made observations which he would not have made had it been otherwise, yet I am not prepared to say that I find in the summing up of the Lord Chief Baron, delivered as it was under these circumstances of difficulty, any statement of law which is, in my judgment, absolutely erroneous. But it does seem to me that the explanation given of an extremely difficult and obscure Act of Parliament was not so full or so clear as a jury ought to have in a case of so great importance, and certainly not so full as the jury will have if a new trial is granted, now that the whole subject has been so ably discussed. I think, also, that there are expressions in the summing up which a jury would probably have misunderstood. So that, on the whole, I think we ought to grant a new trial on the ground of misdirection, including, as I do in that, inadequate direction and expressions calculated to mislead the jury. Taking this view, I need not again revert to the question whether the verdict was against evidence, or whether, supposing it to be so, the present case ought to be assimilated to a penal action, in which case the rule is that a new trial is never granted solely on the ground that the verdict is against the evidence. I expressly refrain from offering any opinion whether the verdict found by the jury in this case was or was not in my judgment the right one. But I say that it was an unsatisfactory verdict, because it may have proceeded upon a misapprehension of the law and of the questions to be decided. It is a satisfaction to me to find that my Brother Pigott has arrived in the result at the same conclusion with myself, though his reasons for doing so may not be entirely the same as my own. It is also a satisfaction to me to know that, although I differ from the Lord Chief Baron and Mr. Baron Bramwell in the result, there are many broad points of agreement between us. I agree with them in thinking that what this statute forbids is an equipment for war. I agree with them in thinking that the main object of the statute was to prevent our ports being made stations of hostilities. Our difference appears to be this, that they think the equipment must be intended to be completed so that the vessel when it leaves our port shall be in a condition at once to commit hostilities; while it seems to me that in the fair and reasonable meaning of the words used another case is included—viz., where the equipment not being complete to that extent is yet capable of being used for war, and the intent is clear that it is to be used for war. I say that the full and reasonable meaning of the words includes that case, and that we should judicially construe the Act to include it. It may be said that the manner in which I have considered this case, by a minute scrutiny of the words of the Act, is a mere lawyer's method of viewing the matter; that in a case of this kind it is our duty to take a broader view—to take into our consideration the principles of international law, the duties of nation to nation, and even the opinions of great statesmen on those duties. I, for my part, have no ambition to decide cases in this court in any other capacity than that of a lawyer. In days long past judges, I think, often invaded what we now consider the sole province of the Legislature. They interpreted statutes to include cases which they assumed to

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[Ex.]

think ought to have been included. Thus, not merely constituting themselves legislators, but generally also legislators *ex post facto*. That, I think, will never be done again. As long as Acts of Parliament are drawn as they are now, the office of construing them will be no sinecure, though we have but to interpret the law, and not to make it. If it is for the interests of the nation that the law should be other than we interpret it—if our construction of this Act of Parliament may endanger the peace of the nation, then I say that it may be the duty of Parliament to enact a new law, but it is not our duty to look elsewhere than at the present statute for an interpretation of it.

PIGOTT, B.—The rule for a new trial in this case has been drawn up on seven different grounds. We have, however, to consider them as practically reduced to two, and, accordingly, the arguments were directed to impeach the general verdict which was found for the claimants of the ship the *Alexandra*—first, upon the ground that the Lord Chief Baron had misdirected, or had insufficiently directed, the jury in point of law; and secondly, that the verdict was against the weight of evidence. The material facts disclosed in evidence on the trial were, that the vessel, the *Alexandra*, was built by Messrs. Miller, who stated that she was for Messrs. Fraser, Trenholme and Co., agents of the Southern Confederacy; that she was launched in March, and, at the time of the seizure, on the 5th April, the defendants' workmen were variously engaged in fitting her with stanchions for hammock-nettings. The masts were up, and had lightning conductors on them. She was provided with a cooking apparatus sufficient for 150 or 200 people. That her build was apparently for a gunboat, with low bulwarks, over which pivot guns could play, and her hatches were too small for merchandise; in fact, that she was not qualified for mercantile purposes. No evidence was called for the defence. The contention upon the trial (as upon the argument before us) was that, upon the true construction of the 7th section of the statute, the evidence disclosed no illegal act done or attempted in reference to this vessel, which worked its forfeiture. The Lord Chief Baron's direction to the jury is before us at full length, and I now propose to consider the objection to its sufficiency, and the arguments which were addressed to the court thereupon. It is clear that the construction of a statute is for the judge, and there are, no doubt, many statutes which are so unambiguous in their language that it is quite sufficient to read the words to the jury without explanation or comment. A judge has a right to assume that the jury whom he is directing are persons of ordinary intelligence, and in his direction to them to treat them as such. But there are a variety of statutes of quite a different character, and which persons of intelligence not accustomed to the consideration of the artificial language in which Acts of Parliament are frequently framed, require to have fully and carefully explained. In such cases the duty lies upon the judge to give the necessary explanation, and to evolve the question of fact, which the jury are to decide. The statute in question is clearly one of this class, and we have to see whether, upon the whole, the jury were sufficiently directed on the true meaning of the 7th section of the Enlistment Act, so that they would clearly understand the issues of fact which they had to try. In order to determine this, it is necessary to ascertain the construction which the 7th section ought to bear, and I propose to examine the arguments which were addressed to the court to guide us in our decision. As to one class of these arguments, I felt great doubt if they could be legitimately addressed to us for the purpose of ex-

pounding a municipal statute; and, certainly, I do not consider myself at liberty to look to them, except as matters of history, to throw light on the state of our law at the date of this statute. I allude to the debates in Parliament, to the correspondence of English and American ministers of state, to Hamilton's rules of 1793, and the writings of modern historians. But a second head of argument was founded on the state of international obligations as between neutral and belligerent nations, and which, it was argued, the Legislature, by the 7th section, intended to enforce upon the subjects of the Crown. The arguments necessarily embrace a very wide field, and no doubt these obligations are the foundation of this legislation; but, in my opinion, they are pushed too far if argued as the necessary limit of a municipal enactment. A belligerent would have no right to complain of a neutral State, so long as it is not affected by hostile acts, or until aid be in some way actually afforded to his adversary; but the neutral State, as between itself and its own subjects, may find it expedient so to legislate that between them it attempt to commit acts of hostility and the completion of them by their subjects an opportunity would be afforded to arrest such completion, in which the object is a "prevention of mischief," on which the peace of the country is supposed to depend. I should expect, *a priori*, that such would be the course adopted. Be this as it may, the consideration of the subject can, for the present purpose, be serviceable at the utmost where the language employed in legislation is in itself really ambiguous; and I think that it cannot be carried to the extent of creating an ambiguity which does not otherwise appear. It is not necessary for me to determine whether this branch of argument is otherwise well founded by a comparison of international obligations with the actual provisions of the Act, for it is admitted that to some extent the latter go beyond them. A third head of argument was founded by both sides on the language and provisions of the American statute. Doubtless it is the same general object, is framed in *pari materia*, and was the forerunner of our statute. In the circumstances, I see no objection to the making a comparison of the language of the two, and seeing whether by their marked agreement or variance any doubtful meaning of the English Legislature can be more certainly ascertained, and in the same way the authorities of the American courts may serve to guide, though not to govern, our judgments. Now, with reference to the corresponding section of the American Act, as compared with the 7th section of the English statute, it is impossible, on the most cursory glance, not to perceive that, although the former was (judging by the similarity of language) taken as the model of the latter, yet that our Legislature has made very material variations from it. Of these the very prominent ones are the use in the English statutes of the disjunctive for the conjunctive, the extending the prohibition to equipping transports or storeships, the addition of the "or in order" to those "with intent," and the omission in the forfeiture clause of the materials for building the ship—alterations which can only have been made with the same object at least. As regards the American authorities, the case of *The United States v. Quincey*, 6 Peter's Rep., is most relied on by the Crown. The decision must be admitted to be open to some criticism. There was in that case certainly evidence of hostile preparations, and neither of the questions answered by the court is exactly in point. But it does, nevertheless, appear from several parts of the judgment, that the court would, if necessary, have gone the length of holding, as, indeed, they say in terms, "that the offence consists principally in the intention with which the

tions were made." And again, "It is the point on which the legality or criminality must turn and decide, whether the advent of a commercial or warlike character." I am that and other dicta in the judgment that are disposed to disregard altogether the of the preparations. I pass now to the head not addressed to us by both sides, and on in my opinion, the judgment of the court mainly based—viz., on an examination of ate itself, its object, preamble, and enacting e: and I own that were it not for the great e of opinion which seems to exist I should : thought it so difficult to construe as it would ppear to be. It is a municipal Act, and is to trued according to the ordinary import of uage employed. This was the rule of con- n stated by Parke, B. in *Lyde v. Barnard*. e of construction is also clearly stated in *see Peerage* case by Tindal, C. J. thus: words are in themselves precise and unambi- then no more can be necessary than to l those words in their natural and ordinary the words themselves do in such case best the intention of the lawgiver." And I con- approve, though with deference, after the aef Baron's observations, Lord Coke's rule *nam*'s case. He says, "the good expositor every sentence have its operation to suppress mischiefs, he gives effect to every word in ute, he does not construe it so that anything be vain and superfluous, nor makes expo- gainst express words." Bearing in mind ules of exposition, and agreeing with my :Channell as to the nature of this statute, I the Foreign Enlistment Act plainly recites chief and the cause of it, which it is designed ent—viz., "The fitting out and equipping ming of vessels by Her Majesty's subjects, : Her Majesty's licence, for warlike opera- which may be prejudicial to and tend to er the peace and welfare of this kingdom." aguage is tolerably plain, and I pass on to r the enacting clause, where the mode of ion is stated. The language of it is varied, I think, in some respects studiously varied, at of the preamble. There is introduced he additional word "furnish;" the copula- nd" is changed into the "disjunctive "or" ect the four much debated words, instead of resion "fitting and equipping and arming ls for warlike operations," which is the lan- f the preamble, the expression is "equipping, ing, fitting out, or arming of any ship or with intent or in order that such ship or shall be employed in the service of any prince, &c., as a transport or storeship, i intent to cruise or commit hostilities," : is agreed on all hands that the latter "with intent," may be taken as omitted. The clause is also directed not only the principal offences stated in the preamble, o against any attempt to commit them, against the knowingly aiding, assisting, or concerned in them—offences expressly, of mentioned for the purpose of the forfeiture. acting clause, therefore, is more extensive : preamble, but I take it to be a clear rule of : tion that where that is the case effect must less be given to the larger words of the

It would be unnecessarily lengthening my nt if I attempted to review all the arguments part of the case. I shall therefore confine to noticing some of them in the course of my own views; and, first, I do not think that isature have used any apt words to prohibit ding a hull of a vessel as contralistinghished ipping it for sea and for other purposes.

It seems to me that if such had been the intention it would have been done plainly by the use of the word "build" before the expressions "equip, &c., and that it is impossible for a court to guess that such might have been the meaning, as was argued by the Attorney-General from the use of so doubtful an expression as that of "fit up," rendered more doubtful for such a purpose by its collocation in the sentence, not standing even in the position which it occupies in the American statute first, but placed among expressions plainly signifying acts done on a vessel in existence. And when reference is made to the forfeiture clause, it is to be observed that neither the hull nor the "building materials" are enumerated there; but, as before observed, the latter words, which were to be found in the American Act, appear to be studiously omitted, and no equivalent ones are substituted. The subject was one too prominent to have escaped the observations of the framers of the statute, and I am led therefore to infer that the Legislature had reason for not interfering with the shipbuilding trade as such in contradistinction to the business of equipping ships. It may have been because of its extent and importance, or it may have hoped to prevent the mischief aimed at by less objectionable means, or—and I think that most probable—it may have considered that ample time would be afforded between the completion of the hull and the equipments necessary to enable it to leave the port during which its destination being ascertained, if illegal, a seizure could be effected. Whether I am right in these suggestions or not, I find no distinct prohibition of the building a hull or vessel, and I feel bound, therefore, to say that by building merely no forfeiture is incurred. But I am of opinion that any act of equipping, furnishing, or fitting out done to the hull or vessel, of whatever nature or character that act may be, if done with the prohibited intent, is expressly within the plain language, and also within the evident spirit of the statute. This intent I take to mean an intent of the principal (who has control of the vessel), having directly for its object the employment of the vessel by a foreign State; or in the equipper a like intent; and with such intent a contributing equipments of some kind necessary to such employment, and it is evident that the intents need not be derived solely from the nature of the equipments, but may be proved *aliunde*. It may not be easy to define, in all cases, the exact point at which the building the hull ends, and the act of equipping or fitting up begins, but that in each case would be for a jury to decide. I will now state some reasons for the construction at which I have arrived. I feel bound, where the Legislature has used different expressions, having different meanings, and has coupled them with the disjunctive "or," not to treat them as if they were coupled with the copulative "and," or as merely redundant expressions, unless I am compelled by the context to do so, but to give effect to each of them so far as they will admit of it, unless I thereby find that manifest injustice or absurdity will result. I do not find that in the present case, and I therefore do suppose that the Legislature attached meaning to the several expressions. I further think it impossible to believe that the word "and" in the American statute should have been so pointedly changed to "or" without object. It was next argued that the four expressions are to be construed as *ejusdem generis*, the word "arm" being the distinctive feature. But, in my judgment, the use of so many as four different words can hardly have been meant to express precisely the same thing, and it is obvious that the words "equip, furnish and fit out," are used in the sections for some purposes at least to signify something different from the word "arm." For instance, as applicable to a transport or storeship they are so

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used. Then, these words being there used, as they must be, to signify peaceful equipments, it would seem a very forced construction to say that they exclude the same meaning when applied to a ship intended to commit hostilities, although that ship equally requires peaceful equipments with a transport or storeship. But it was urged, and more particularly by Mr. Mellish, that the several expressions may have a several effect given to them, only that their meaning should be restricted to equipments of a distinctive character, according to the nature of the ship, and, therefore, that a ship intended for war must have warlike equipments. I think that this construction would be, in effect, introducing into the statute words that are not to be found there, which is quite as objectionable as striking out words which are there, or it would be changing the collocation of the language for the purpose of forcing its meaning, for it is not said in the statute that those equipments alone are unlawful which shall make the ship fit in all respects for its purpose, whether as a storeship or to commit hostilities; but those equipments are unlawful which are supplied with intent that the ship shall be employed in the service of a foreign State; and then the several services in which it shall not be so employed are enumerated, the service of committing hostilities being only one of them. Again, it is admitted by the claimants' counsel, that a complete equipment is not necessary to the violation of the statute, but that a partial one is sufficient (if of the distinctive kind), and further, that as regards a war-ship, any warlike equipment, even short of arming, is forbidden, the consequence would be that you may not put one gun-carriage or gun on board without a violation of the statute, and yet by such partial warlike equipment the ship would be no more in a position to commit hostilities than she would if only peacefully equipped. But it seems to me that a strange result would be produced if we were to hold that the statute intended to prohibit only warlike equipments (founded on the words "equip with intent to commit hostilities"), which was Sir H. Cairns' argument; for that reasoning would drive us to say that only such warlike equipments are forbidden which would enable the ship to commit hostilities, as was argued in *Quincy's* case. The consequence would be that this vessel might have had its pivot guns on board, and yet no offence be committed against the statute, because without the cannon-balls and powder her equipment would still be useless for actually committing hostilities. So that if the intention really were to go out of the port equipped with a full armament, but not to receive her ammunition on board until she was out of the English waters, the 7th section would still not be violated. Again, with reference to the necessity of distinctive equipments, I have not heard that there are any such applicable to a storeship, except the ordinary peaceful ones which a merchant ship requires. And if the argument of distinctive equipments will not hold as to all the several ships pointed out by the statute, I do not think that I have a right to apply it arbitrarily to one class—viz., to ships equipped with intent to commit hostilities. As regards the meaning of the several expressions and the necessity for the use of them in the statute, it may be that the word "equip" in its largest sense would alone have sufficed; but probably an interpretation clause would have been requisite, as it certainly means different things when applied to different subject-matters. In Falconer's *Marine Dictionary* it is defined as "a term frequently applied to the business of fitting a ship for sea or arming her for war," and I think, therefore, the other expressions may be regarded as in the nature of words of interpretation of the possibly ambiguous expression "equip," and meaning the same as if the words

had been a prohibition of equipment, including ships' furniture of all kinds and arms. But because the word "arm" is added to the others, it is fully to express a complete description of the equipments, peaceful and warlike, of a war-vessel, I find it impossible to say that I ought so to construe the section as to deprive the other expressions to which it is superadded of their ordinary meaning. I find, therefore, in the result find any reason for the distinctive construction. In my view, the prohibitive intent is the main ingredient, and any act of equipping done in furtherance of that intent constitutes the whole offence; for, assuming the same intent to be present in two persons, I do not see the difference between the agent who did put on board a cooking apparatus sufficient for 150 or 200 men, unfitted the stanchions, and the man who might be put on board a pivot-gun to have played over the low bulwarks when ammunition should be supplied by some one afterwards. For both would be done with a common object, and the part contributed by each would equally conduce to the fulfilment of it. Before I could come to the conclusion contended for by the claimants, in the absence of plainer words to that effect, I must believe that the Legislature, when enacting a forfeiture and power to arrest a vessel, meant to deprive itself of all reasonable opportunity for exercising that power, and that, too, when the avowed object is to prevent the vessel leaving the English port, and not merely to punish offenders by indictment afterwards. Upon this restricted construction, it is positively plain that the statute would be at defiance in one of two ways—either as was done by the *Alabama*, whose armaments went out in another ship, or, by completing the peaceful equipments first, and then putting on board the guns at the last act in port, probably occupying a few hours at most, and giving no opportunity of seizure or prevention. In fine, I see no more reason for saying that the ship must, in order to violate the statute, be so equipped in our ports with arms to be ready to commit hostilities on leaving them, than for saying that she must be sufficiently manned also, which she would certainly not be in such a condition. I cannot so restrict the statute by construction without feeling that I had virtually repealed it. In arriving at my construction, I do not feel pressed by Sir H. Cairns' argument of inconsistency in drawing so sharp a line between the building and equipping, for the same might be said of the distinction which does exist between selling an armed vessel to a belligerent and arming one with the requisite intent under an order of the same purchaser; the line is equally sharp, and the only difference is in the place where it is to be drawn. Indeed, this argument is rather to be addressed to the lawgiver than to the expounder, there be inconsistency in the legislation. Admitting as I do in my view, inconsistency in this state of the law, as to what is lawful and what is not, I believe nevertheless, that the lesser amount of inconsistency is incurred by adhering to the ordinary meaning of the language employed as I have above construed. Upon this view of the statute, in my opinion the proper direction to the jury would have been that they should first look to see if the principals and equippers had the intention which I have above mentioned; and secondly, whether, with such intent, the latter had done any act towards equipping, furnishing, or fitting up the vessel beyond the mere work of building the hull of the vessel, or had attempted or endeavoured to do (and I agree with the definition of the latter which my brethren have given). But, looking at the whole of the direction of the Lord Chief Baron (which I need not criticise at length after brother Channell's judgment), although his L

appear to have left the question of fishing, or fitting up to the jury in yet I think there are other passages g-up, which are inconsistent, and ve a tendency to mislead them, and e jury should have been distinctly ents, as before defined, being estab- tisfaction, any act of equipping, in such intention, would be unlawful aning of the statute. I am also of en if my construction of the statute id that it ought to be construed as tended—that is, as prohibiting only distinctive character, yet that upon ove stated there was sufficient upon t the jury that the claimants had tive equipments within that meaning he evidence to which I allude is the ting stanchions for hammock-racks apparatus for a crew of 150 or 200 ar-vessel. I do not find that such iven, and I am therefore of opinion ound of an insufficient direction, be a new trial. On the other ground, t was against the evidence, I agree r Channell that it is unnecessary for as I think the rule should be absolute ove stated.

IEQUER CHAMBER.

JOHN THOMPSON, Esq., Barrister-at-Law.

IN THE COURT OF QUEEN'S BENCH.

Tuesday, May 11, 1864.

C. J., BRAMWELL, B., WILLES, J.,
B., KEATING, J. and PIGOTT, B.)

AND ANOTHER V. MONTEFIORE.

Issue—Construction of policy—Adventure
commence from loading in P.

As on board the ship *D. H.*, stated the
at and from port or ports in the River
United Kingdom," "beginning the adven-
said loading thereof aboard the said
ve." Goods were put aboard before the
in the River Plate, and the ship sailed;
ess of weather, the ship put in at
ite for repairs, and part of the goods
! to enable the surveyors to ascertain the
the repairs to be done, and the goods
rds reloaded. The vessel and cargo,
river Plate, were then sold to *D.*, who
n to plts., who thereupon effected the
on the cargo while the ship was on her
land. The underwriter was told where
! been put on board. A loss occurred
age:

the judgment of the Court of Q. B.),
ty of Nonnen v. Kettlewell, that there
ent constructive loading in the River
e the plts. to recover.

special case for the opinion of the
That court gave judgment for the
.. T. Rep. N. S. 294).

was brought upon a policy of in-
cargo of guano on board the ship
The policy was effected Dec. 4,
te., to whom the ship and cargo had
. The ship sailed from Monte Video,
ite, on the 21st Oct. 1857, for Eng-
e course of the voyage suffered sea
uch part of the cargo as was not
y by sea damage was sold. At the

trial the loss was admitted, but the liability of the underwriters disputed under these circumstances.

In Aug. 1857 the ship called the *James N. Cooper* arrived sea-damaged at Monte Video, with 800 tons of guano on board, which she had shipped at Liones Island, Patagonia, destined for England. A portion of the guano, for the purpose of repairing the vessel, was unloaded and reloaded after the ship had been thoroughly repaired. The ship and cargo was then put up for sale and bought by Da Costa, Brothers, of Monte Video, who re-named the ship *Dos Hermanos*. They determined to send the ship and cargo to England, and it was arranged that Messrs. Jacobs and Co., of Monte Video, should advance 4000*l.* on the security of the ship and cargo, which were consigned to the plts., their London agents. This arrangement was carried out, and Da Costa, Brothers, were requested to effect an insurance on the ship and cargo. The policy of insurance now in question was then effected with the company, of which the deft. is chairman.

The policy described "the voyage at or from port or ports in the River Plate to the United Kingdom," &c., "beginning the indenture upon the said goods and merchandise from the loading thereof aboard the said ship at as above," &c.

Brett (A. Cohen with him) for the defts.—It is submitted the judgment of the court below is erroneous. The plts. are not entitled to recover, as the policy did not attach on the guano on board the vessel. The policy states that the risk is to begin upon the goods from the loading thereof aboard the ship, "at as above," i. e., in a port in the River Plate. This guano was loaded on board at another place before the vessel arrived in the River Plate. According to

Robertson v. French, 4 East, 130;

Spitta v. Woodman, 2 Taun. 416;

De Symonds v. Sheddon, 2 B. & P. 153;

Horneyer v. Lushington, 15 East. 46;

Langhorn v. Hardy, 4 Taun. 628;

Mellish v. Almutt, 2 M. & S. 116;

Pickman v. Carstairs, 5 B. & A. 651;

Redman v. Loudon, 5 Taun. 462;

a policy with a clause like this does not attach on goods previously loaded at another place before the ship arrives at the place where the adventure is to commence. Clauses like this are inserted to prevent the liability of underwriters attaching in such cases. The words of the policy are to be construed according to their ordinary meaning, and if plain, as the words in this policy are, the surrounding facts cannot be looked at to control their meaning. The taking out a part of the cargo and then re-loading it, is not a loading of the cargo within the contemplation of this clause, even if it could be considered a constructive loading:

Richards v. The Marine Insurance Company, 3 John-
son, 307 (American);

Murray v. The Colonial Insurance Company, 11 John-
son, 302;

Harrison v. Ellis, 7 E. & R. 481;

Halhead v. Young, 6 E. & B. 312;

The William, 5 C. Rob. Adm. 385.

The case of *Nonnen v. Kettlewell*, 16 East. 176, relied on in the court of Q. B. by the other side, is an exceptional case. Besides, there the whole cargo was ascertained and examined at the port of Lanse-rona, as well as a part taken out.

Milward (Potter with him) for the plt., was not called upon to argue.

ERLE, C. J.—I am of opinion that the judgment of the Court of Q. B. ought to be affirmed. This was a policy of insurance on a ship "at or from port or ports in the River Plate to the United Kingdom . . . beginning the adventure upon the said goods and merchandise from the loading

[Ex. Ch.]

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[Ex. Ch.]

thereof aboard the said ship at as above." The ship sailed with a cargo of guano from Monte Video, and suffered sea-damage, and the cargo never arrived in England. And the question is, whether the policy ever attached on the guano, because the policy is "beginning the adventure upon the said goods and merchandises, from the loading thereof aboard the said ship, at as above." It is clear that the cargo in the first instance was substantially loaded at Liones Island, Patagonia, and the ship then sailed, and from stress of weather put into Monte Video in a damaged state, and that a part of the cargo was unloaded to enable the repairs to be done, and then put on board again. And the question is, did the policy attach under these circumstances? The deft. insists that it did not, because of the words in the policy "beginning the adventure upon the said goods from the loading thereof aboard the said ship at as above;" and he says that there has been no loading of the entire cargo at Monte Video. I decide this case on the authority of the decision in *Nonnen v. Kettlewell*. It seems to me that as far as the stipulation for the loading at the port of departure is concerned, there is as much a loading at the port of departure in the present case as in that case. Here, in consequence of damage to the ship, a part of the cargo was taken out at Monte Video and put on board again after the ship had been repaired; while in that case a part of the cargo was taken out to enable the custom-house officers to inspect and examine the whole and adjust the duties payable, and then reloaded: and Lord Ellenborough held that to be a virtual reloading of the whole, and that the owners were entitled to recover under the policy. I am of opinion that there has been a compliance with the words of the policy according to that case, which to my mind is supported by principle, and I should abide by it, if there had been a conflict of authorities, which there is not. That was not an exceptional case, as was put by Mr. Brett, and his argument on that head, I think, is untenable. A policy of insurance is a mercantile instrument, and is to be construed according to the rules applicable to all written instruments, so as to give effect to the intention of the parties, which is to be gathered from the words of the instrument and interpreted by the surrounding circumstances. If the words are capable of more interpretations than one, it is the duty of the judge, with the aid of the jury, from the surrounding circumstances to ascertain the true meaning. Mr. Brett relied upon the case of *Robertson v. French*, 4 East, 120, where it was expressly stated by Lord Ellenborough that the same general rules of construction apply to policies of insurance as to other instruments. Lord Ellenborough says, at p. 435: "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments, and in all other cases. It is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of assurance, namely, that it is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the intention of the parties to that contract, be understood in some other special and peculiar sense." It is a universal rule, that the surrounding circumstances may be taken into

account to assist the construction of the contract. In the recent case of *Stanley v. Webber*, relating to the Asheton Smith estate, this matter was a good deal considered. In *Robertson v. French* there was no doubt whatever of the meaning of the policy, and there was a full description that the adventure was to be in respect of goods put on board in some port of Brazil. That judgment entirely gives effect to the words of the instrument, taken in connection with the surrounding circumstances, so as to effectuate the intention of the parties. In *Spitta v. Woodman*, and in the Gottenburg cases to which we have been referred, the construction was so modified as, in my opinion, to defeat the intention of the parties. The question whether the description in a mercantile instrument is to operate as a condition, or a representation, or as a mere description, was a good deal considered in *Behn v. Burness*, 9 L. T. Rep. N. S. 207. There my brother Williams, J., who delivered the judgment, goes into a consideration of the rule of law by which written instruments containing words of description are to be construed. Here the words are, "at and from the loading thereof aboard the said ship at as above." There can be no doubt, if the surrounding circumstances are to be looked at, that it was the intention of the parties to effect an insurance on a cargo half way on its voyage to England; and that the subject of the insurance was the guano then on board. The time when the policy begins to run is when the vessel is in the river Plate, and from the loading of the cargo thereof. Are the words, "beginning the adventure on the goods and merchandises from the loading on board the ship in the river Plate," a condition or mere description? I should think that it was a mere description, and not a condition. In Phillips on Insurance, a masterly book, the discussion of this point at p. 511, begins by asking the question, "Whether specifying the risk to begin on the loading of goods is a mere description, or a warranty that the goods shall be loaded at the port named," and at p. 514, the author sums up in the following words:—"This specification of the *terminus a quo*, unless it appears by the policy to be intended as a warranty of the loading at the designated place, is to be taken as mere recital, or description, or intention, or expectation, being at most an implied representation of the loading, and is to be construed accordingly." It cannot be said that the American lawyers are entirely consentaneous on the point. After all, this is the case of an underwriter who never attached the smallest importance to the place of the loading of the cargo, and I can see no reason why he should be allowed to defeat his liability on this ground. Not meaning to run counter to any of the decisions, I dispose of this case because *Nonnen v. Kettlewell* is an authority in point in favour of the plts., whether the general question is to be decided according to the meaning of Mr. Phillips, or the stricter construction contended for by Mr. Brett.

BRAMWELL, B.—I do not wish to differ from any decided cases, but to state what I believe to be the true construction of the clause in question. In a policy of insurance the parties first describe the voyage, then the thing to be insured, and then they insert the time when the risk is to commence. I think it may well be argued that the clause amounts to nothing more than this, that the risk is to commence on the loading of those goods which may be loaded in the river Plate, and as to other goods loaded for the voyage from the time of their being brought there. If the loading there had been intended to be a condition precedent, one would have thought that it would have been more fully expressed than it is in this clause. As to *Robertson v. French*, I think that it is not very clearly reported. It was the case of a vessel which had taken on

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argo on a voyage from the Cape of to the coast of Brazil, to trade there and ther back. The insurance there was to be made on the return cargo, and what ally decided in that case was, that neither rgo was insured until the return voyage nced.

J., CHANNELL, B., KEATING, J., and . concurred.

Judgment affirmed.

orneys, *Oliverson and Co.*
ttonneys, *Pearce and Co.*

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OF QUEEN'S BENCH, GUILDHALL.

LORD CHIEF JUSTICE COCKBURN, and
a Special Jury.)

Dec. 1863.

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*de law—Insurance abandonment—Total loss
—Evidence.*

*ces under which the master of a merchant
thout making any effort to save her, without
rating with the underwriter, and in the
f any immediate peril, is justified in abandon-
selling her, and treating her as a total loss,
cannot claim for a constructive total loss unless
e that the vessel, being unseaworthy, required
hich were either impossible at the place where
or which would entail upon them an expense
as to exceed the value of her when repaired.
hat the injuries arose from the perils insured
Third, that the sale was justifiable as being
pressure of urgent necessity.*

s an action to recover from the under-
full amount 15,000*l.* on a policy of insur-
ed on the passenger screw steamer, the
under the following circumstances:
amer, built in 1847, was built as a war
d of greater strength than usual. Messrs.
ught her in 1857, when she was therefore
ears old; and after employing her for
in the China trade, they insured her for
February, 1859, and had her sent home
ro from Calcutta. Her hull was valued
her engines at 4000*l.*; total 17,500*l.*;
ttings and gear would make her, it was
worth about 20,000*l.* She left Calcutta
and in May called at Algoa Bay, on the
f Africa, to refit. She twice left that place
not a port, but an open roadstead—to pro-
voyage, but was twice forced back by rough
It appeared that she was hardly in a state
such weather. Her hull, though said to
was corroded; her woodwork and rigging
ther rotten or defective, and her boilers and
ere out of repair. So bad, indeed, were
that soon afterwards, it appeared, they
lly work. Beyond all doubt she was in
; and when she had for the third time put
Algoa Bay the captain wrote home in July,
as "very doubtful" as to her hull; that
eads were gone, and that a rivethead had
it. Iron vessels, it should be stated, are
n plates, each of which lap over another,
passing through each, and fastening them
framework, with heads or "nuts" both
outside. The rivet which had dropped
rse left a small round hole, which let in
but, though it was under the sole-plate
he engines rest, that was cut away and
ugged *securely*, and no mischief came of

it. However, the ship was in such a state in July,
whether from wear and tear or rough weather, that
the captain came home to consult the owners, and
he conferred with Mr. Lindsay, between whom and
himself the whole business was transacted. He
made a claim on the underwriters for damage then
done, and they "settled" at 4000*l.*, which he received,
and then sent the captain back. His instructions to
the captain were, he said, to get the vessel repaired
and bring her home. While the captain was away
in October two severe gales occurred at Algoa Bay,
where the ship was riding at anchor, but she rode
them out in apparent safety without any visible or
sensible injury. In November the captain came
back, and still no injury was observed beyond what
had already been paid for, and he wrote home that
he found the ship as he had left her. The repairs
were, he said, proceeding, when, on the 27th Dec.,
a leak was discovered, which was found to proceed
from a small hole in the centre of one of the plates
at the bottom, the precise position of which was
much in dispute, but which became of less import-
ance when at length it was admitted in effect that
wherever it was it could be got at and repaired. The
ship's "log-book" described it as of the size of a
rivet-hole, and recorded that the captain ordered it
to be plugged (as the other hole had been), and
that it was so plugged, and that the vessel then
leaked nowhere else, and was pumped dry. The
captain had a survey next day, and nothing more
was at that time discovered; but on the 3rd Jan. he
wrote home to Mr. Lindsay to the effect that he was
so sure the vessel had received a strain that he had
no doubt she would have to be abandoned. He gave
orders forthwith not only to have the cargo taken
out, but even the engines, and they were accordingly
removed. On the 16th Jan. Captain Salmon and
Captain Joss surveyed her again, and reported that
from the state of the internal plates and rivets they
should recommend that she be hove down—i. e.,
turned first on one side and then on the other—in
order to expose her bottom for external examination.
The captain advertised for tenders for "heaving
down," and had only one tender, for 3000*l.* Some
one, indeed, offered him a hulk gratis for the purpose,
but Captain Simpson and Captain Salmon, who
again surveyed the vessel, advised him not to accept
the tender, and he did not deem it prudent to accept
the other offer. The third survey was on the 1st
Feb., and the two surveyors stated that the ascertained
leaks were in several places, but did not state that
they had seen them, or where they were, or that
they saw any rivets started or any plates loosened.
They thought, however, that an external examina-
tion was necessary, and that it would be unsafe to
heave the vessel down in Algoa Bay. They said
nothing as to abandonment, and were not asked to
advise about it, nor as to what course ought to be
pursued. The Messrs. Lindsay had agents there, but
who took care to remind them afterwards that they
had sent them no instructions on the matter, and
that the captain had considered himself authorized
to act on his own judgment; and Lloyd's agents
refused to offer any advice, as the owners had their
own agents there. The captain, therefore, had no
advice as to the course he ought to pursue. It
appeared that there were several courses open to
him. Simon's Bay, about three days' voyage from
Algoa Bay, is a safe port of retreat at all seasons,
and the voyage there at that time of the year was
fair and favourable; a respectable shipwright there
told the captain that he could have the ship repaired
there in two or three months—that is, in
June; and it appeared that if the vessel could not
go there with her own engines there were steamers
which could be got to tow her there. Further,
divers could have been got to examine the ship's
bottom. However, he did not get divers, nor

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endeavour to get tugs (being sure, he said, that he could not have got them; nor did he wait for advices from home, though Algoa Bay is only sixty-days' post there and back), but without any advice so to do, at once resolved to abandon the vessel. On the 3rd Feb. he gave notice of abandonment; on the 8th he advertised the ship for sale; and on the 24th he sold the hull (the engines having been sent home) for 2000*l*. The purchaser, it appeared, did not know what to do with her without engines, and declared he did not know why she should have been abandoned. He kept her lying at anchor for several months. He did not take possession till May. She broke her cable and drove on shore; and then he broke her up in July and sold her plates as old iron. Meanwhile the captain, in March, had left for England, which he reached in May, when Mr. Lindsay, approving his abandonment of the vessel, made a claim on the underwriters for a total loss. He and his captain represented at that time that the hole was under the sole-plate of the engine, and so inaccessible to repair; though how the captain came to represent this, or why, even if it was so, the hole should have been less accessible than the former hole under the sole-plate, did not satisfactorily appear. If the captain had been called as a witness at the trial, explanation of these matters might have been elicited in cross-examination; but when, after some of the underwriters had "settled" the claim at 50 per cent., the others refused to settle, the captain, said Mr. Lindsay, returned to Algoa Bay and "settled" there, and there he had since remained, not having been called as a witness at the first trial or the second. The majority of the underwriters refused to pay, upon the ground that the vessel had not been rightly abandoned, for that any injuries sustained by the vessel through perils of the seas were not fatal but repairable, even at sea.

The *Solicitor-General*, Dowdeswell, and *Horace Lloyd* were for the plt.

Bovill, Q. C., Sir *G. Honyman*, *Watkin Williams*, *Mangles* and *Norman*, were for the deft.

The facts and arguments are fully stated and reviewed in the summing up.

COCKBURN C.J.—There is one point upon which I agree with the counsel on both sides, and that is the importance of this case, on which we have been so long engaged. I do not believe that a more important case ever occupied the attention of a London jury since the time when first at Guildhall commercial causes were tried, for it involves a question of the deepest importance, not merely to the interests of assurers and assured, but involving the interests of the whole of this great maritime community, of our mercantile marine, and of all merchants engaged in our extensive commerce, the question being whether, under such circumstances as have been stated in evidence, the master of a merchant vessel may, without making any effort or endeavour to save her, without communicating with his underwriters, and in the absence of any immediate peril to her, abandon her, and not only abandon her, but sell her, and treat her as absolutely and totally lost. Now, at the outset, let me state the law upon the subject. The plt. here claim in respect of the total loss of the ship; but the ship when abandoned was still a ship. She was not on shore, nor wrecked, nor sunk. She remained as much a ship as ever she had been; and, that being so, her owners cannot claim for a constructive total loss, except under one of two conditions—that the vessel, being unseaworthy, required repairs which were either impossible at the place where she was, or which would entail upon them an expense so heavy as to exceed the

value of the ship when repaired. Now, the case the part of the plt. here is not the latter alternative, but the former, that the repairs were utterly impossible. If the plt. make that out to your satisfaction, then you will have further to consider whether the injuries arose from the perils insured against; and you will then have to determine whether the abandonment under the circumstances was justifiable; and next whether, even if a sale was justifiable as under the pressure of urgent necessity. Now we start certainly with a most remarkable fact. Here is a vessel, valued by the owners at 13,500*l*. for hull, and 4,000*l*. for machinery—altogether 17,500*l*.; and we have her cast away not upon a barren, inhospitable coast, far from human help, but while riding at anchor in Algoa Bay. We have her abandoned there and sold for 2000*l*. That is a fact, certainly, which calls for explanation, and it will be for you to say whether under the circumstances the explanation offered by her owners is satisfactory. But, certainly, it is a fact which calls for rigid inquiry. On the other hand, there is nothing to show that this was done for any sinister purpose. Setting aside the high character and position of her owners, they were not even insured, and the principal owner was under-insured and wanted his vessel home. It cannot again be suggested that from any sinister or criminal motive the captain would have fraudulently abandoned the vessel. The learned *Solicitor-General* made no observations yesterday on the subject of barratry. It is true that the underwriters insure the owner against loss "from barratry of the captain and crew;" and that, as barratry comprehends a thing that is fraudulent against the owner, or, more generally, if the captain, in violation of his duty, does something fraudulent or illegal, as against the owners, which entails loss upon them, the master has to make it good. But if it could be shown that the captain fraudulently abandoned the vessel with a view to give the owners the benefit of the insurance, that would not be barratry against which the insurers would be held to indemnify, for it is an inflexible axiom of law that a man cannot take advantage of the fraud of his own servant intended for his benefit. It is not, however, necessary to enter into that question, for the plt. do not say that they are entitled to recover upon that ground. But the *Solicitor-General* contends that, if the captain abandoned the vessel from a desire to get rid of his engagement, it would be a fraud upon the owners, and would be barratry for which they could recover against the underwriters. Conceding that for the present to be so, there appears to be no evidence that in fact the master has been guilty of such fraud. Still, it is contended, on the part of the deft. that he, knowing it would be for the interest of her owners to abandon, did not show the energy and earnestness which he otherwise should, and it is urged that he knew that a large sum of money was about to be laid out upon her, and doubted if she was worth it, and that this detracted from his anxiety to use all possible exertion to save her. I should deeply regret that anything said here should be considered as in any way reflecting on the character of the captain as having been wanting in honesty or a desire to do his duty to the owners. But, when we are enquiring whether he has exercised a sound and honest judgment in the matter, it may not be unimportant to see whether he has shrunk from meeting the difficulties of his position, whether he has displayed timidity and hesitation and want of that energy and courage which generally distinguish the character of the best seamen of our country. Without imputing to him the slightest dereliction of duty so far as his employers were concerned, you have to consider

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did all that a sense of duty ought to elicit from him. Now there are some able features in this case—circumstances even though there are no grounds to suspect or improper motives, might well excite suspicions that his conduct had not been correct.

The leak which first caused the difficulty occurred on the 27th Dec., and the captain brought two surveyors on board on a proper course, though it may be rather it would not have been better to connect with engineering, who could at least really state the state of the vessel, and recommend that the cargo should be removed to see the internal state of the ship. At that time, it is plain from the evidence that it was found out amiss in the ship except the hull was, for aught that then appeared, all right. The cargo began to be removed on the 3rd, and up to that time all that was known of the condition of the vessel was that it was sprung. Now, it is material to see the captain's mind at that time and what conduct was. Before he was aware of amiss in the ship, on the 2nd Jan., if one of the witnesses is true, he spoke as if the vessel was condemned; and beyond all doubt the 3rd, he wrote a letter to his owners, dated that he "feared the vessel must be condemned."

In short, it is plain that from the very first that which was ever present to his mind was the idea that the ship was really condemned. On the 3rd Jan. he wrote to his owners. On the 4th he took a step and began to disconnect the engine at that time he had no knowledge that it was off and knew of nothing but nevertheless, he began to disconnect the engine which so much of the power of the ship; and still further, if we are to believe of two witnesses, he took at this time unprecedented. According to these witnesses he solicited two of the crew to refuse to go on their voyage. It is true he denies it; but one of the men that the captain asked to do so. No doubt a man who would sign circumstances may not be a reliable witness.

It does not appear that he had any conversation with the captain, and that is what he has never heard before of a captain's crew to refuse to proceed on their voyage because of the vessel being unseaworthy? if that were really so, as if the captain without waiting to ascertain the real facts, made up his mind to have the vessel repaired, and was seeking to secure some of himself by obtaining this paper from the captain, that was on the 4th Jan., and from the captain went on taking the machinery he entries in the log show that men were employed; and on the 10th Jan., a week afterwards, on the second survey, on the 10th, he stated that the vessel must be holed. The captain suggested it. How did he know it was holed? He admitted now as a fact, that, so far as one of the plates was concerned, it had been repaired; and the captain admitted along he knew that hole might be repaired. He was "fearful of other leaks." These circumstances well worthy your consideration to determine whether the captain's judgment and pursued a proper course to come to the conclusion that he was wrong will not be material that he was pre-hasty, and that, instead of grappling with the facts, he yielded to them; but then these facts may assist you in your judgment

as to whether he was right. Well, on the 16th Jan. there was the second survey; and before that time the captain had tried to obtain a tender to hoist the vessel down; so that he acted as though, in his mind, there was no doubt that the vessel was unseaworthy, and must ultimately be condemned. Now, the question of abandonment always depends on what a prudent owner, uninsured, would have done under the circumstances. If a prudent owner, uninsured, would have abandoned the ship under such circumstances, then the abandonment will stand. Before you come to that conclusion you must consider the state of the vessel as she lay at anchor on and after the 27th Dec. There are two causes of unseaworthiness alleged—first, the hole in the plate; and secondly, the general state of the plates and rivets. It is necessary to consider them distinctly. As regards the hole, no doubt it made the vessel unseaworthy until repaired, and it would not have been prudent or proper to proceed to sea without its being repaired. Then we come to another and more difficult question, as to the state of the plates and rivets. This is material, not only as to unseaworthiness, but its cause; and whether it was sea damage, or wear and tear. Now, as to the state of the plates and rivets, there is an extraordinary contradiction of evidence—though, perhaps, not so striking out the witnesses who spoke to the state of the rivets as indicating straining or wrenching; because, so far as I am aware, there is only one witness—Gilley—who speaks to rivet-heads as having been wrenched off or bent. The first survey states nothing as to the rivets; the second, on the 16th Jan., states that (the cargo and engines having then been taken out) the surveyors were able to make a careful examination of the ship's bottom, and that, from the internal state of the plates and rivets, it was necessary to have the vessel holed down. They speak, you see, only vaguely of the "state of the rivets," and don't say whether it arose from the violence of the sea or from straining. In their evidence, one of them (Joss) stated that he found in the engine-room rivet-heads worn off, and several plates also worn; but he did not observe that any of the rivets had started, and though the hole was recent, "the state of the rivet-heads might have been going on for some time." The other surveyor (Salmon) stated that, in examining the neighbouring plates, they found a great many of the rivets started and bent. He is the first who states that; and it is observed that it was not stated by him until he came to England, and had found out what would be the value of such evidence in the case. There can be no doubt that if the rivets had started, the plate would be loose and let in water. He could not have meant to state that they were so, and did let in water, or he would surely have spoken positively of a fact so important. Beyond all doubt some of the rivets were worn and corroded; but the question is whether they were "started." Such being the evidence of Joss and Salmon, the evidence of the latter on that point is supported by Gilley, who says he saw the rivet-heads off as if wrenched off. He and Salmon are the only two witnesses in the case who speak to rivets being started, except the captain himself, who in his evidence states that he saw some "apparently started." His evidence goes further than that of the others, and if you believe him implicitly as to the general condition of the ship, there can be no doubt as to its general unseaworthiness, for he says that the iron plates and rivets in the bottom were injured, and some of the rivets off, and some of the plates "apparently started." That, no doubt, would be serious, but you see he does not, as Salmon and Gilley do, speak of rivet-heads being bent or wrenched off. He only says some of the plates were "apparently started." On the other hand, North, the chief officer, says no plates were loose, and no

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rivets started, wrenched, or bent; and so says the stoker, who, however, may not have seen the engine-room when cleared of the engines. But it is strange that North should have failed to see all these loose plates and started rivets. Joss does not speak to them, you observe. And if such was the state of the plates and rivets, it is strange that it should have been omitted from the survey; and it is remarkable that in no letter to the owners does the captain mention that the plates and rivets were in such a state. Yet he wrote on the 16th Jan. as well as on the 3rd, and he had already intimated his conviction that the ship must be condemned. Yet he does not say one word as to the state of the plates and rivets, and speaks only of the hole! Nay, further, he made a protest on the 25th Jan., and afterwards an act of abandonment; and in neither did he make any mention of the state of the plates and rivets. Then the defts. strongly contend that there could have been no straining in the gales of Oct., because from that time till the vessel was abandoned the ship was quite dry, except the leak from the hole; and there was a great deal of evidence to show that the plates could not have been wrenched or loosened without the water being let in. There is one witness, and only one, who spoke to other leaks than from the hole, and he only in cross-examination. That was Salmon, who, being pressed as to the causes of abandonment, said at last that there were other leaks, having said nothing about it in his examination in chief. But in the log-book we may naturally expect to find reliable evidence, and on the 27th Dec., the very day the hole was discovered and stopped, the entry is, "In the course of half-an-hour all quite tight; the pumps sucked out dry, and found the vessel not making water in any other place." And I have looked into the log from that day to the end without discovering any trace of an excess of water in the ship. Added to which, there was a witness who stated that the vessel was dry, and required to be pumped only once a fortnight. If this be so, then it is for you to consider whether there could have been such straining and starting of the rivets as supposed. Where the plates have started one expects to find leaks; and I have looked carefully through the log-book to find any traces of any other leakage than from the hole, and have failed to do so. And it is a very remarkable fact that if there were other leaks no mention is made of them or of the places where they were found. It is true that the third survey speaks of "ascertained leaks in several places." But it is clear that Mr. Simpson had not ascertained them; for he says he took the state of the facts (except as to his own inspection of the hull), from the other surveyors. He does not mention them. And it is strange that if there were other leaks there should be no mention of them in the log-book, where everything of the kind is recorded, nor in the protest, nor in the act of abandonment, nor in the letters of the captain. It is plain the captain had discovered no others, for in cross-examination he said, "I knew the hole could be temporarily repaired, but I was fearful of other leaks." He would not have said he was "fearful" of other leaks if he had discovered them. And neither Joss nor Gilley say a word as to other leaks. Now, it is admitted by all the witnesses that, where there has been straining of the ship so as to cause starting of the plates and wrenching of the rivets, water will come in. The plt's. own witnesses said so. Thus, Mr. Simpson, a trustworthy witness, said, "Unless the plates leaked they could not have been much strained." So Mr. Gilmore,—"If the plates were wrenched and loosened, I should expect to find leakage." So Captain Benson and Mr. Bailey and Mr. Murdoch (Inspector of Machinery to the Royal Navy), and Captain Champion and Captain Aitken

(who for years commanded an iron steamer), and Mr. Grantham, the engineer—all concur that if the plates were started there must be leakage. Then, if there was no serious leakage, could there have been straining? And another argument against the fact of straining arises from the absence of all other indications of it. There is a great body of evidence to show whether if there were straining it would show itself in the bottom or in the upper works. Mr. Bailey says, in both. There seems to have been no such indication in the upper quarters. Mr. Simpson said a steamer would, if riding at the bows, strain at the "bits." So said Captain Benson; so Mr. Robinson, surveyor of the Peninsular Company; so Mr. Cook, engineer of the Royal Navy; so Mr. Grantham and Captain Aitken. It is for you to say, upon the evidence, whether you are satisfied that there was a straining of the steamer such as would cause the rivet-heads to be wrenched and plates loosened. Suppose you were so satisfied, then you would have to consider whether the unseaworthiness, by reason of the state of the rivets and plates, was such as to require the vessel to be hoisted down. This again depends upon the true state of the vessel. If there was all this straining and wrenching of plates and rivets, it would, of course, be proper to have the vessel examined. You must, I should think, be satisfied that the hole could have been repaired. If that were all, there were appliances on board for its repair—a forge, and iron, and three engineers; and there is no doubt that it would be repairable. But the state of the rivets and plates would be a different matter, if you were satisfied that the ship was unseaworthy in those respects. It is, therefore, extremely important to satisfy yourselves on that point. And even supposing that the state of the plates and rivets, so far as actually ascertained, was not such as to render the vessel unseaworthy, still you would have to consider whether that, so far as it was ascertained, raised a reasonable presumption of the existence of further mischief, such as would make it incumbent upon the captain not to adventure the lives of his crew and the safety of his cargo without having the vessel examined in order to ascertain her state. Here, again, the question depends upon what you believe to have been the appearances manifested in the vessel, prior to such examination. If you think that, though there was an absence of leakage and other signs of straining, yet that the rivets were wrenched and the plates loosened, then you would not consider the captain would have been justified in proceeding without such examination. On the other hand, if you think that there was not such a starting of the rivets and nothing which ought to have excited reasonable apprehensions, then there would be nothing to justify abandonment or require further examination. Now, upon that point there is evidence on both sides on which you must form your judgment. But one is struck with this, that no one seems to have been so far apprehensive at the time, either before or after the discovery of the leak, as to take the trouble to ascertain the fact whether there was any other leakage; and so far as appears, the vessel remained tight. It is for you to say whether you think that it was so essential to submit the vessel to a further examination that the only alternative (if it was impossible) must be entire abandonment. That is the important question. It may be that it was desirable; but was it so essential that, if it was found impossible, the state of the vessel was such that it must be sacrificed? That must depend upon your view of the state of the vessel as actually apparent, and the symptoms presented, and whether they were or were not such as to show, or to raise a fair presumption, that its state was such as to render further examination essential. It is not every idle fear that may fall upon the mind of a feeble or

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[NISI PRIUS.]

man which can justify him in throwing away
 sel; you must say whether, so far as could be
 tained, the state of the vessel was such as to
 general unseaworthiness, or raise such a
 nable presumption of it as to render it essential
 there should be a further examination of the
 el. If so, what was it the duty of the captain
 o? It appears that in Algoa Bay there was no
 no dock, no means available to heave the ship
 n, and it was said that the vessel could not be
 down there. That is for you to consider. If
 think that, considering the expense and risk, it
 ld not be desirable, then the question would still
 in whether the only alternative was entire
 ndonment. That is the great question for you.

great difficulty I feel in the case is that it
 ed to be considered that the only alternative
 abandonment. It was said there was a chance
 ing the vessel. But even if so, was it not worth
 e to run some risk to save a vessel worth
 000l.? The question is whether, as there was a
 ice of saving her, and the only alternative was
 abandonment, the experiment ought not to have
 i tried. What right had the captain to sacrifice
 vessel without giving the underwriters the
 on, at all events, of trying to save her? The
 on why the law requires notice of abandonment
 at they may have this option. And then, sup-
 ng you think that nothing could have been
 e at Algoa Bay, you will have to consider
 ther nothing could have been done at Simon's
 . The startling fact is that nothing was done,
 nothing was tried to be done. Because a
 ain man wants 30000l. to heave the vessel down,
 ship is abandoned. There are two questions as
 Simon's Bay—Could the vessel have been hove
 n and repaired there? and, if so, could she have
 n got there? There is much evidence, on both
 n, on both these points. There was a ship there,
 ch was finished in September. Simon's Bay is
 rt which is always safe and secure, and it is a
 d depôt. It is only three days' voyage from
 on Bay. It was summer, and the wind was
 ally favourable. Doubtless there are tempests
 that coast, but the weather cannot always be
 pestuous; and the captain could have chosen
 own time for the voyage. The difficulty I find
 hat nothing was done. Nothing was tried. It
 said no one suggested Simon's Bay. But
 captain knew of it, having been there himself;
 if you are of opinion that the ship could have
 i got to Simon's Bay and could have been
 ured there, and ought to have been taken there,
 the captain do his duty to the owners? But sup-
 ng you should be of opinion that it was not
 ticable, was the only alternative abandonment?
 it is the great question for you. As I said at the
 set, the question whether, so long as a ship
 ains a ship, the owner is at liberty to abandon
 and claim as for a total loss, depends upon
 ther, if he were uninsured, he would, in the
 rise of that ordinary prudence which men ought
 ring to the conduct of their affairs, have aban-
 ed her. If in that state of things, if uninsured,
 would have thrown away a ship worth 14,000l.
 taken 200l. for it, and that would have been a
 dent course to pursue—then the owners are
 itled to recover. Or, again, if the captain, acting
 behalf of uninsured owners, and acting as he did,
 ld be justified in abandoning, then they are en-
 d to recover. But if an uninsured owner, in the
 rise of ordinary prudence, would not have acted
 e did, or would not have approved his so acting,
 e they are not entitled to recover. Now ask your-
 es, putting yourselves in the position of unin-
 d owners, what would you have done under the
 umstances? Would you have abandoned the
 el? Mr. Lindsay says he should have done so,

for that he could have done no more. He, no doubt,
 believes so; but from long experience I know that
 the infirmity of human nature easily biasses men's
 minds; and the question is not whether he sincerely
 thinks he would have so acted, but whether you are
 satisfied that he would have done so. The captain
 admits that no one advised him to abandon. Mr.
 Simpson proposed to add to his report a recommen-
 dation that he should not abandon without consult-
 ing the owners. Unhappily, Mr. Salmon interposed
 and prevented that most salutary advice, which, had
 it been given and taken, would no doubt have saved
 us all this litigation. In the face of such a recom-
 mendation the captain could hardly have ventured
 to abandon. Unfortunately Mr. Salmon interposed
 to prevent it, and you will consider how far that may
 detract from the value from his evidence. It was
 the most unfortunate incident in the history of this
 case. The captain had no advice from any one to
 abandon, and, though he could have had an answer
 from London in two months or ten weeks, he did not
 wait for it, but proceeded not only to abandon, but to
 sell. Now, even supposing he was justified in a ban-
 doning, was he justified in selling? The captain can
 only sell subject to these conditions—there must be an
 urgent necessity; and it must be for the interest of the
 parties. Where was the urgent necessity? What
 need of such hurry to sell? The ship lay at anchor
 in the summer, and could have lain there, and,
 indeed, did so for some months. But she was sold, and
 for the price of old iron. Suppose the captain had
 waited an answer from the underwriters, would
 they not have made some efforts to save a vessel,
 the hull of which was worth 13,000l.? Unless you
 see that the sale was for the interest of the parties
 concerned, and urgently necessary, it was not just-
 ified. And if not, then, although there might be
 no bad motive, there was no total loss. It was not
 enough that the captain exercises an honest judg-
 ment. He must also exercise a sound judgment.
 Not that it is required that he should be infallible.
 He may be mistaken. So might the owners or
 underwriters. But the question is, whether, under
 the then existing circumstances, his judgment was
 fairly and reasonably sound; and whether men
 exercising ordinary prudence would have sold that
 vessel. If not, then the debt was entitled to the
 verdict. It is no doubt important that insurances
 should be upheld; but the whole system of in-
 surances, spreading over the large sphere of our
 commercial operations, depends upon good faith.
 And, as the authority which the law vests in the
 captain of a merchant vessel is liable to be abused,
 its exercise must be held rigorously to those con-
 ditions which the law prescribes, and the captain
 must exercise a judgment reasonably sound for the
 interests of all who are concerned. Then, as to the
 other part of the question—whether the injuries
 arose from sea damage or "perils of the seas"—the
 theory suggested by the plts. of the blow from
 a piece of wreck, was negatived by some of
 their own witnesses, while the counter theory of
 the underwriters, that the bilge water wore the
 rivets, was supported by some of the plts.'s witnesses,
 for instance, by Mr. Gladstone. Remember that the
 underwriters do not insure against all loss or damage,
 but only against perils of the sea, the sunken rock,
 the dangerous sand, the storm which overwhelms,
 and the sea which swallows up. For these things
 they are liable, but not for natural decay and
 inevitable wear and tear. All things human wear
 away with use and time, and the unseaworthiness
 which entitles the owners to recover must have been
 caused by perils of the sea. So much, then, upon
 the question whether there has been a constructive
 total loss. Next as to the question of a partial loss
 from perils of the sea, or sea damage. Mr. Lind-
 say says that even if there was no constructive total

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loss, and his captain was bound to have taken some of the courses suggested to save the vessel, he is entitled to recover the expenses which they would have entailed, and he has given you his estimates on that head. I own I doubt whether, as in fact he did not take any of those courses, he is entitled to recover such expenses—the expenses of measures which he did not take. But that point of law may be reserved. Taking all the evidence into consideration, you are now to consider the question thus presented to you; first, as to total loss, and next as to partial loss. The great question is, whether the captain did rightly in abandoning this vessel, and still more in selling her without communicating with her insurers. It is impossible to exaggerate the importance of the question, for the reasons I have mentioned. Every man who sends a ship to sea places her in the power of her captain, and the captain is bound to exercise a sound as well as an honest judgment. And in this case, if you do not believe that he did so in abandoning and selling the steamer, you cannot find for the plts. for a total loss. The Lord Chief Justice, in conclusion, handed the jury a written paper containing the questions for their consideration, which we give with the answers so far as they were given:—

I. Reference being had to what a prudent owner uninsured would have done, was the damage which the ship had sustained, and the circumstances in which she was placed, such as to justify the master in abandoning and selling her?—No.

Subordinate questions involved herein:—

1. Was the ship unseaworthy?

(a). As to the hole in plate?—Yes.

(b). In other respects and specifically as to plates and rivets?—Yes.

If so:—

2. Could she have been repaired in Algoa Bay so as to be fit for voyage to England?

(a). As to the hole?—Yes.

(b). If necessary as to the rivets?—Very doubtful.

3. If the ship was unseaworthy—but so far as the unseaworthiness was ascertained, capable of being repaired—was there a reasonable presumption of unseaworthiness in other respects, so as to make external examination of her bottom necessary?—Yes.

4. If so, was heaving down the proper course?—Yes.

5. If so, ought an attempt to have been made to heave the vessel down in Algoa Bay?—No.

6. If the ship could not have been hove down in Algoa Bay, so as to be examined, and, if necessary, repaired, ought diving apparatus to have been tried?—Yes.

7. If the ship could not be hove down in Algoa Bay, ought she to have been taken to Simon's Bay?—Not without consent of owners and underwriters.

Could she have been hove down, and, if necessary, repaired there?—Yes.

Could she have been made seaworthy at Algoa Bay for the voyage to Simon's Bay?—Yes.

Could she have been protected on the voyage so as to provide for the safety of the crew?—Yes, by convoy.

8. If all these questions answered in favour of plt.,

(a) Was abandonment justified?—No.

(b) Would a prudent owner uninsured have abandoned?—No.

9. Was the sale justified as matter of urgent necessity; from inability to repair and proceed on the voyage; and also from the probability of still further loss from delay to the parties interested?—No.

Would the circumstances have properly admitted of delay while the captain communicated with the underwriters?—Yes.

II. Was the damage (a) either to the plate in

question, or (b) to the other plates and rivets result of sea damage? or did either result from wear and tear and corrosion?—Answer as to (a):—“From combined effects of wear and tear and sea damage.”

III. Is the amount paid into court, 7 per cent. sufficient to make good the partial loss? 1. As to the injury actually found existing. 2. As to the expenditure necessary for heaving down, examining, and if further sea damage ascertained, repairing. If not, jury to say how much more would such partial loss.

When the jury had retired,

The LORD CHIEF JUSTICE said there was no opinion, such an entire absence of evidence to justify the selling the vessel, that, in the event of a verdict for the plts. for a total loss, he reserved leave to the defts. to move to reverse that point.

The jury were absent about two hours.

At a quarter to six the jury came into court and said that they were unable to agree on a question, viz., how much should be paid by way of a partial loss in addition to the sum already paid into court? They stated also, that they had to the fact that the captain should not have done the vessel without communicating with the underwriters. They had not, however, specific answers to the questions submitted to them, and the Chief Justice accordingly requested them to retire again in order to give their replies to the questions, as well as to reconsider the question as to the amount the plts. were entitled to for a partial loss.

At twenty minutes past six the jury returned, and the learned Judge read out the following questions to them, which they answered:—

I. Reference being had to what a prudent owner uninsured would have done, was the damage which the ship sustained, and the circumstances in which she was placed, such as to justify the master in abandoning or selling her?

Which is divided into these subordinate questions:—

1. Was the ship unseaworthy?—

(a) As to the hole in the plate, the jury answered—Yes.

(b) In other respects and specifically as to plates and rivets,—Yes.

2. Could they have been repaired in Algoa Bay so as to be fit for voyage to England?—

(a) As to the hole,—Yes.

(b) (If necessary), as to the rivets, doubtful.

3. If the ship was unseaworthy, but, so far as the unseaworthiness was ascertained, capable of being repaired, was there a reasonable presumption of unseaworthiness in other respects so as to make external examination of her bottom necessary?—Very doubtful.

4. If so, was heaving down the proper course?—Yes.

5. If so, ought an attempt to have been made to heave down the vessel in Algoa Bay?—No.

6. If the ship could not have been hove down in Algoa Bay, so as to be examined, and, if necessary, repaired, ought diving apparatus to have been tried?—Yes.

7. If the ship could not be hove down in Algoa Bay, ought she to have been taken to Simon's Bay?—Not without assent of underwriters and owners.

Could she have been hove down and repaired there?—Yes.

Could she have been made seaworthy at Algoa Bay for the voyage to Simon's Bay?—Yes.

Could she have been protected on the voyage so as to provide for the safety of the crew?—Yes, by convoy.

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these questions are in favour of plt., then the abandonment justified?—No. Would a prudent owner uninsured have abandoned?

the sale justified, as matter of urgent from inability to repair and proceed on also from the probability of still further delay?—No.

the circumstances have properly admitted hile the captain communicated with the rs?—Yes.

the damage either to the plate or the result of sea damage or wear and tear?—combined.

at is the amount of the average loss, if ld be only an average loss?

this last question, the jury could not were again sent back. Before they ired a further discussion took place in een the Chief Justice and the counsel as r the parties could not agree upon a sum upon as the amount of the average.

-We are willing, as before, to leave this age stater to settle.

licitor-General.—We have had an eight , and we wish to have the amount found

.—We think the amount had better be n average stater.

ties not agreeing, the jury again retired. their return the parties again conferred d to a final settlement of terms, so minate the case without any of the law reserved being left open.

ictor-General said they had agreed that a ld be withdrawn, and each party pay his own rs. Cotterill, the solicitors to the under-reeing to pay over to the plaintiffs the 000l. out of the sum of 5000l. paid into he underwriters, the residue of that sum over to the underwriters.

RD CHIEF JUSTICE observed that it was a rties had not agreed before.

-So we would, my Lord, but we could not. d we have ever agreed had it not been for t of the jury, so far as it was given. And e settlement has saved a long litigation, ending in the H. of L.

moment the settlement was agreed to the ready to deliver their verdict, which it was d would have been for 2500l., including the into court on all the policies.

ADMIRALTY COURT.

(IRELAND.)

l by WILLIAM CHAMNEY, Esq., Barrister-at-Law.

THE MARYANNE.(a)

alvage.—Special agreement, as to seamen's ser- Ditto as to masters' services.—The Merchant y Act (17 & 18 Vict. c. 104), s. 182.

reements with the owners by the masters of a mer as to a percentage on the earnings of the by seamen as to increased wages, for foregoing us for salvage, will not be upheld by the Court ivalty, as being repugnant to general principle icial to the public interest, and as the effect agreements would be to take away from the abhors the motives to all enterprise and energy. se, in which the derelict barque and cargo

From the Irish Jurist, by permission.

which sold for 2700l. was saved from total destruction, but saved without risk to life or limb, the Court considering it a case of meritorious salvage, although not of first-class merit, awarded to the salvors the sum of 1080l., or "two-fifths" of the value.

The Court, in distributing a sum awarded for salvage, will award very liberal remuneration to a steam-vessel specially built for and devoted to salvage services, inasmuch as she is not employed in general trade for the conveyance of goods and passengers, and depends entirely on her chances for public encouragement and support.

This was a cause of derelict salvage, instituted by the new Steam Tug Company (Limited), on behalf of themselves as owners of the steam-tug *Resolute*, 374 tons burden, and 200 horse power, and on behalf of the master and crew against the barque *Maryanne*, of Falmouth, 796 tons burden, and cargo, for salvage services rendered by their tug, who found her derelict in the Atlantic Ocean, and brought her and her cargo safely into the harbour of Cork. The property had become vested by operation of law in the Alliance Marine Insurance Company, as underwriters on ship and freight, and in the Glasgow Underwriters' Association of Dublin, as the underwriters on cargo. The case had been closed at both sides and stood for judgment. But an application was by permission specially made in support of the claims of the master and crew of the steam-tug to be considered entitled to a salvage reward, notwithstanding the evidence in the cause, that the crew, by a special agreement as to the amount of their wages, and the master, by another special agreement on his part, to a certain percentage on the earnings of the steam-tug, had bound themselves to forego all salvage claims.

Drs. Townsend and Chatterton, Q.C., and William O'Brien, for the promovents.

Dr. Gibbon for the derelict; and Dr. Elrington for the master and crew.

KELLY, J.—The Court of Admiralty in cases of salvage, has uniformly refused to admit such agreements as are here relied on as barring the rights of the master or seamen to salvage, and held that it would be repugnant to general principle, and prejudicial to the public interest, if such a proposition could be legally maintained in cases of that description, as the effect of it would be to take away from actual salvors the motives to all enterprise and energy. The case of masters of vessels is still under the protection of these equitable decisions; that of the seamen, however, has since obtained an additional guarantee, as by the Merchant Shipping Act, sect. 182, it was expressly enacted that every stipulation on the part of a seaman to abandon any right he might have in the nature of salvage shall be wholly inoperative. Their claim in the present case must be therefore admitted. This is, confessedly, a case of salvage rendered to the barque *Maryanne* and her cargo, found abandoned at sea, and brought to port in safety by the salvors. The *Resolute*, a steam-tug, and her crew, who performed the service, are the property and in the employment of a company in Liverpool, who, seeking a new field of enterprise, have embarked capital to a large amount in building and equipping this and other vessels of a similar description, for the purpose of towing large vessels many miles out to or in from sea, and with the still more laudable purpose of going out to search for wrecks and vessels in order to bring them into port. The steam-tug which in the present case has performed this latter office is stated in the evidence to be 374 tons burthen, and as fitted up with disconnecting engines of 200 horse-power, but really effective to 500 horse-power, with two distinct

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engines to work her windlass, with the whole of her deck aft left altogether clear for the operations of her towage, and furnished with Manilla hawsers of superior strength and manufacture, and cost a sum of 13,000*l*. Seeking neither for freight or passengers, and devoted exclusively to the useful purposes for which she had been so skilfully and powerfully constructed, this tug, having coaled and victualled at Cork, sailed from that port on the 7th Jan. last into the Atlantic in search of derelicts, her orders from Liverpool having been to that effect. Beating about without success until the 9th, she spoke a schooner, who informed her that a vessel without sails had been seen by her to the south-west. The tug, altering her course accordingly, at length, after the lapse of two days more, sighted the vessel on the morning of the 11th, about twenty miles off, one point on her port bow. On coming up to the master of the tug boarded her, and found her to be the *Maryanne*, a fine barque, 796 tons, timber laden, and totally abandoned. She was sunk to the water's edge, her main deck, with most of her upper beams, broken, her bulwarks amid-ships and stanchions washed away, her rudder gone, her masts, rigging and spars all standing, but the sails blown away from her yards, her chain cables on board, but foul and in confusion, and her papers, instruments and valuables taken away. She was full of water, the sea rolling over her deck, and her cargo of timber, which was full to the deck, was kept down alone by a few beams which were still unbroken, and which barely held the ship together. There was neither binnacle, wheel, nor cabin furniture. The master ordered the engines of the steam-tug to be disconnected, and the tug to be brought to the starboard bow of the derelict, a hawser was hove in by means of a hauling line, and made fast round the foremast, there being apprehension that if it had been made fast round the windlass the strain would have pulled the bows out of her. The derelict being thus secured, the master returned to the tug and the towage began, it being then about midday of the 11th Jan., and the distance to Cork harbour, which he was anxious to make, about 325 miles. The hawser parted near midnight, but being made fast next morning by a shackle to a chain cable of the derelict, the service was carried on without interruption, day and night, until the evening of the 15th, when the harbour was reached, and on the next day she was brought up and anchored in safety in the upper part of the harbour. It was then ascertained that the *Maryanne* had sailed from Quebec on the 13th Nov. previous with a cargo of timber, bound for Grangemouth; but having met with storms and been disabled by the disasters which ensued, her master and crew, on the 11th Dec., took to their boats, and abandoning her to her fate, arrived themselves safely in Cork, from which they afterwards departed on other ventures—and she meanwhile floating about (her cargo being a buoyant one), was ultimately found by the salvors in this case, on the 11th Jan., a complete wreck, just two months after her leaving her port of departure. It appeared in the evidence in another branch of this case that the several insurances which had been effected on ship, cargo and vessel had been paid by the several underwriters concerned, as in a case of total abandonment, and that thus acquiring their interest, these parties now are defending this suit—a suit instituted on the part of the salvors in order to be awarded remuneration for their services. It is to be observed that a necessity having arisen to sell the ship and cargo, in order to ascertain their actual value, that has been done, and the net amount of sales now lodged in court abiding the decision in the case, is a sum of 2700*l*. It is conceded that the property which realised this sum was derelict, and was paid for by the underwriters

as for a total loss; and it is also conceded that but for the salvors it would have been a total loss forever. The general rule of the court of awarding to salvors in such cases a proportion varying from one-third to one-half of the value of the property is appealed to, the right of the court, however, to bend that rule so as to meet the various degrees of merit in each case, being admitted by both sides. Under such circumstances, it is right to observe that this was a perfectly voluntary service; that it was one also predetermined upon by a steam-tug of most superior build and equipment constructed for such occasions altogether, with crew engaged and paid and victualled for the express purpose, who cruised during a course of ten days in the western Atlantic, in a north latitude of 49 deg. 22 min., in the month of January, at a distance from land between three and four hundred miles, and succeeded after a continuous labour by towage for four days and nights unceasingly in bringing into a harbour of safety a vessel of double her own burthen, and with a water-soaked cargo, although of great value. It is right also to observe that this was done, notwithstanding the impediment arising to the towing vessel by the derelict being without a rudder, and that thereby she escaped the heavy gale which commenced to blow the very evening she entered the port, and which, had she encountered six hours earlier out at sea, must have caused her destruction, kept together as she was by a few beams only, and with nearly 300 tons of weighty ballast in her hold. Again, on the other hand, it must be borne in mind that, whilst the service was being performed, the weather was moderate, the sea flowing in a long swell, no risk to life or limb, the steam-tug's men on board their own vessel every night as usual, the days of actual labour four only, and the distance actually travelled less than 400 miles. With these views and counter-views, the court is of opinion that the salvors, although decidedly not of the first class of merit, is nevertheless meritorious, and considers it just to all parties to award two-fifths of the value—being the sum of 1080*l*.—as remuneration to the salvors. The question of the distribution of this sum is not to be determined, and here the peculiar circumstances of this case become as prominent as they are novel. In the early history of salvage the exertions of the salvor, as they constituted almost the entire service, so they monopolised the entire reward. Presently, as skill in navigating and using boats, as well as damage incurred in the use of them, by degrees put forward their claims for a share, courts of salvage began to consider them as in some, but in a very minute degree, entitled. Then, and lately too, came the stage, when a learned judge said: "We all know that formerly claims of owners of vessels to participate in salvage did not receive very favourable attention; but since then things are much changed—steamers are able to render important salvage services, in which the ship herself is the chief agent, and I, therefore, have departed from the former practice, and given adequate rewards to the owners of such vessels." This court may, using these expressions, say with reference to the present case, "things have much changed since then;" for this is not the case of a steam-vessel employed on owner's business with freight or passengers, risking the market for that freight, or the insurance on that voyage, should the master at his own peril deviate to help a vessel in distress, and that, too, but half provided for the purpose; but the case of a steam-tug, built and equipped in all points for such a purpose, and for nothing else—that her market, that her insurance, that her voyage, that the end and aim of her whole adventure, and of her owner's enterprise, is to render salvage services. Under such circumstances the steam-tug becomes not the chief actor only,

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et, as to utility, almost the exclusive one. The master, for the first time, rank only in the subordinate class. It becomes then the duty of this court, as in the case referred to, to depart from the former practice, and to take care that the rewards given to the owners of such a vessel be adequate. The court therefore, out of the amount awarded, apportioned to the steam-tug company the sum of 800*l.*; the remainder it distributes as follows amongst the master, engineer, and crew, considering it right, however, to advise that although their conduct was negatively correct, they during the progress of their service by means exhibited that skill and adroitness which is incumbent on them, and also called for under the circumstances:—To the master, 80*l.*; chief engineer, 70*l.*; chief mate, 30*l.*; second engineer, 15*l.*; Morris, a seaman, who showed most zeal, 12*l.*; five seamen, 8*l.* each, 16*l.*; five firemen, 8*l.* each, 40*l.*; boy, 2*l.*; total, 280*l.* The salvors are to have their costs.

Proctor for the promovents, *Hamerton*.

Proctor for the impugnans, *McLoughlin*.

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Wages — Materials — Kettle-money — Conduct-money — New hiring — Costs.

These seamen sign ship's articles for a specified service, and before the voyage has concluded, the captain agrees to give one or more of them increased wages, the Court will not bind the owners by such an agreement; and will only make its decree for the wages properly payable under the ship's articles.

The Court will award kettle-money and costs to petitioners claiming for wages, and substantiating their claims; but will not give conduct-money in the case of a British registered ship.

A decree for materials will be made on funds in court realised by the sale of the ship, but the payment must be pious to the claims of the seamen for wages.

This was a suit for wages and materials. The petitioners claiming wages was filed by Guiseppe Giacomo, the master, Eugene Mattia, the mate, and nine seamen, the crew of the Maltese brigantine, *Patriotto*, against her on the proceeds of her sale, 410*l.*, then court, to recover wages due to them for their services on board of her. Their joint claims amounted to a sum of 276*l.* 1*s.* 6*d.*, besides conduct-money, kettle-money and costs. By the ship's articles it appeared that this vessel, 215 tons burden, was the property of Vincenzo Caprisis, of Cospicua, in the island of Malta, had been bound on a voyage from Constantinople to any ports in the United Kingdom or continent of Europe, calling at a port, required, for orders; from thence to any port in the Mediterranean; voyage not to exceed ten months. She sailed with a cargo of corn on the 15th Sept., arriving at Cork, which was subsequently arranged to be the port of discharge, on the 26th March following—last March. During the voyage she had been obliged to raise money on promissory at Constantinople, at Valetti and Cagliari. After discharging her cargo and waiting further 30 days at Cork, whilst lying there she had been arrested and sued by the holders of the last promissory bond, who had in consequence obtained a decree of the court against her for its amount, 10*l.* 19*s.* 4*d.*, under which decree the vessel had been sold, the produce of that sale being then in the custody, and not yet applied. It was against that the master and crew now claimed payment of their wages, as having a lien antecedent to all other demands. Upon the part of the

mate and three of the seamen there was a claim also for extra wages from the 2nd Nov., the day the vessel left Malta. As it appeared from indorsements on the articles the mate had been re-engaged that day at a higher rate of wages, and the three seamen rated also at increased payments. The petition for materials was filed by John Christie, James Harris, and John Eccles, of the county and city of Cork, who had supplied stores of various kinds for the fitting out of the vessel, and meat and provisions for her crew when on board, during the months of April, May and June. The case was, by consent, heard *riid voce*.

Dr. *Elrington* appeared for the master and seamen; and Dr. *Townsend* for the other petitioners. The owners did not appear by an advocate.

KELLY, J.—The petition of the material-men must be pronounced for, to the amount of 32*l.* 17*s.* 8*d.*, but all further directions as to its payment must, for the present, be deferred, until the exact amount of the funds, subject to the disposal of the court, be ascertained, and the prior charges also satisfied. The petition for wages, which stands on a different footing, as being a lien antecedent to all others, is now to be considered. The court is satisfied that the hiring and services of the master and crew of this vessel have been well proved, and no evidence has been offered in disproof. Had the petition merely prayed for payment, in accordance with the stipulated hiring, the decree of the court should go as of course. That is not the case, however, as the mate and three of the petitioners claim beyond that stipulated hiring. The allegation on their part is, that when the vessel was, during the course of her voyage, lying in Malta Harbour on the 31st Oct. last, the mate was re-engaged for the remainder of the voyage at a rate of wages much higher than that for which he had hired at the beginning of it, and that the master had consented to increase the wages of Sagelari, Esposito and Possich, the other three claimants under this petition. Now, a claim of this nature, being in derogation of the original contract, requires to be examined into with scrupulous attention, as the circumstances of it must indeed be very exceptional to take it out of what has been and is the declared law, both of the Court of Admiralty and the common law courts. The ship's articles have an indorsement signed by the assistant-superintendent of the port, at Malta, that Mattia, the mate, had been discharged, and afterwards engaged upon the terms mentioned in the articles; but the court in looking at these terms finds them identical with those of the original hiring. That indorsement then does not support his claim. The master's evidence is next appealed to, and that evidence is, that the mate was not discharged, but reinstated at a salary of 4*l.* 4*s.* per month, instead of 3*l.* 12*s.*, the original hiring. Upon this admitted fact, namely, that the mate was not discharged before the fresh contract, the court will guide itself by the settled law. In *Harris v. Carter*, 3 Ell. & Bl. 559, where a plt. under such circumstances was nonsuited, Lord Campbell, C.J., was of opinion "that the nonsuit was proper, and ought not to be disturbed. Had the plt. (he said) been relieved from the obligation which he had contracted towards the shipowners, he might have entered into a fresh contract, and under some circumstances the captain might have had authority to bind the owners by entering into a fresh agreement on their behalf with him. Had there, for instance, been an entire change of the voyage, it might have been so, but here there were no circumstances of that kind. The voyage remained the same for which the men had shipped. There was no consideration for a promise to the plt., and the captain

(a) From the Irish Jurist, by permission.

had no authority to bind the owners." He then concluded with saying: "It would be most mischievous to commerce if it were supposed that captains had power under such circumstances to bind their owners by a promise to pay more than was agreed for." Crompton, J. adds: "I should be very sorry to let it be supposed that there was the least doubt in this case." The mate's claim for additional wages must therefore fail. The evidence as to the claim of the three seamen calls for a decision upon a different principle. The indorsement on the articles states that the increase of wages to them was by consent of the master; but the master's testimony is, "that they would not sail otherwise—that they were imprisoned at first for refusing to go, and that then they consented when put on the increased rate." Now all the reasoning in the case just cited applies to this claim also; moreover, there is here strong evidence that what is called in the indorsement on the articles "a consent" was a consent under compulsion—the master thinking it a wiser choice of evils to comply with the demand of these men for higher wages than to hire others at a higher rate or to sail away shorthanded. In *The Araminta*, 18 Jur. 793, the learned judge of the Court of Admiralty of England, when similar circumstances were under his consideration, said: "I strongly incline to the opinion that if there were a contract for any award beyond the wages stipulated for in the mariners' contract, it would not matter whether the contract were compulsory or voluntarily, it would in either case be illegal, and such was the effect of all the cases." Upon all these authorities, then, the Court considers the contracts, upon which the claim for extra wages are founded, to be illegal, and pronounces against them. The wages due, and to be allowed by the court, must be calculated in accordance with the several rates stipulated for in the ship's articles. For the several sums when so computed, together with kettle-money and costs, the petitioners shall have their decree; but the court refuses conduct-money, this being the case of a British registered ship. The decree was accordingly entered for 250*l.* 19*s.* 6*d.*

Proctor for the owners, *Taylor*.

Proctor for the seamen, *Doran*.

Proctor for the intervenients, *Hamerton*, Q.P.

THE SEMAPHORE. (a)

Collision—Lights and look-out—The Merchant Shipping Act (17 & 18 Vict. c. 104), s. 296—Costs.

In a suit of collision, where the impugnants plead that it was caused by want of proper lights on board the promovent vessel and this plea is positively denied, the court will carefully examine the entire of the evidence, and decide the question upon the general accuracy and trustworthiness of the respective witnesses.

Where there is the risk of a collision, if two vessels continue on their respective courses when first seen, both vessels are bound to port helm under the provisions of the Merchant Shipping Act (17 & 18 Vict. c. 104), s. 296, and if one of them ports in proper time, and the other neglects to do so, and a collision takes place, she will be held liable to make good all the damages caused by her default, and pay the costs of the suit.

The absence of a good look-out in hazy weather on board the impugnant vessel will go far to induce the court to hold her liable in a suit of collision.

This was a suit of collision instituted by the registered owners, the master and crew of the brig *Nereid*, of Belfast, 149 tons burthen, Joseph Ferry

master, against the registered owners of steamer *Semaphore*, of Belfast, 380 tons. John Campbell master, to recover compensation for injuries it was alleged they had severally sustained in a collision which took place between the vessels on the 4th Oct. last, in the Irish Sea, whereby the brig was sunk and totally lost, as the petitioners alleged, to the gross negligence and want of nautical skill of the captain of the steamship. The damages sought were recovered amounted to a sum of about £10,000 which included the full value of both vessels, cargo, and the personal effects of the crew. The Court was assisted by Cayley, R.N. and Lieutenant Crosby, R.N., nautical assessors, and the case was, by agreement, heard *virâ voce*. The facts appear full judgment of the court.

Drs. Todd, Townsend and Ebrington for the petitioners.—The case was one of total loss, and the petitioners were the sole cause of the collision through gross negligence in not having a proper look-out. The petitioners were entitled to be awarded the value of their respective losses. They cite

The Cleopatra, 8 Wm. Rep. 135;

The Mangerton, 1b. 120;

The Anne and Jerome, 5 Ir. Jur. N. S. 384;

The Telegraph, 8 Moo. P. C. C. 167; and

The Vivid, 8 Wm. Rep. 91.

Drs. Gibbon, Lloyd, Q. C. and Chatterton, the impugnants.—The petitioners were not entitled to any relief, as they had been the cause of the collision in not exhibiting lights, as required by the statute, and the *Semaphore*, under the circumstances, was justified in starboarding.

The Commerce, 3 Wm. Rep. 287;

The Joseph Somers, 8 Wm. Rep. 185;

The Clyde, 1b. 23; and

The James, 10 Moo. P. C. C. 162.

KELLY, J. (addressing the assessors) said: "It is now my duty, after due consideration and deliberation, to present to you the several circumstances of the case, which, upon a careful review, have been established, in order that you may be better enabled to assist me with your nature and experience respecting certain issues which my judgment must mainly rest upon. You have had the advantage of being present during the entire progress of the trial, and that you will have but little difficulty in following me as I proceed. About five o'clock on the morning of the 4th of October, a collision occurred in the Irish Sea, about 10 miles north of the Calf of Man, between the brig *Nereid*, of Belfast, a brig of 149 tons burthen, bound for Cardiff with a cargo of coal, and the steamer *Semaphore*, of Liverpool, an iron steamer, of 380 tons and twenty-nine hands, bound for Belfast with passengers and cargo. The result of that collision were damaging to both vessels. They came together nearly head on, the bowsprit of the *Nereid* being broken off at the third, and her foretopmast carried right down; the *Semaphore's* starboard bow carried away the *Nereid's* stanchions, nightheads and past the luff of her starboard bow and board bow anchor. The water rushed in on both sides of the *Nereid's* stem after the collision, and a hole was made in her starboard side one foot from the stem, and about one foot square. The *Semaphore*, on the other hand, although the bowsprit and all her foretopmast were injured, nothing forward hurt, had received a fracture of one foot square over her topgallant mast, twelve or fourteen feet from the stem to the board bow, and was also stove in nearly to

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a full of her starboard side, about fourteen or fifteen feet from her stem. She, however, succeeded in making her port of destination. The *Nereid*, in half an hour after the collision, filled and went to the bottom, and, with her cargo and effects, made a total loss. For some time, and immediately previous to the collision, the courses of the vessels had been, that of the *Nereid* S.S.W., and of the *Semaphore* N. by E., consequently they were upon opposite directions, and one point only between them. Upon this there is no controversy. The wind at the time was S. E. and fresh, blown by the masters of two sailing ships, and the *Semaphore* conceded by the depts., and the *Nereid* going closed-hauled on her port tack about one and a half knots an hour. That is also admitted. On the other hand, the *Semaphore*, being a steamer, was going free about eleven knots an hour, according to the evidence of Captain Finlay, a competent witness, was steering admirably. It is borne in mind, that at the hour named it was the master's watch in both vessels, and that the masters of both vessels were then on deck. The evidence of the master of the *Nereid* is as follows:—About four or five miles off in the morning he descried at once, in the report of his look-out, a bright light about five miles off, one point on his port or weather bow. That light proved to be subsequently the bright masthead light of the steamer. Holding on his course, he, in about eight or ten minutes, made out a green light, the same bearing as the light on his bow. He still kept his course waiting for the light, as, until he saw it, he could not know the steamer's course in order to shape his own. After seven minutes he opened that red light broad on five points on his port bow, and about one mile off, and upon that at once gave orders to the man at the helm, beside whom he was standing, to keep the *Nereid* off, and to give her good full. These orders were at once obeyed, and the *Nereid*, under the influence of her port helm, was off half a point, being at the moment quarter of a mile distant from the *Semaphore*. He had, however, taken scarcely two or three steps along the course when he saw the green light open again, and the *Semaphore* coming right down on him. Seeing that a collision was then inevitable, he ordered his helm down to ease its effect, but as that was scarcely a second before the *Semaphore* was close upon him, the *Nereid* did not alter her head at all. He ran forward to catch the *Semaphore* to save himself, but he got to the windlass end of the deck he fell under the shock of the collision. The evidence of the man at the helm corroborates this statement, as also that of the other witnesses of the plot, and they are not contradicted. On the opposite side, the evidence of the master of the *Semaphore* is this:—He saw the *Nereid* when reported by his look-out, about one-fourth or one-third of a mile off, from one or two points on his starboard bow. She was sharp by the wind and seemed close-hauled, and her yards were set at an angle. She was approaching him. He knew at once she was on his starboard bow one or two points, and made her out by his side eye, and saw that she was approaching him on his bows. He did not port when he saw her, but was of opinion had he then ported he must have been every one on board her. He saw her one point and a half before the collision; he was going eleven knots, and the *Nereid* three and a half. He put his helm hard a-starboard and stopped the *Nereid*; his vessel would fall off one or two points in a minute, and had time to fall off; the *Nereid* did not before he put her a-starboard. His second, agreeing in the rest of this evidence, that the *Semaphore* starboarded before the *Nereid* ported; but Thompson, the look-out man, had the best opportunity of the three for obser-

vation, says: Agreeing with the master that when he reported her she was porting, going off to starboard, and when the signals were given she was going more off to starboard, and was porting. He further adds, that the *Semaphore* had paid off under her starboard helm. The man at the wheel corroborates this last fact; and it should be here observed, that in the 9th article of the defensive plea of the *Semaphore*, it was under the circumstances thus sworn to by each, that, in order to avoid a collision when both vessels saw what was likely to occur, the master of the *Nereid* ported and the master of the *Semaphore* put her hard a-starboard. It is rather a singular fact that neither party challenges the truth of the other as to these circumstances. Your assistance will be, therefore, most necessary to determine where the error lay. Considering the evidence of the master of the *Semaphore*, that he first saw the *Nereid* about one-fourth or one-third of a mile off, approaching across his bows on his starboard bow one or two points, that seems to be the very moment of time when the master of the *Nereid*, according to his evidence, first saw the red light about a quarter of a mile off; and thus the evidence on both sides would agree in this, namely, that about one minute and a half occurred between that sighting and the collision, and that the two vessels were then one quarter of a mile asunder. There is established, then, by the evidence, this state of facts, that these two vessels, approaching each other from opposite directions, with but a point between them, and both conscious that they incurred the risk of collision, should they continue in those directions, that with common consent, they determined to do something to avoid that risk; and, accordingly, the one and the other starboarded. The *Nereid* ported after she had the *Semaphore*'s red light broad four or five points on her port bow. The *Semaphore* starboarded after she had seen the *Nereid* port. I need scarcely mention to you that the law never did leave cases of this kind without some fixed rule to regulate them by. The Merchant Shipping Act has laid down the rule that in such cases both vessels should port so as to pass on the port side of each other, except circumstances existed to justify a departure from that rule; and that such circumstances did exist in this case is the defence, and, if proved, the justification of the *Semaphore*. The plea first put forward with that object by her, is that the *Nereid* did not port in time, and a very sufficient plea for that object, provided it be established by the evidence, and you should so advise me. Now, in examining that evidence, it is to be remembered that the *Nereid* was sailing from north, on a course S.S.W., and the *Semaphore* from the south, on a course N. by E. Referring again to the evidence of the master of the *Semaphore*—that he saw the *Nereid* about one-half or one-third of a mile off on his starboard bow; that she was approaching him; that in a few seconds she was approaching him across his bows; that he would fall off one or two points in a minute, and had time to fall off; that she ported before she starboarded; and to the evidence of the look-out, that when sighting the *Nereid* at first she was giving more port-helm and porting as she neared him, the court cannot discover how such a plea as that she ported too late can be maintained. Here it may be observed that the duty of all shipmasters is, under all circumstances, to do what is right, each on his own part, properly and fairly presuming that the other will do the same on his part. But how strongly contrasts with this plea the evidence of the master of the *Nereid*, in which he states his reason for not porting until the time he did, namely, that until he had opened the red light of the *Semaphore* he could not know her course, or decide upon his own, and that as soon as he had opened it he did so at once, and that sailing as he had been

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under the influence of port-helm, half a point more was quite sufficient to keep away. But again, it is not clear how this alleged delay could have prejudiced the *Semaphore*, as both the master and mate appear to have determined all through that they would not, under any circumstances, have ported the *Semaphore*, their evidence being that if both ships had ported when first sighted there would have been a collision. These matters I will, however, submit to your nautical judgment. Another and a very substantial ground of defence has been pleaded on the part of the *Semaphore*; that is, that the *Nereid* had not exhibited lights according to the statute, whereby the collision was occasioned, and she was disentitled on that account to sue in that or any court whatever. In regard of the fact here alleged, the presumption that a party upon whom a duty under a penalty was imposed had properly fulfilled that duty was urged on the part of the *Nereid*, but such a presumption cannot be urged if strong or sufficient evidence exist to rebut it. There exists, however, a strong probability against it, as it is scarcely likely that the master of the *Nereid*, looking as he was for at least fifteen minutes upon the *Semaphore's* lights as she approached, and knowing their vast importance, to enable him to ascertain her course and decide upon his own, it is unlikely that, at the same time, he should have forgotten or neglected to exhibit his own. Passing by altogether, without further observations, these mere preliminaries, I must assume the duty of examining the evidence itself which has been given in support and denial of this plea, perfectly conscious that with regard to that evidence I must act upon my own sole responsibility, performing, with regard to it, the duties of a juror. In support of it no fewer than eleven witnesses have been examined, five of whom were the master, second mate, and three seamen of the *Semaphore*, and six were passengers on board of her. Of these latter two only saw the *Nereid*, for the first time, one minute or immediately before the collision; the other four not until after it. Now, the state of the *Semaphore* at and after the collision is described by the second mate to have been one of great confusion, between the fears of the passengers—some of whom were females—and the dangerous appearance of the *Semaphore* herself, as she had filled in her fore compartment, and sunk down by the head above her hawse holes. At such a moment of time a steady or accurate examination of the *Nereid's* lights was neither likely, or to be expected; the *Nereid* herself, after passing off to leeward, momentarily filling and going down, and being herself a lower vessel in the water than the *Semaphore*. Accordingly, the evidence of these six witnesses, with one exception, is very general—the answer from each and all of them being the same—"they did not see the lights," and "if there were any they must have seen them;" the exception, however, is a remarkable one—Captain Finlay, the master of an East Indiaman, then a passenger in the *Semaphore*. This gentleman admitted that "the red light of the *Nereid* might have been burning without his seeing it." Now it is to be remembered that that was the light of the *Nereid's* portside. The master and crew of the *Semaphore* have given their evidence in precisely the same terms—they saw no lights—had there been lights they must have seen them. One of them, the second mate, refused to say that the *Nereid* had not lights. Of these witnesses, moreover, three only saw the *Nereid* before the collision, viz., the captain, the second mate, and the look-out; and for that reason their evidence, although like all the other testimony on this point of a negative character only, required minute examination; but such examination must be with reference to the accuracy and consistency of their evidence on other points of material importance;

and if by such a test, the only one in my power, they are found to be little worthy of dependence, accuracy of observation or of statement, court can scarcely be called upon to altogether upon their observation or statements with regard to this question of the lights. I first, with regard to their evidence as to telegraph signals, the captain swore that he gave both these signals; the second mate swore that he himself, and not the captain, gave them; and the look-out swore that the captain gave the one and the mate the other. Next, with regard to their evidence as to the captain being on the bridge before and the time the *Nereid* was sighted, the captain swore that he was, the second mate that he was not, and the look-out contradicted the mate; and again, with regard to the look-out man, the captain swore that he knew at the time who was the man, and the mate swore that the captain asked him afterwards who the man was. These discrepancies tend to shake the credence which the court might otherwise be induced to give to the testimony of these men, and compelled it, in the exercise of a proper caution, to require corroborating evidence. Such, however, was not to be had; but, on the contrary, there is evidence on the part of the *Nereid*, full, positive and circumstantial, that she was provided with proper lights; that they were burning brightly and were previous to and after the collision; that they had been set up the night before at seven o'clock; that they had been burning at four o'clock the morning of the collision, and just about one hour before the collision. The master of the *Nereid* described their place on the ship's sides with great particularity, and the lighting of the signal lantern and the green light when they were pulling off in their boat. The *Nereid* went down. Laidlaw, the mate, swore that he was the man who lighted the signal light at that light; Parke, the steward, swore that he cleaned and trimmed it that morning one hour before the collision; and Boyle, a passenger on board the *Semaphore*, deposed that he saw a red light on the *Nereid*. Here, then, were three witnesses swearing to the same, as well as different particulars of a fact within their own knowledge, and who, upon other points of equal importance in the case, have sworn consistently with each other and without exaggeration, and corroborated, already observed in the leading points of it, by evidence on the part of the *Semaphore*. Mr. Tait, in his book on Evidence, observes, "That the question, in trials of fact, is not whether it is probable that testimony may be false, but whether it is sufficient probability of its truth—that whether the facts are proved by competent satisfactory evidence," and he defines such evidence as being that amount of proof which generally satisfies an unprejudiced mind beyond reasonable doubt, so as to convince it that it would act upon conviction in matters of important personal interest. In applying such principles to the evidence adduced on the part of the *Nereid*, as compared with that on the part of the *Semaphore*, I can come to any other conclusion than that I have been satisfied by the former, beyond reasonable doubt, that the lights of the *Nereid* were exhibited by her before the occurrence of the collision in question. I consider, therefore, that the defendants have failed their proof in support of this ground of defence. There remains now but one matter more for consideration of the court—that alleged by the petitioners in their 22nd article, that a sufficient look-out had not been kept on board the *Semaphore*. According to the evidence of the captain of the *Semaphore* the place for the look-out on board that vessel was on the castle when in rivers, and on the bridge when in the open sea—giving as the reason that when

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hipped water forward. Now, the captain's vessel was set at half-past two o'clock he look-out in that watch was placed at forecastle, and at about half-past four as passing the Calf of Man, was called upon by the second mate, and stood on the point of it about midships. The morning at and up to the time of the collision, was as dark and hazy, the evidence of the fact that a vessel without lights could be at a distance of a mile off, and with lights the bridge was a more elevated position than the forecastle. The look-out admitted that the look-out was little and lay mostly on the deck, that he could see objects on the water as well as he looked under than over that haze; for such purpose the forecastle, which was as good to look out from, was a better place than the bridge, to which the mate had called up. The captain states that he was on the deck at the same time with the look-out and the mate; but the latter officer, as more than once sworn, that the captain was not there, but been there from the time the look-out called up until the collision, which was full minutes after. The mate admitted that he was not forward with the look-out, but on the bridge, and did not describe the *Nereid* look-out reported. The amount of the damage, was, that the duty of the look-out at that very critical time entrusted to one Henry the evidence of Boyle, the passenger of the *Semaphore*, becomes of importance. As has gone upon deck about one hour after the collision. He stated that at that time no one on the forecastle, and no one on the bridge. The credit of this witness was set at naught by the corroboration given by the second mate on another point, namely, that some time after the collision the captain called out to the look-out on the bridge at the time of it. These details simply before you, I shall now give my opinion upon the following points:—

considering the respective courses upon *Nereid* and the *Semaphore* were sailing on the 4th Oct., the half-hour immore the collision, was there risk of collision continued in those courses, and if risk, their common duty in order to avoid it? Was the *Nereid* justified in delaying until she had opened the red light of the or did that delay in any way contribute the collision?

Was the *Nereid* when she saw the *Sema-*
g down upon her with a starboard helm,
starboarding her own helm, or did she,
in any way contribute to, or cause the

Was there a sufficient look-out kept on *Semaphore* previous to and after the col-

Whether, within the time and distance was reported to the *Semaphore*, the latter had time sufficient to avoid the collision by proper measures?

Was starboarding the *Semaphore* the sure to adopt under the circumstances, or to have been done by her? and y, Do you attribute the collision to the th vessels, or of one only, and, if so, of ting your reasons.

DAHIR having retired with his assessors, absence of an hour and a half returned and announced that they had given the answers to the questions proposed :

-We consider that there would have been collision had both vessels continued on

their respective courses as first seen, and under this belief we are convinced that both vessels should have ported.

To second—The *Nereid* was perfectly justified, and the delay of not porting could not, under the circumstances, contribute to or cause in any way the collision.

To third—We consider the *Nereid* was fully justified, to save herself as far as she could, in putting her helm to starboard, at that time the collision being inevitable.

To fourth—We are not satisfied that there was a vigilant or active look-out kept previous to and up to the time of the collision.

To fifth—We consider that there was sufficient room and time to avoid the collision had the steamer instantly ported on seeing the brig under the influence of her port helm.

To sixth—We consider that starboarding at the time of seeing the brig was erroneous, and we are convinced that it was the steamer's duty, for every reason, to have ported.

To seventh—We consider the *Semaphore* solely and wholly to blame for the collision, for the reasons assigned in all the foregoing answers.

KELLY, J.—I fully acquiesce in the answers I have just read, and, adopting them, decree for the petitioner, with costs.

Proctor for petitioner, *Richardson*.

Proctor for impugnant, *Hamerton*, Q.P.

THE SWAN. (a)

Collision—Lights—The Merchant Shipping Act, 17 & 18 Vict. c. 104—Appeal to Court of Delegates—Costs.

In a suit for collision to recover damages, as in the case of a total loss, the impugnant vessel will be held liable, if she ported her helm when she should, under all the circumstances, have starboarded, and if she was herself the cause of the collision, in not exhibiting coloured lights as required by the statute.

This was a cause of collision brought by the owners of the schooner, *Sydney Jones*, of Carnarvon, 79 tons register, Maurice Jones, master, against the brigantine *Swan*, of St. John's, Newfoundland, 170 tons burden, Jordon Pike, owner and master, under the following circumstances: On the 10th Nov. the *Sydney Jones* and four hands sailed from Portmadoc to Limerick, with a cargo of slates, and on the 17th of the month was, in the prosecution of her voyage, about six miles off Kinsale Head, steering W.N.W., the wind blowing fresh from S.W. At half past six o'clock that evening, the wind still blowing fresh and the night dark and rainy, she descried a bright light about half a mile to westward and two points on her weather bow, being at the time close-hauled on her port tack. The light continued to approach, and in a very short time crossing the bows of the schooner she was discovered to be the *Swan*, of St. John's, going free on her starboard tack, and steering a course E. and by S. She was on a voyage from St. John's to Waterford, with her master and sole owner and eight hands on board, and her cargo was salt, fish and herrings. The schooner, being close-hauled, continued on her course; and the *Swan*, crossing it, and appearing one point and a-half on the lee bow of the steamer, put her helm hard down, and luffing up in the wind four points, was coming down so close on the schooner, that the latter vessel, seeing a collision was inevitable, in order to deaden the weight of the blow, put her helm hard a-starboard. The consequence was, that immediately the jibboom and stem of the *Swan* struck the

(a) From the Irish Jurist, by permission.

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schooner on the starboard quarter, and did her considerable damage. The master and crew of the schooner abandoned her, and she was subsequently brought in by salvors to Cork. The damages claimed were made up of the direct damages, and the salvage and demurrage as consequential, and amounted to a sum of 566*l*. His Lordship was assisted by nautical assessors, and the case was, by consent, heard *viva voce*. The facts appear fully in the judgment of the court.

Drs. *Townsend* and *Chatterton*, Q.C., for the promovent.—The *Swan* was solely to blame for the collision in not having exhibited proper coloured lights, and should make good the loss sustained by the owners of the schooner. They cited
The Legatus, Swa. 168.

Drs. *Gibbon* and *Elrington* for the impugnant.—The schooner was herself the entire cause of the collision in not putting her helm to port, and the want of coloured lights in the brigantine had nothing whatever to do with it. They cited
The Linda, Swa. 306; and
The Cleopatra, Swa. 135.

KELLY, J., addressing the assessors, said:—It will now be my duty briefly to direct your attention to those points of the case upon which an issue has been knit, as the consideration of them will be necessary in order to enable you to draw the proper conclusion, namely, as to which of those parties is in default, or whether both or neither is in default; for under any one of those shapes the result may present itself. The main facts of the case are stated without contradiction by either sides. The party promovent was steering W. N. W., and the impugnant E. by S., courses which are one point distant from each other. The wind was S. W. by S. The defts. going at a rate of six of six-and-a-half knots an hour, and the promovents about four knots an hour. The tonnage of the two vessels are also beyond dispute, the promovent vessel being 79 tons; and the deft. about 168 tons; and there were four hands in the former, the smaller vessel, and eight hands in the latter. These two actors in the scene are going on opposite courses, a point asunder, one vessel about double the size of the other, and one crew about double the number of the other: the wind being in this position, that the larger vessel was going what must be considered free, and the smaller vessel close hauled on the port tack: in fact, one was close hauled on the port tack, and the other free on the starboard tack. The point of distance from the land, was about six miles from the old head of Kinsale; and the time of collision is also pretty well ascertained. It was about six o'clock in the evening, upon a dark night, with small rain; but both sides agree that lights would be seen at a certain distance, and both vessels had lights. The party promovent had lights according to the present statutable regulations, namely, a green one on the starboard, and a red light on the port side. The other vessel, which is a colonial ship, had one light at the end of the bowsprit, a clear bright light, and it is in evidence in regard to this clear bright light, that it was lighted early in the evening. Regarding the coloured lights, there is strong evidence that they were lighted at half-past five o'clock; but, on the other hand, there is some evidence given of a contrary nature, to induce the court to suppose that these coloured lights were not lighted until immediately before the collision. However, it is not very material to come to any conclusion on that point, for the evidence is this, that a few minutes before the collision, the coloured lights were seen by the people of the *Swan*. The case as to the lights pretty well comes to this, that about ten minutes be-

fore the collision, the people of the *Sydney Jones* saw the light of the *Swan*; and by the admission of the captain of the *Sydney Jones*, his own coloured lights were not seen by the *Swan* for four or five minutes after. The mate of the *Sydney Jones* states, that it was four or five minutes before the collision, that the white light of the *Swan* passed the bow of the *Sydney Jones*, which bears out the evidence of the captain, who says, that four or five minutes passed before he saw the lights; we have therefore this remarkable fact put forward by the people of the *Sydney Jones*, that four minutes elapsed between the time they saw the *Swan* approaching, and the people of the *Swan* saw her, the *Sydney Jones* lights. We have the plt.'s vessel in this precise condition. She is on the port tack, close hauled, and going about four knots an hour, W. N. W., and seeing, according to the mate's evidence, about half to the quarter of a mile off a white light on her port bow. We have her in the condition of having seen the light ten minutes before the collision. She continues to see that light until in about four minutes, when she sees it crossing her bow. We have it in evidence, that she bore on her course, close hauled, going at that rate, and doing it for the four minutes, in other words it may be said, she sees a vessel unmistakably approaching towards her, and unmistakably on the opposite course to that which she was on herself, and we have it in evidence, that from the first moment she saw her crossing her bow, she continued on her original course. Seeing her approaching thus, and there can be no reasonable doubt entertained that she must have seen her course, what did she do under the circumstances? It appears on the evidence, that she simply did nothing but hold on her course. The question then, at this first stage of the case, in which the *Sydney Jones* saw the *Swan* fast approaching, the latter having seen her, is, what ought the *Sydney Jones* to have done? It appears on the pleadings and proofs on her part, and was also relied on by her people, that under the circumstances, the old rule of the sea, namely, that a vessel going free should give way to a vessel close-hauled, the latter continuing her course, should be held to apply. This rule, the sea was relied on by the captain of the *Sydney Jones*, for we have it in evidence that he twice stated it to the master of the *Swan*, and that he considered himself justified in relying on that rule of seamanship. The question now is, under the circumstances, was it applicable, seeing a vessel approaching so that she was evidently nearing him and crossing his path more and more. Was it right that he should hold on, justifying himself by that rule, from any consequences which might arise or be legally upheld in holding on that course? It becomes my special duty to state when any such question of law arises, what the law is. That that had been the rule then can be no doubt, but from time to time that rule has been modified, and what has now become the law is to be found in the 296th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). That section is as follows: "Whenever any ship, whether a steam or sailing ship, proceeding in one direction meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses, they would pass so near as to involve any risk of collision, the helms of both ships shall be put to port, so as to pass on the port side of each other, and this rule shall be obeyed by all steamships and by all sailing ships, whether on the port or starboard tack, and whether close hauled or not, unless the circumstances of the case are such as to render a departure from that rule necessary, in order to avoid immediate danger; and subject also to the proviso that due regard be had to the dangers of navigation; and as regards sailing-ships on the starboard tack, close

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ed, to the keeping such ships under command." not denied, that if the circumstances of the case established this as a fact, that the *Sydney Jones*, steering W.N.W., saw the *Swan* approaching her, steering E. by S., and that those two ships moving towards each other and continuing his opposite direction, by so continuing would be near as to risk a collision, that then this law must ly. That being the very class of case for which law was made, it is binding under all such circumstances, save only one, and that is this, where a statute from it is necessary in order to avoid mediate danger, for then the law of self-preservation, or doing the best under the circumstances, is the course followed; and therefore I shall put to you to say on the evidence, would these vessels have passed so near each other as the law of this statute contemplated? In the history of the cases in the Court of Admiralty, frequent exceptions have been made to get out of the binding acts of the rule, and to show that ships did their duty; but the firmness of the judges was called on to back the policy of the law for the preservation of life and property, and they persevered in holding it, except under circumstances of immediate danger, there should be an implicit obedience to the rule, which ought to be well known, and which I need no doubt is well known among seamen. If, then, under the circumstances in which the ships were placed, these vessels were bound to pass each other on the port side, you have it in evidence and pleading, and not denied but justified, that the *Sydney Jones* did not comply with this rule. The statute regulates the conduct of each vessel, and according to the statute it was the duty of the *Sydney Jones* to port, unless justified in not doing so from immediate danger. Now, were there circumstances of such immediate danger to justify a non-compliance with this rule? You will consider the case from the evidence, and answer that question, and if you consider there were such circumstances of danger, we then have a justifiable departure from the rule resting on those circumstances. I am bound to state that, if you conceive specially that these two vessels, approaching so that they would meet, and have come into collision, could both have ported, such condition will involve heavy penalty on the *Sydney Jones*, as it would result her in this court, for that is one effect of a non-compliance with the statute. That will be our first and most serious question, and it is a question of large moment, and goes to the whole of a case before the court, and involves the consideration whether, without the statutory cause, so wise as this, so much observed upon by me, should be put aside. I am addressing gentlemen of long experience in a perilous profession, who are to assist with their opinions upon this point to keep me from going wrong, and enable me to give such a judgment that, while it satisfies the rights of the parties, will keep the law inviolate. Then comes the second part of the case, which belongs more peculiarly to the deft. The case of the deft. is this, that about four or five minutes before the collision he was right ahead of the *Sydney Jones*, and saw her red light and green light, saw her close-hauled, and crossed her course W.N.W. No ignorance is pleaded for her crossing, or of her position, and it is stated that she was but a cable's length off in the leadings, and from fifty to sixty fathoms in the evidence. The difference between the witnesses on this part of the case is very little indeed. The evidence of the captain of the *Sydney Jones* and the witnesses on the other side made only a difference of forty or fifty yards in their respective accounts of the distance. Here the question of the look-out becomes material. There is but a minute's difference in time as to the seeing of the coloured lights.

Jones said that they could not be seen for four or five minutes, and the other witnesses said about four minutes. There is but a minute of difference, and it may be concluded that the ships were about fifty or sixty fathoms asunder at the time they both saw each other. At this the second stage of the case, where the *Sydney Jones* and the *Swan* saw each other, it will be for you to say on the evidence whether each vessel did that which was usual and proper. The *Swan's* evidence is this—that the look-out reported the coloured light of the *Sydney Jones*, and the distance of the two vessels; and the captain of the *Swan*, who had just gone below, hearing the confusion and order to starboard given, ran up and ordered the helm to port, and that although the boy at the wheel answered "starboard," he did not obey that order, but obeyed the order of the captain only. Now this evidence shows, that immediately the *Sydney Jones* was seen, the rule of the road was complied with by the *Swan*. Her evidence further states, that before that time the look-out of the *Swan* saw no light ahead of her or round her. The man who was on the look-out said he saw nothing, and the captain and his son, and the second mate, say that they saw nothing until the moment those lights appeared, and that then the order was given by the man on deck. Immediately they see the light, the captain made his appearance on deck, and gave the order to port, and that order alone is complied with. It will be for you to say whether that was a seaman-like and proper act under the circumstances. That that act was done, and done in that way, there is no evidence to contradict. The evidence of the *Sydney Jones* takes ten or twelve yards from the alleged distance, but differs nothing upon the question of time; and it will be for you to consider, and not for me to tell you, which way you should lean; and it will be a very difficult matter under the circumstances, where the two vessels were coming so close to each other, to do otherwise than suppose that the time given was, upon the average, the correct time, and that the correct distance was also given. All this time on board the *Sydney Jones*, it is clear that nothing was done but to alter her helm; then when the *Swan* was seen luffing up, it is beyond doubt that the helm of the *Sydney Jones* was put hard to starboard; it is admitted and justified, and said it was done to soften the blow, and prevent the mischief that was then inevitable, as much as possible. That the collision took place is beyond doubt, but whether from the *Swan's* stern or starboard bow, or how, is not of much consequence. The question for you is—was the act of the *Sydney Jones* at that moment, a necessary and seamanlike act? It was contended by the captain of the *Swan*, that if she held on, and had not starboarded, she would have gone clear, as he had ported. You will be the best judges of that, and should you be of opinion with Captain Pike, you will tell me so; but on that I must leave the conclusion altogether in your hands. You will be able from the distance to say, whether, if she continued her course after the *Swan* ported, she would have gone clear. It was pressed by one of yourselves on the captain, that if both vessels held their courses, they would have cleared? The question was put more than once, and he negatived it more than once, and said that nothing could have prevented a collision. An answer of that kind is for you, and my judgment must be in your hands. I cannot form so strong an opinion in my own mind, as to say that I should rely on that statement, and I therefore leave it with you. There is other evidence in the case, with which you have nothing to do. On the subject of abandonment I was referred to a case full of good sense, which I will read shortly for you. It is the case of the *Linda*, Swa. Adm. Rep. 306. In that case, just as in this, a vessel having suffered damages by collision, was abandoned by

master and crew, and a question of the amount of salvage in consequence of that abandonment having arisen, the question also arose, was that abandonment justifiable. The learned judge is reported in that case as follows:—"He said he would require to be satisfied that the master had wilfully abandoned his vessel when he might have saved her; or that he had abandoned her through the want of ordinary nautical skill and resolution; but if there were extraordinary risk of life in remaining by her, or if it turned out to be a question of the want of judgment in the master, as to whether it was expedient to act in this way or that way, he should consider the collision to be the cause of the whole damage and expense incurred." And in the same case he says, "I consider the master and crew after the collision are not bound to incur extraordinary risk of life by remaining on board the vessel." You have it strongly urged at the bar, that risk of life would have been incurred if they had remained. Now by the evidence it was a lee shore, and all the spars were overboard, and it appears that the vessel was in such a position that he could not handle her; and it might be that he was exercising, under the circumstances, a very wise and humane precaution, to save the lives of his men, by taking them on board the *Swan*, even although there might be a want of judgment in it. It was also in evidence against that, that he was offered help. The captain of the *Swan* offered to lie by him, and it was said it was suggested to him to rig up a jury mast; but there does not appear to have been any very substantial offer, and you will consider under what head you will class this fact, and I will be guided by your opinion. The whole of the case comes to this, that on the evidence, you will say: first, whether you consider these two vessels had been so meeting each other, as to come within the construction of the statute; secondly, whether, as the *Sydney Jones* did not comply with the statute by porting her helm, there were any and what circumstances in the case, to justify her departure from the rule? Thirdly, what, under the circumstances of the case, was the duty of the *Sydney Jones*? Fourthly, after the *Swan* first sighted the *Sydney Jones*, was the porting her helm a proper and seamanlike act? Fifthly, to what cause do you attribute the collision? Sixthly and lastly, was the master of the *Sydney Jones* justified in abandoning his vessel?

KELLY, J., and his assessors then retired to his Lordship's chamber, and after a deliberation of upwards of two hours returned into court, when the learned judge read the several questions, and the answers given to them as follows:—

To first question—Yes. To second question—Yes. The bright light shown by the *Swan*, and seen by the *Sydney Jones*, was no indication whatever in itself of the course pursued by the *Swan*. The *Sydney Jones* could only surmise the course of the *Swan* by the alteration in the bearings of the light. That light indicated the passage of a vessel across the path of the *Sydney Jones*, and had the *Sydney Jones* borne away as the Act directs she would have placed herself in the way of a vessel that was fast getting out of her way. It was not possible for the *Sydney Jones* to ascertain, certainly, the course actually pursued by the *Swan*, until it was too late for the *Sydney Jones* to comply with the rule. To third question—Under the circumstances, it was the duty of the *Sydney Jones* to put her helm hard a-starboard, and thus by deadening the vessel's way, diminish the consequences of inevitable collision. To fourth question—No. We believe that if the first order of starboard given by the officers in charge of the deck had been complied with, the *Swan* would have passed to leeward clear of the *Sydney Jones*. To fifth question—The absence of

coloured lights on board the *Swan*, and their helm when too late. To last question—mainly not. We feel bound to remark that were on the deck of the *Sydney Jones* at the time of the collision; all had equal opportunity of saving their vessel, and the master was the first: one to do so; and as he never returned to his vessel, although offered assistance, and that she was not leaky, we do not consider he was justified in abandoning her without effort.

KELLY, J.—Having received the answer read, I pronounce the party of the *Swan* to be at fault in the collision, and decree accordingly, reserving the question of costs and damages until further information, disallowing so much damages in accordance with the finding, and decreeing that the master of the *Sydney Jones* was not justified in abandoning his vessel, as were the result of the abandonment.

[There was an appeal to the Court of Appeal in this case, and the decision of the Court of Appeal was affirmed, but without costs.]

Proctor for promovents, R. C. Lee.
Proctor for impugnant, J. T. Hamerton.

NOTE.—Since the judgment in this case was delivered the statute law as to the rules for collisions has been altered by "The Merchant Shipping Amendment" (25 & 26 Vict. c. 63). It is, however, considered of sufficient general importance to render its publication desirable.

THE ARBUTUS. (a)

Collision—Compulsory pilotage—Consequence of non-compliance with the Merchant Shipping Act (17 & 18 Vict. c. 104)—Sects. 296, 297, 340, 353, and 354.

A steam-ship which does not keep at her proper distance from a vessel which is passing her, and which starboards her helm when she is passing her, will, under ordinary circumstances, be liable, in a suit for collision, to pay both damages and costs.

Where a vessel has come into collision with another vessel, owing to the gross negligence of those on board her, her owners will not be liable, in a suit for damages, to pay damages to the owners of the other vessel, if it appear that the vessel causing the collision was in charge of a duly licensed pilot at the time of the collision, and that the pilotage was by statute compulsory.

This was a suit of collision instituted by the owners of the *Arbutus*, of Runcorn, in the County of Chester, in England, registered owner, Samuel Owens, master, against the owners of the *Unity*, of Runcorn, 120 tons, master, Samuel Owens, to recover damages for collision between those vessels in Belfast on the 5th February last, owing, as the plaintiff alleged, to the gross negligence of the crew of the steamer, &c. The court was divided on the original hearing, by Lieutenant A. M. Touche, R.N., and Lieutenant Crosby, 1st class, nautical assessors; and the case was referred to a jury, *in chambers*, and the facts appear from the judgment of the court.

Drs. Todd and Elrington, for the petitioners, cited the *Unity*, Swaby's Reports, 101, and contended that it was a case for ordinary damages, and

(a) From the Irish Jurist, by permission.

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sequential damages. They also cited, on the question of compulsory pilotage, *The Merchant Shipping Act, 17 & 18 Vict. c. 104*, ss. 296, 297, 340, 353 & 388; *The Maria*, 1 Wm. Rob. 95; *The Agricola*, 2 Wm. Rob. 10; *The Liverpool Pilotage Act*, 5 Geo. 4, c. 73, s. 24; and *The Girolamo*, 8 Hag. 169.

Dra. Gibbon and Townsend for the steamer, relied on a twofold defence, viz., upon the merits, and secondly, that the *Arbutus* was, at the time of the collision, in charge of a duly licensed pilot under a compulsory statute, and that consequently her owners were not liable. They cited

The Belfast Harbour Act, 10 & 11 Vict. c. 52, s. 101; *The Attorney-General v. Case*, 3 Price's Reps. 302; *Carver v. Sydebotham*, 4 Man. & Sel. 77; *The Maria*, 1st Wm. Rob. 95; *The Agricola*, 2 Wm. Rob. 10; *The Johanna Stoll*, Lush's Rep. 295; *The Waterford Pilot Act*, 9 & 10 Vict. c. 292; and *The Fama*, 2 Wm. Rob. 184.

KELLY, J.—(upon the original hearing, in addressing the assessors, said)—On Wednesday morning, the 5th of February last, between the hours of eleven and twelve o'clock, the weather being bright and clear, and the tide a little more than one quarter flood, a steam tug was proceeding up the Victoria Channel to the town of Belfast, with two vessels in tow about fifteen yards astern of her. One of them, the *Duke*, the petitioner in this cause of collision, a steamer of 120 tons, drawing nine feet three inches, a little on her port quarter; the other on her starboard, a one-masted flat named the *Ellen*, drawing seven feet; the wind was blowing a moderate breeze from W.N.W. to N.W., and there was a fresh in the water. Victoria Channel being a narrow one, the tug and her tow, complying with the provisions of the Merchant Shipping Act, kept to the starboard north side of it in going up, and nothing was in sight until the master of the tug observed the screw steamer *Arbutus*, the deft. in this cause, about half mile a-head, coming down the channel rather on the north side of it, on her customary voyage from Belfast to Bordeaux, with passengers and goods. About the very same time, a smack, named the *Nero*, left a Belfast pilot on board, was standing over for the north shore on her port tack, but astern of the tug and her tow. The part of the channel in which she descried the *Arbutus* half a mile a-head is straight, and nothing was between them, both being, or nearly at, the north side of it, and approaching each other at a combined velocity of about ten miles an hour, their being a fresh, and the rate of the tug being between three and four, and that of the *Arbutus* five miles, an hour. In this state of things the master of the tug, according to his evidence, when the *Arbutus* was yet a half-mile distant, ported a little, and when she was a shorter distance—about thirty fathoms off—put his helm hard a-port, the *Duke* porting also, and hailed her to keep her own side. In less than a minute after porting, the tug, drawing four feet only, took the wind, and was on the ground, the *Duke* slantways stern of her under the influence of her port helm, when the *Arbutus*, then close abreast of them on her port side, clearing the tug, struck the *Duke* right amidships on her port side with her stern, striking four or five planks right down above and below the water, and doing her other damage under the force of that blow the *Duke* drove the lee, which was alongside of her, ashore, and was herself obliged to hoist canvas and run ashore also, avoid sinking in the deep water, as she had nearly begun to fill. For that collision the *Duke* puts the blame to the *Arbutus* in not having

kept to her starboard side of mid-channel, in compliance with the statute, and in not having ported, as she should have done. The case of the *Arbutus*, not denying these facts, is, that the petitioners themselves were the cause of the collision, and for two reasons—first, for having ported when it was too late; next, for having ported when they should have continued on their course. With respect to the first, the evidence of Hutchinson, the pilot of the *Arbutus*, is, that he saw the tug and her tow right a-head about one mile and a quarter off, and the smack *Nero* further down, at the southward on her port tack, and heaving about on her starboard tack, laying pretty well up the cut; and that when he was between one-quarter and one half mile off the tug, she being right a-head, and the *Nero* standing on between the tug and the southern bank, he ordered his helm a-starboard, in order to pass to the north of the tug, as he had not room to pass to the south or at the port side of her, on account of the *Nero*; but that the tug coming on at full speed, when about one ship's length off, put her helm a-port, although he had waved to her to keep her course, and by so porting hove herself and her tow right over the *Arbutus* hawse, whereupon he ordered to reverse at full speed, but did not succeed in clearing them. Now, as already observed, the evidence of the master of the tug was, that immediately on seeing the *Arbutus* half a mile off, he ported a little, and then, when he was about thirty fathoms off, he put his helm hard a-port. The porting at the latter distance is here corroborated by Hutchinson, who said he was a ship's length off when the tug ported, the length of the *Arbutus* being 180 feet, which is just thirty fathoms. But the material point for corroboration is, did the master of the tug port when he was the half-mile off?—or, in other words, did he port before the *Arbutus* starboarded, as the latter was done only when the distance between them was between half and one-quarter of a mile. Now the evidence of James Mount, the man at the wheel of the *Arbutus* upon the occasion, leaves no doubt whatever upon the matter. It is this: "When the tug came close to us she ported, and he got orders to starboard. Then the tug put her helm hard a-port. That was the first and only order he got to starboard." With such evidence given by their own helmsman, it seems impossible that the *Arbutus* can maintain her plea that the tug ported too late, even if the *Arbutus* can succeed in proving that she herself was correct in having starboarded, her own witness having thus so positively sworn that the tug had ported before the *Arbutus* starboarded. Another point bearing on this part of the case is also to be observed upon. Holmes, the pilot of the *Duke*, has sworn that after he had ported her helm he hailed the *Arbutus*, then coming on under a starboard helm, to port and reverse, and that he then saw her bows go off a little to starboard, but not enough to clear the *Duke*, as she struck her in the waist a slanting blow. Now this is admitted most distinctly by Hutchinson, the pilot of the *Arbutus*, his evidence being that, "having starboarded two or three minutes before the collision, he was heading to the north side of the channel and had brought the tug on his starboard bow, and was keeping her on it when she ported; and he then told his mate to put his helm a-port and reverse—that she had not time to reverse, but that her head came to starboard under the port helm, and that was before the collision." Of course, then, there can be no doubt upon the point—an important and material one in its bearings upon the case—and, independently of other views of it, showing at the time the full consciousness of this pilot Hutchinson as to the proper course it was his duty to have pursued that morning. I will, however, ask your nautical opinion on all these circumstances. There now is to be considered the

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second plea of the *Arbutus*, namely, that the tug should not have ported, but have continued her course, as there was an unavoidable necessity for the *Arbutus* to keep to the north side of the channel, there being plenty of room for her, and to starboard her helm to escape the risk of running into the smack *Nero*, at the time beating up the channel, and that she was justified in so doing to give the tug and her tow greater room. Now this plea, which apparently assigns three distinct grounds for the course pursued by the *Arbutus*, is in regard of the first and last of them very untenable. If the object of the *Arbutus* had in reality been to give the tug greater room, she should have left to her the north side, where, according to her own admission, there was more room than to the southward; and that the more readily, because under clause 297 of the Merchant Shipping Act the northern was the proper side for the tug and the southern the proper side for the *Arbutus*, and under the 296th section of that Act the *Arbutus* was not justified in starboarding for such reason but should have ported and passed the tug upon the port side. The plea in question then is to be considered merely with reference to the averment, that there was an unavoidable necessity to escape the risk of running into the smack *Nero*. Unquestionably there was one point of time in the brief three or four minutes during which this most indefensible calamity was being inflicted, when, as the pilot and mate of the *Arbutus* both admitted, that they could have passed to southward of the tug in safety, and they assigned no reason whatever for not having then done so, and so arose the circumstances which followed. It will be borne in mind that the pilot of the *Arbutus* admitted he saw the *Nero* heaving about on her starboard tack when he first saw the tug. The pilot of the *Nero* deposes as follows:—"That he had gone as close to the north shore as he could go in order to have a long reach when he went round on that starboard tack, and that tacking under the stern of the tug, and going a-head of them, he stood across to the south to run out of the road; he then saw the *Arbutus* coming down five or six lengths of herself a-head of the tug, and rather on the north side. The *Arbutus* was three or four lengths off the *Nero* when the latter was in mid channel, standing right on to the south bank to keep clear of her—the channel there being 250 feet broad. The *Nero* was her own length a-head of the *Arbutus* when she passed her just going to run ashore to keep out of her way, and at that time there was 150 feet of water between her and the *Arbutus*, and that was before the collision. Immediately after running ashore he looked over to see what had happened, as he had seen the *Arbutus* heading right for the tug, or for the northward of her, and he saw the *Arbutus* backing astern from the *Duke*, but he had not seen the blow struck." The pilot of the *Arbutus*, so far from contradicting or denying, actually confirms that evidence, for he admits that when the *Nero* was abreast of the tug, and on his own starboard, there were 100 feet of water clear between the *Nero* and the tug, and that the *Nero* was still running to the southward, and more out of the way. Now, it was at that very juncture that the *Arbutus*, twenty feet only in beam, with such admitted as well as increasing sea-room between the tug and the *Nero*, starboarded to go to the northward of the tug, where, according to the mate's evidence, there was but sixty feet. I will ask your opinion, if these circumstances embodied an unavoidable necessity. The result of these latter portions of the evidence, when taken into consideration with the running ashore of the tug and her tow immediately before and after the collision, shows how close they must have been to it all along, and that was the evidence of the master of the *Duke*. It also strongly leads to more than surmise that the

course adopted by the pilot of the *Arbutus* in selecting the northern side, was the carrying out of his predetermination, formed when he took charge of the vessel on the morning in question. I will now read the two sections of the Merchant Shipping Act already referred to, and begging you to keep them in mind, put the following questions:—

First—Was the tug with her tow justified in porting, or should she have continued her course?

Second—Did she port in time?

Third—Was the *Arbutus* justified by unavoidable or any necessity in starboarding and going north of the tug in order to escape the risk of collision with the *Nero*?

Fourth—Was there sufficient sea-room to pass southward of the tug at the time the smack *Nero* was standing over to southward when the *Arbutus* put her helm to starboard?

Fifth—What course should the *Arbutus* have pursued under all the circumstances?

Sixth—To what party do you attribute the blame of the collision, stating your reasons?

His Lordship and the assessors having retired to chamber to consider and confer, returned in an hour into court, when the following were the answers given to the several questions:—

To the first question—The tug was fully justified in porting, not only to keep on the proper side, but to avoid the risk of a collision.

To the second—We are quite satisfied that the tug did port in time.

To the third—The *Arbutus* was by no means justified, there being ample space to the southward of the tug for the *Arbutus* to pass without any risk of collision.

To the fourth—We are perfectly satisfied that the *Arbutus* had sufficient room to pass to the southward without risk or injury to the vessels on either side when she starboarded.

To the fifth—Having seen the vessels in good time and at a reasonable distance, and having had ample sea-room all through, the *Arbutus* should have kept to her proper side instead of starboarding.

And to the sixth—We attribute the blame of the collision solely to the *Arbutus* for not having kept to her proper side when coming down, and for starboarding when she should have ported.

KELLY, J.—Agreeing in all the opinions now expressed, and under all the circumstances of the case, I pronounce for the petitioners in the cause, subject, however, to whatever conclusion I may arrive at upon the plea of exemption on the ground of compulsory pilotage, relied upon by the defendants, and yet to be the subject of argument.

The case was subsequently re-argued on the question of compulsory pilotage.

KELLY, J., in pronouncing judgment on that point said:—This was a case of collision, in which proceedings were instituted on the part of the schooner *Duke*, of Runcorn, against the screw steamer the *Arbutus*, of Morecombe, to recover damages for injuries sustained by her in consequence of a collision between those vessels in Belfast Lough, on the 5th Feb. last. The court was assisted at the original hearing by assessors, and, being so advised, found that the blame of the collision was to be attributed solely to the person in charge of the *Arbutus*, for having erroneously put her helm to starboard; and further found, both on the admission of the petitioners themselves and on all the evidence, that the *Arbutus*, on the morning in question, was under the charge and management of a qualified pilot—that the helm had been starboarded by his order, the officers and crew acting merely in obedience thereto—and that the pilot alone was in fault. Under this state of circumstances the

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question arose, and has been ably argued on both sides, whether or not, under the Belfast Harbour Act and the Merchant Shipping Act, as pleaded by the owners of the *Arbutus*, these owners are to be relieved of their liability to make good the loss occasioned by the act and fault of their pilot, as these statutes made it compulsory upon them to employ a qualified pilot; and the latter one, in s. 338, expressly enacts "that no owner or charter of any ship shall be answerable to any person whatever for any loss or damage occasioned by fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." It has been considerably said that this statute could not be extended past its strict construction;

although founded on the principle of natural justice, that when masters are compellable to take persons on board, owners should not be responsible for the acts of strangers to whom they are forced to commit the management of their vessels, and from whom they have no control; yet it is at the same time to be remembered that it deprives of their remedy persons who have suffered injury. A court, therefore, ought to be well satisfied that the shipowner claiming the exemption has brought himself distinctly within the several conditions imposed by the statute before any declaration of his being entitled thereto be made in his favour. These conditions are, that there was a qualified pilot on board at the time—that such pilot was solely in charge—that he was exclusively in fault, and that the district in which the collision occurred the employment of a pilot was compulsory by law. In the present case the court is spared the consideration of the three former requirements, having been parts of the finding already come to in this cause, and now to come to a conclusion upon the last named only, namely, whether the employment of the pilot was compulsory or not. The advocates for the petitioners, confining their arguments very properly to this question, urged in regard of it two objections, first, that the case of the *Arbutus* was deficient in substance for not having pleaded or proved in the present instance that the master was not himself a qualified pilot, and that in consequence of that defect they should be debarred the plea of compulsory pilotage under the Merchant Shipping Act, secondly, that under the Belfast Harbour Act pilotage was not compulsory at all. The sections of the Merchant Shipping Act under which the first objection is taken are sects. 340 and 353; the former enacting that "the master or mate of any ship may apply to any pilotage authority to be examined as to his capacity to pilot the ship of which he is master or mate, or any one or more ships belonging to the same owner; and, if found competent, a pilotage certificate may be granted to him, and such certificate shall enable him to pilot such ship within the specified district without incurring any penalties for the non-employment of a qualified pilot." And the latter (the 353rd), "that every master of an exempted ship navigating within any district, who, after a qualified pilot has offered to take charge of such ship, himself pilots such ship without possessing a pilotage certificate enabling him so to do, shall for every such offence incur a penalty double the amount of pilotage demandable for the conduct of such ship." Now, it is clear that under the former section a certified master incurs penalties for the non-employment of a qualified pilot, and that therefore in such case pilotage is compulsory; and that under the latter section an uncertificated master does incur the penalties, and that pilotage is compulsory. Such being the case, the objection is, that the plea of the defendants, who simply averred "that the *Arbutus* was at the time under the charge of a qualified pilot,"

should have previously averred, as set out in the 353rd section, "that her own master did not then possess a pilotage certificate;" the intended and avowed object of the objection being, that in the absence of the latter the defendants had not entitled themselves to plead or avail themselves of the former averment—that is, of the immunity of compulsory pilotage. To this objection the defendants have argued, in reply, that they are not bound to prove a negative, and that it comes too late, and the court can well admit the reasonableness, and even the strength of this reply when it observes that the petitioners have laid no ground, by affidavit or otherwise, to induce a presumption that the master of the *Arbutus* had in his possession, at the time in question, a pilotage certificate, or that their own rights, as ascertained by the court in its finding on the original hearing, were likely to be defeated by the evasion of the defendants in pleading their case. No difficulty lay in the way of the petitioners, either in ascertaining the fact as to the pilotage certificate, the sections 337 and 349 of the Merchant Shipping Act having made ample provision for the registration and publication of the names of all persons licensed by any pilotage authorities to act as pilots. The court, however, guiding itself by the rules and practice of pleading, will examine whether the averment contended for by the petitioner ought not rather to have been their own reply to the plea of the defendants than part of that plea itself, being a new matter and in derogation of it. In the *Agricola*, 2 Wm. Rob. 10, where, as in this case, the petitioners merely denied that the Local and General Pilot Act under which the defendants pleaded their exemption, applied, the court said that their mere denial was defective, inasmuch as it was intended to deprive the owners of the *Agricola* of their exemption under the statute, upon the ground that the pilot was voluntarily and not compulsorily taken on board; it should have been expressly pleaded by them, together with the reasons. This case was further strengthened by a much later one, the *Killarney*, Lush. 202. In the *Killarney* the petitioners sought to deprive the defendants of their plea of exemption on the ground of compulsory pilotage, by showing that their master had himself a pilotage certificate. And how did they proceed? By formal pleading, and by raising that issue in their reply to the plea of the defendants. Such is the course then which, in the opinion of this court, the petitioners here should also have adopted, and not have sought to raise a question of serious importance and of first impression—not even upon motion—not upon notice even, but on a mere surmise long after the trial of the cause, and not until after the argument upon the question at issue had been fully opened by the defendants' advocates. The Court therefore overrules the objection, remitting the defendants to the full benefit of their plea under that 353rd section. There is now for consideration the objection raised to the Belfast Harbour Act, namely, that under it pilotage is not compulsory. Two sections of this Act—101 and 104—contain the enactments referred to in support of this objection. By the former the master or owner of vessels coming into or going out of the port, harbour, or river of Belfast, shall, for every such vessel, pay as and for pilotage on entering or on leaving a certain rate or sum fixed by a schedule referred to in the Act; and by the latter it is enacted that in case any master or owner who is required by the Act to employ a pilot shall refuse to take on board and employ any such who should offer his services, such master or owner shall pay double pilotage over and above any penalty he may be liable to. Now, the argument is, that as the latter clause inflicts the penalty only on such recusant masters and owners as are required by the Act to employ pilots, and as

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in the only other clause on the subject—the 101st—the compulsion is merely to pay pilotage, not to employ pilots, the penalty falls to the ground, and there can be no compulsion. But the full reading of the section (101st) will set this argument in its proper light; that reading in full, and not as the argument had it, in part only, “that every master and owner of a vessel, on its entering or leaving the said port, shall pay to the commissioners of the harbour, as and for pilotage thereof, a rate or sum proportioned to the tonnage of the vessel, and the class of pilot employed by such vessel;” thus in precise words making compulsory, through the commissioners of the harbour, the payment of pilotage for each vessel to those pilots only who were employed by it—compelling them to pay those whom they were required under the Act to employ—for under the Act the whole class of pilots were created and regulated, and to them was exclusively committed the pilotage of the harbour. In *Curuthers v. Sidebotham*, 4 Mau. & Sel., weaker expressions were considered compulsory—the words of the Liverpool Act, the subject of that decision, being simply that, if no pilot be taken pilotage shall be paid; and in *The Maria*, 1 Wm. Rob. 95, the Court says, “Is not making the neglect to take a pilot punishable with payment of the pilotage itself a compulsion upon the owners?” Suppose the statute had mentioned ten times that amount, the difference would be only in the degree of compulsion, but not in the compulsion itself. To these may be added *The Malrina*, which was before this court and in which the very same question was raised upon the Waterford Harbour Act, identical in its pilotage clauses with the Belfast Act; and the court, after a very learned argument, decided in favour of the pilotage being compulsory. Under these reasonings the second objection of the petitioners must then be disallowed; and the court being satisfied that the defts. have fully established their case and claim of exemption under the 388th section of the Merchant Shipping Act, dismiss them from further attendance on this suit, but without costs.

Proctor for the petitioners, *Richardson*.

Proctor for the defts., the *Queen's Proctor*.

UNITED STATES DISTRICT COURT OF ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate in Admiralty

SOUTHERN DISTRICT OF NEW YORK.

(Before SHIPMAN, J.)

THE CORNELIUS GRINNELL.

Salvage—Rate of compensation—Remote damage to salvaging vessel.

Where a vessel, being ignorant of her whereabouts, had struck a shoal, but got off and came to anchor, and a steamer coming by gave her information of her position and attempted to tow her to a place of safety, but the hawser breaking no further attempt to tow was made, but the steamer guided the vessel out to sea clear of all shoals, being with her about five hours:

Held, that the steamer was entitled to salvage.

Where the steamer being thus delayed, arrived in the subsequent prosecution of her voyage at a dangerous place about low water, which, but for that delay, she would probably have reached at about high water and have passed in safety, but it being low water she struck a rock and was very seriously injured:

Held, that such damage was too remote to be considered as an element in estimating the amount of salvage.

The vessel saved being worth \$22,500 with a cargo

worth \$100,000, the saving vessel being worth \$100,000 with a cargo worth \$400,000, the peril not being imminent, and the risk and labour of the salvors small:

Held, that the salvors should recover \$5000 as salvage, together with \$260, the amount of damage occasioned to the steamer by coming in collision with the ship while attempting to take her in tow.

For libellants, *Martin and Smith*; for respns., *Exort, Southmayd, and Choate*.

The facts of the case are fully set forth in the judgments.

SHIPMAN, J.—This is a libel for salvage brought by the owners of the steamship *Saxon* against the sailing ship *Cornelius Grinnell*, for services rendered to the latter by the *Saxon*, near Five Fathom Bank, to the eastward of Cape May, on the 3rd April 1863. Two questions are raised on the pleadings and proofs: 1. Whether the services rendered come within the rule of compensation applicable to salvage rewards; and 2. If so, what amount should be allowed. The peculiar character of the case will be best presented by a somewhat detailed statement of the facts which appear proved by the evidence. The New York and London packet ship, *Cornelius Grinnell*, of New York, valued for the purposes of this case at not less than \$22,500, having on board cargo of the value of at least \$100,000, with a large number of passengers and a full crew, left London for New York on the 13th March 1863. On Saturday, the 2nd of April, at about 10 o'clock a.m. she hove to in a severe gale of wind, her master supposing that he was off Fire Island, south of Long Island. The ship lay to till the next morning at 4 o'clock, her head being kept east south-east, the gale continuing severe. After 4 o'clock she was run in west south-west, as it was then supposed, towards New York. Between 12 and 1 o'clock she made the land, which was then thought to be the New Jersey shore. She was then headed off east south-east, and in half or three quarters of an hour struck in shoal water. She then wore ship to the westward, and immediately anchored in five and half fathoms of water. She lay here, with her head to the wind, which was blowing fresh from the north-east, accompanied with rain, for about an hour, her officers being ignorant of their position, when the steamship *Saxon*, owned by the libellants and running regularly between Philadelphia and Boston, was discovered passing on her trip to Boston. The captain of the *Grinnell* immediately set signals of distress, and the *Saxon* hove down for him. When within hailing distance, Captain Spencer, of the *Grinnell*, inquired of the master of the *Saxon* if he could tell him where he was. The latter replied that he was on Five Fathom Bank, off Cape May. Captain Spencer then told him that he had struck on a shoal, had a considerable number of passengers on board, and asked him if he would take him to a port of safety. Captain Mathews, of the *Saxon*, replied that he would try. Thereupon, after the proper orders, the *Grinnell's* cable was slipped, and the *Saxon* took the hawser from her for the purpose of taking her in tow. In attempting to get the ship off before the wind, under her jib and fore-topmast, the hawser broke, from inevitable accident, and without fault on the part of either ship. The hawser parted near the *Grinnell's* knight heads, and though every effort was made to haul it on the steamer, it got foul of her screw, though her engines were stopped as soon as they could be. Some twenty or thirty fathoms of it were found on the screw after she reached Boston. After the hawser parted, the captain of the *Saxon* ordered the *Grinnell* to make sail to follow him, which was done, the two ships steering

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wards the mouth of Delaware Bay. After sailing six or six miles, the steamer stopped her engines to the *Grinnell* come up, when Captain Mathews the master of the *Grinnell* that he should have get another hawser to him before night, as it would be ebb tide before they reached the mouth of the bay, and he could not get him to a safe anchorage without it. Captain Spencer then asked him if he could not take him to sea. The captain of the *Saxon* said he could, and thereupon the steamer led the way, and the *Grinnell* followed out to sea clear of the shoals, when the *Grinnell*, on notice from the master of the *Saxon* that she was all clear, hauled up her course for New York. The *Saxon* went on her way to Boston. The ships parted about 8 o'clock, Monday evening, April 3, having been together about five hours. When the *Grinnell* arrived in New York, she was found to be in good condition, damage having been suffered in the gale. While hauling the hawser fast, the sea running high, the *Grinnell* in pitching, as the *Saxon* came across her bow, came down on her, staving the boat of the *Saxon*, carrying away her rail, and cutting a hole in her deck. This damage to the *Saxon* was repaired for \$260. Beyond this, and the winding of the screw about the screw, the *Saxon* received no injury while engaged in rendering assistance to the *Grinnell*. Before, however, her arrival at Boston, she suffered serious injury to repair which, including her cost for her detention during the repairs, cost her more than \$2500. The weather continued stormy after she left the *Grinnell*, and, the evening of the day after, she encountered a heavy gale. She kept her best steam on, and arrived at Pollock Rip, in her usual route, at about 5 o'clock Tuesday morning, about an hour before dead low water. In attempting to cross the Rip, the steamer struck, and was very badly injured, and had to be towed to Boston. Had she not been detained by the services rendered the *Grinnell*, she would undoubtedly have reached the Rip at about high water, and escaped over it in safety. The *Saxon* was a valuable steamer, worth over \$100,000 and had a cargo on board valued at \$400,000. To the south and west of Five Fathom Bank, where the *Grinnell* lay, are shoals, some of which are said not to be laid down on the charts, and as the wind and current were blowing in a south-westerly direction, if the *Grinnell* had parted her chains, she would have been in considerable danger of being wrecked, especially if the sea had increased to a point of great severity. In case of such increase of the gale, she would have been in some danger of parting her cable had she not been rescued. The *Saxon* was the only regular steam-packet which was due at that point about that time, though Government transports occasionally passed up and down the coast in that vicinity. Upon these facts the two questions already referred to arise, which have been elaborately discussed by counsel, and they are obviously, as heretofore stated: 1. Were the services rendered by the *Saxon* to the *Grinnell* salvage services, and therefore entitled to salvage compensation? 2. If they were salvage services, what compensation is the *Saxon* entitled to? Upon the first point, the court is satisfied that the service rendered was in the nature of salvage. The *Grinnell* was saved, by the timely intervention of the *Saxon*, from a position of considerable peril. She was at anchor in the neighborhood of dangerous shoals, upon which there was at least some danger of her drifting, in the event of the parting of her cables. One severe gale had just been encountered, which had driven her into the position of danger, where she then lay; and though the storm had lulled, it was not entirely over. The sea was high and the wind fresh; and another severe gale visited the coast within a few days after she was taken out to sea by the *Saxon*.

The evidence is not entirely clear as to the degree of severity of the succeeding gale at Five Fathom Bank, but, judging from the ordinary range of such storms, it is fair to conclude, from the evidence, that it was felt in considerable violence at this point. It is true the *Grinnell* might have ridden out this gale, but the captain was ignorant of his position, and the pilots who cruise the waters in that vicinity were thirty miles away, at Delaware Breakwater, and not likely to reach the neighborhood of Five Fathom Bank in such weather. No one can certainly determine whether or not she would have ridden out the gale in safety, and though Captain Spencer thinks she would, as her ground tackle was strong, still it must be conceded that there was more or less danger in her lying there and trusting to the experiment. It is quite evident that Captain Spencer considered his ship in great danger, and was therefore anxious that the *Saxon* should take him to a port of safety. It is true that he now says his fears at that time were based upon the supposition that his ship was leaking badly, which turned out to be an error. Still I think it is clear that the ship was in real and unusual danger, independent of the fact whether she was leaking badly or not. The services of the *Saxon* were therefore, in the judgment of the court, salvage services, and come entirely within the rule laid down by Dr. Lushington in the case of the *Charlotte*, 3 Wm. Rob. 71, where he says: "According to the principles which are recognised in this court in questions of this description, all services rendered at sea to a vessel in danger or distress are salvage services. It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered." This doctrine is accepted and enforced by the Admiralty Courts in this country. Curtis, J., in the case of *Henessey et al. v. The Ship Versailles and Cargo*, 1 Curt. R. 353, gives a brief and clear definition of salvage: "The relief of property," he remarks, "from imminent peril of the sea, by voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property, constitutes a technical case of salvage." Many other authorities to the same effect might be cited, and in view of the general rule, when considered with reference to the particular cases from which it has been deduced, I cannot doubt but that the present case is covered by it. It only remains to consider the amount of compensation to be awarded. We are met on the threshold of this branch of the case with the claim that the court, in fixing the amount to be awarded, should consider the damage suffered by the *Saxon* in striking on Pollock Rip. It is not claimed that the entire amount of this damage should be included in the award, but it is insisted that the *Saxon*, by the delay of five hours while aiding the *Grinnell*, arrived at Pollock Rip so much later, and at low water, by which her risk in crossing was increased, and in consequence of which she met with the accident and suffered great damage. And it is clear that the *Saxon* would have arrived at the Rip at high water, and therefore, in all probability, have passed over in safety, had it not been for her delay in aiding the *Grinnell*. In a certain popular and remote sense, when she undertook to get the *Grinnell* out of danger at Five Fathom Bank, she incurred whatever risks such a delay might subject her to. She took the risk of encountering another storm, which she might escape if she avoided the delay. Whatever increased dangers might arise during the time which her

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detention in this salvage service at Five Fathom Bank might prolong her voyage, were all, in one sense, hazarded by her in staying by the *Grinnell*. But these remote and uncertain dangers do not, in the eye of the law, enhance her merits, and thus increase her reward. Though she had been totally wrecked by another gale, which she would have wholly escaped but for her delay of five hours in this service, I apprehend that such a disaster could not be allowed to enhance the salvage compensation. All such dangers were contingent, and the damages which might result from them must be considered, in the language of the law, as remote, having no logical or legal connection with the transaction upon which the libel is founded. We come, then, to the simple question of the amount of compensation due to the *Saxon* for the services rendered at Five Fathom Bank. The elements to be considered in solving this question are well understood. The only difficulty is as to their application. The general rule as to compensation is that it should be liberal. In determining what is liberal, we are to consider "the value of the property saved; the degree of the peril from which it was delivered; the risk of the property, and especially of the persons of the salvors; the severity and duration of their labour; the promptness of their interposition; and the skill exhibited: (1 Curt. R. 361.) So far as the value of the property saved is concerned, it was considerable; admitted, for the purposes of this case, to be \$22,500 for the ship, and \$100,000 for the cargo. As to the degree of peril from which the ship and cargo were delivered, it is more difficult to determine. It was sufficient to constitute it a case of salvage, but was not that imminent peril which often menaces the certain destruction of vessels on a lee shore. As the wind and sea were at the time of her rescue, she was not in a condition of great peril. To what degree the gale increased soon after her escape from that point is not clear. So far as the risk of the property or persons of the salvors is concerned, there is no unusual ground of merit. There was, comparatively, very little risk to either. The labours of the salvors were neither severe nor long, and though their services were promptly rendered, there was nothing in the exigencies of the case to call for very great skill. On the whole, I think I shall be following the spirit of the rule which calls for liberal rewards in salvage cases, by adjudging \$5000 as the proper sum. Had it not been for the untoward disaster at Pollock Rip, I think the salvors themselves would have regarded this as a liberal reward. To this sum, however, I will add \$260, the amount of the damage which Captain Mathews stated that the *Saxon* suffered by being struck by the *Grinnell*. Let a decree be entered for the libellants for the sum of \$5260, with costs.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,
Barristers-at-Law.

Friday, Nov. 11, 1864.

GLEDSTANES AND OTHERS v. THE CORPORATION OF
THE ROYAL EXCHANGE ASSURANCE.Marine insurance—Open policy—Appropriation—
Declaration.

The H. Marine Insurance Company, established abroad, from their course of business not knowing at the time of issuing certain policies what might turn out to be the amount of risk on any particular ship, effected with the defts. in London, through the plts., their agents, open policies of insurance to cover any excess beyond 5000l. in which they might be interested in any one ship. The ships were described in these open policies,

"First-class ship or ships as may be declared. plts. from time to time, as they were advised. Calcutta agent of the H. Company, made dock of the amounts and names of the ships which company had insured beyond 5000l. to the defts. indorsements were thereof made on the defts." As one of such policies was on the point of being exhausted, a fresh one was entered into, and an indent made of it on the back, e.g. "to follow succeed policy No. day of . . ." On March 1860, there remained 5000l. unappropriated the open policy of March 31, 1859; and on news was received in London, both by plts. and that the R. G. ship had been lost; but it was no that the H. Company had any interest in the goods of her. The plts. appropriated the 5000l. other vessels than the R. G. on the 17th March on the 19th March effected another open policy for 10,000l., "to follow that of March 1859." On the 21st March 1860, the plts. notice from the Calcutta agent that the H. Company insured the R. G., and that the R. G. was to be under the defts.' open policy, and that papers would be sent by the mail. The plts. immediately notified to the defts. that a declaration of insurance in excess of 5000l. on the cargo of the R. G. was made on the policy of the 19th March 1860; the 26th March, having then received papers made an indorsement accordingly on the back policy, and gave notice to the defts. :

Held, that it not being known on the 19th March the H. Company had any risk on goods on board the R. G., the appropriation of that risk and notice were sufficient to entitle them to recover on a policy of the 19th March for the excess beyond 5000l.
Per Cockburn, C. J. and Shee, J., that if it is known to both plts. and defts. it would have no difference.

Special case.—The action was brought on 27th Jan. upon a policy of marine insurance effected by the plts. with the defts. on goods insured at 7 respect of the cargo of the ship *Red Gauntlet* in the following circumstances.

The plts. are the London agents of the H. Marine Insurance Company, who have a agent at Calcutta, with general authority to write policies on their behalf.

The course of the company's business at Calcutta is as follows. Merchants there, intending to consignments of merchandise, &c., to the Kingdom, apply to the agent there for the purpose of effecting assurances some time before the goods are actually shipped or even the name of the ship is known, or the precise quantity or par of the merchandise is defined, and if the application is accepted, a slip, naming the risk accepted in terms, but without naming the ship or specifying the particulars of the merchandise, is delivered to the assured, and as soon as the particular is determined on, a formal policy of insurance is issued to be upon the whole amount of merchandise the assured may consign by that particular drawn up and delivered to the assured. The quantity of merchandise is covered by such remains uncertain until the same is actually shipped.

Under these circumstances the said company does not know, at the time of issuing a policy of insurance as above mentioned, what may probably be the amount of risk taken by the company on any particular ship, and not deeming it expedient to take upon themselves risks to a greater amount than 5000l. upon any one ship, the plts., as agents in London, effect on their behalf, with the defts. and others, open policies of insurance to cover several amounts, if any, which the said company may have taken in excess of 5000l. upon any one ship. The maximum amount of value to be insured is 5000l.

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policies is fixed therein, as will presently
 accordance with the course of business the plts.
 a policy of insurance with the defts. dated
 Oct. 1858, numbered 22,112, for 7000*l.*, the
 f insurance being described and valued as
 "Being on goods, free of all average, part of
 to cover the excess of 5000*l.*, which may be
 the Calcutta agent of the Hong Kong
 e Company on any one ship warranted to
 d on or before 31st March 1859.
 ships were described as being "first-class
 ships as may be declared."

act, the Calcutta agent of the Hong Kong
 e Company had taken risks on goods which
 5000*l.* on single ships, and from time to
 be plts. received advices from the said com-
 that effect, stating the names of the ships
 particulars of the amounts of excess on each
 plts. made declaration of the amounts and
 the ships to the defts. and indorsements
 le of the declarations upon the back of the

llowing are the indorsements on the above

splett. Part value of policy No. 2537, 1858	£1250	0	0
macres. Part value of H. K. I. Co., 2 2637, on indigo. Whole value, 2656 <i>l.</i>	2550	0	0
Wallace. Part value of H. K. I. Co., 591, on sugars. Whole valued at	1100	0	0
r Castle. Whole value of policy on indigo, 11th Feb. 1859	2400	0	0
nton. Whole value, policy No. 7210... ..	1450	0	0
m. Part value, policy No. 2741, for at 2s. 1d., 2500 <i>l.</i> of which remainder policy No. 2112, 14th Feb. 1859	1250	0	0

London, 16th March 1859..... £10,000 0 0
 rticulars of the subjects of risks covered
 olicy were thus, on the 16th March 1859,
 i and the policy fully appropriated, or as
 times expressed, "consumed."

: 12th Feb. 1859, before the last-mentioned
 s fully appropriated, the plts. proposed to
 further policy of the same kind for 7000*l.*
 osition was made by means of a memo-
 which will be seen indorsed on the back
 ast-mentioned policy as follows:—"12th
 0*l.* to follow this," and this proposal being
 another policy, numbered 3686/33, and
 b. 14, 1859, was effected for 7000*l.*, being
 ad to be on goods, part of 10,000*l.*, to
 excess of 5000*l.* on any one ship, free of
 re, to follow and succeed policy No. 22,112,
 1858, warranted to be shipped on or before
 a 1859."

olicy was in like manner appropriated by
 m indorsed thereon, as before, the last of
 ing upon part value of a policy on ship,
 mith, was dated 7th Nov. 1859.

lar policy was also opened by the plts.
 defts., numbered 7529/80, and dated
 , 1859, also for 7000*l.*, being upon goods
 10,000*l.*, to follow and succeed policy
 , dated 14th Feb. 1859, warranted to be
 m or before the 31st Dec. 1859, and a
 dum was indorsed on policy No. 3686/33 as
 "31st March 7000*l.*, to follow this at 30/."

7th Nov. 1859 the first indorsement was
 n this policy, and was upon the remainder
 ng Kong Insurance Company's policy on
 W. Smith, partly appropriated by the last
 mt on the preceding policy as above men-

16th March 1860 there remained still
 appropriated upon the open policy dated
 , 1859.

same day the following telegram arrived

in London by the Red Sea and India Telegraph,
 having been despatched from Calcutta six days pre-
 viously:

Submarine Telegraph Company in connection with the
 British and Irish Magnetic Telegraph Company.—Foreign,
 No. 694. No. 2452. Number of words, twenty.—At 6.27 on
 Friday 16th March 1860, received the following message from
 Malta, dated 15th, time, 8 p.m.:

"To Lloyd's, London.

"Ship *Red Gauntlet*, bound to London, burnt and stranded;
 some cargo will be saved. Calcutta, March 10. 16.8.22 a.m.
 Lloyd, Calcutta."

This telegram on the same day was known to the
 plts. and defts.

On the 17th March 1860, the plts. in accordance
 with the course of business hereinbefore described,
 appropriated the remaining 5000*l.* upon the above-
 mentioned policy of March 31st 1859, to insurances
 in excess of 5000*l.* upon the ships *City of Manchester*
 2000*l.*, *Blenheim* 2000*l.* and *Agamemnon* 1000*l.*; and on
 the same day the plts. effected with the defts. three
 specific policies on behalf of the Hong Kong Insu-
 rance Company—one on goods per *City of Manchester*
 for 3000*l.*, another on goods per *Agamemnon* for
 4000*l.*, and a third on goods per *Blenheim* for 2000*l.*,
 parts of the risks in respect of the cargoes of those
 ships having already been placed upon the open
 policy just appropriated as above mentioned.

On March 19, 1860, the plts. effected a further
 policy for 10,000*l.* to follow the policy of March 31,
 1859, which was expressed to be as follows: "being
 on goods free of average, &c., to follow and succeed
 policy No. 7529/80, dated 31st March 1859, war-
 ranted to be shipped on or before the 31st Dec.
 1860."

The plts., in the mode that had been previously
 pursued when the prior policies were effected,
 indorsed on the policy No. 7529/80 the following
 memorandum, "10,000*l.*, to follow 17th March at
 30/" as instructions for the said policy of the 19th
 March 1860, and the defts. initialled the memoran-
 dum as an acceptance of the risk.

On the 21st March 1860 the plts. in due course
 received from the Calcutta agent of the Hong Kong
 Insurance Company the following instructions
 despatched from Calcutta on the 15th Feb. 1860:—
 "In our next by regular mail you will find par-
 ticulars for insurances under our open policies for
Red Gauntlet and *Surrey*."

This was the first intimation received in England
 of any insurance by the Hong Kong Insurance
 Company upon *Red Gauntlet*. The plts., immediately
 upon receipt of these instructions from Calcutta,
 notified to the defts. that the declaration of in-
 surance in excess of 5000*l.* on the cargo of the
Red Gauntlet would be made upon the last-mentioned
 policy when the particulars were received. Their
 right to declare in respect of *Red Gauntlet* was, how-
 ever, disputed, and on the 26th March, the plts.
 having received advices from Calcutta that the
 Hong Kong Insurance Company, as the fact was,
 had taken risks upon the cargo of the said ship
Red Gauntlet to the amount of 4738*l.* in excess of
 5000*l.* upon that one ship, indorsed a declaration of
 that amount, per *Red Gauntlet*, on the back of the
 policy of the 19th March 1860, and gave notice of
 the same to the defts. The defts. refused to accept
 or acknowledge such declaration, upon the ground
 that the burning of the *Red Gauntlet* was known to
 both parties before the policy was effected or applied
 for. The plts. thereupon wrote opposite the declara-
 tion per the *Red Gauntlet* the words "in dispute,"
 and after doing so, declared other risks upon the
 said policy to the full amount, which were initialled
 by the defts., as will appear upon reference to the
 copy of the said policy annexed, but the words
 "in dispute" were not noticed by the defts.

The plts., on the 24th March 1860, before the
 last-mentioned policy was exhausted, and while

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there remained upwards of 5000*l.* unappropriated upon it, effected a further policy with the defts. for 20,000*l.* to follow the said policy of the 19th March 1860, and a memorandum was indorsed on the said policy of 19th March 1860 as follows: "20,000*l.* to follow 25th March," such date being a mistake for the 24th March.

Similar policies have been from time to time effected during the currency of the preceding policy, and there remains upon the last of such policies an amount unappropriated more than sufficient to cover the amount for the *Red Gauntlet*.

The interest of the Hong Kong Insurance Company and the validity of the insurances are admitted as well as the loss, and that the goods were shipped on board the said ship, and that all warranties and conditions were complied with except so far as the same may otherwise appear on this case, and it is agreed that the amount to be recovered by the plts. (if any) shall be settled by an arbitrator to be named by the parties.

Lush, Q. C. (Hannea with him) for the plts.—The policy was an open policy to cover all risks which the Hong Kong Company might take in excess of 5000*l.* The policy attached as soon as the risk commenced in Calcutta. It ran upon all the vessels insured by the plts.' principals in the order that the risk attached. It did not depend on any appropriation to any particular vessel. It is not necessary, however, for the plts. to contend that length, but only that the policy attached as soon as it was appropriated to the risk. Then, as soon as it was known that there was an excess beyond 5000*l.* on any particular ship, it was the practice, and they were bound, to notify it to the defts.; but that was not a condition precedent to the policy attaching: (*Harman v. Kingston*, 3 Camp. 150.) Here, as soon as it was known that there was an excess beyond 5000*l.* insured on the *Red Gauntlet*, the defts. were told that the plts. were to put on the *Red Gauntlet*, and when they received full particulars they forwarded them to the defts.

Bovill, Q. C. (Watkin Williams with him) contra.—It is a mistake to assume that these policies were all one continuous policy. On the 17th March the plts. had consumed all the existing policies, and they had run off. The next policy was on the 19th March, and the memorandum indorsed on it, "to follow the 17th March," meant to follow the policy which was consumed on the 17th March. Then, when the policy of the 19th March was effected, it was known that the vessel was lost, and the policy could not attach. Secondly, the policy was to cover the excess beyond 5000*l.* taken "on any one ship as may be declared." A declaration was therefore necessary, because the policy was not on all the ships, and as soon as, but not until, the ship was declared, did the policy attach. Until the particular ship was declared, there was nothing on which the policy could attach.

Lush in reply.—Here there was no knowledge of the loss of that which was the subject of insurance at the time this policy was effected; all that was known was that the vessel was lost, but not that the Hong Kong Company had any interest beyond 5000*l.* on the goods on board: (*Mead v. Davison*, 3 A. & E. 303.) The argument that the policy does not attach until the declaration is made practically comes to this, that the defts. do not insure any of the plts.' ships that do not arrive safely, because some time, about six weeks, must elapse between the appropriation at Calcutta and the declaration in England. In no case is declaration a condition precedent to a policy attaching:

1 *Arnould on Insurance*, 175.

Cockburn, C. J.—I am of opinion that our judgment should be for the plts. The first point for our consideration is, whether there is any sufficient policy to cover the loss incurred. It is true that the policy which was appropriated to the risk by the assured on the goods on board the *Red Gauntlet* was posterior in point of time to the risk; but I think we must take it that the policy was made in anticipation of a risk to be afterwards appropriated and declared. When we look at the course of dealing, we see that it was intended that the plts.' principals, the Hong Kong Company, should always be covered by insuring with the defts. any risk they might take in excess of 5000*l.* on goods in any particular ship. Mr. Bovill did not attempt to deny that if the policy in question had been effected on the 16th March instead of on the 19th, it would have been sufficient to entitle the Hong Kong Company to recover, although made after the appropriation. But then he contended that, although that might be so, yet the policy is vitiated because the ship, the *Red Gauntlet*, was, to the knowledge of both parties, lost at the time the policy was made. This argument is capable of two answers. First, the answer given by Mr. Lush is a satisfactory one, viz., that even if the agent at Calcutta had known of the loss, and although it was not known as a matter of common knowledge there, this would not have vitiated the policy, because the loss of the ship was not the risk insured, but the excess beyond 5000*l.* which the plts. might have on goods in any particular vessel. Now when this policy was effected, it was not known that the Hong Kong Company had any particular interest in the goods on board of the *Red Gauntlet*, and therefore the plts. had no knowledge of the loss that was covered by the policy. Be that as it may, here the loss of the *Red Gauntlet* was common knowledge to both parties, and, in the absence of authority to the contrary, I, for one, should hold that if an underwriter chooses to insure, with the knowledge common to both the insurers and the insured, of the loss of the thing insured, he is not the party to say that the insurance is to go for nothing. He may have had good reasons for taking the risk. I think, therefore, that there is nothing in the circumstances of the loss of the ship to vitiate the insurance. That being so, then comes the question whether the declaration here having been made subsequent to the loss is good. The policy gives the assured the right to appropriate it to any particular ship, but such appropriation must be declared to the defts. Now Mr. Bovill contends that, until the declaration is made, the policy does not attach. To put that construction upon it would be to frustrate the intention of the parties altogether. The risk intended to be protected was any excess beyond 5000*l.* on goods in any particular vessel which the Hong Kong Company might have insured. But whether the Hong Kong Company would have an excess in any particular vessel would not be known until the loading was complete and the vessel about to sail, and the fact of such excess could not be communicated from Calcutta to the plts. for about six weeks afterwards, and in the meantime the vessel would have started on her voyage. Could it ever have been intended that the ship for so much of her voyage was to be unprotected by this insurance? I think most certainly that that was not what was meant by declaring the vessel. But there are two other constructions which may be put on the meaning of declaring the vessel equally favourable to the plts. It may be said that, looking at all the circumstances, all that could be meant by the appropriation was, that the insured, by some overt act from which they could not recede, should fix the vessel on which the policy was to attach, and that when they had once done

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t, although the fact might not come until a later date to the knowledge of the underwriters, then was done which the policy required. It is not, *per se*, necessary to go that length; it is enough to say that it is sufficient if the declaration be made at the first convenient occasion. By this construction the underwriters are protected, because, if there is any attempt to reappropriate after a particular vessel has already been declared, it will be a declaration on the underwriters. In some shape or other appropriation must be so made that the vessel, in the interval between appropriation and declaration, be covered by the policy. Every object of the declaration is settled that the parties are to be appropriated and the declaration thereof is to be to the underwriters at the reasonably earliest opportunity. I am glad to find that our view accords with that laid down in Mr. Arnould's treatise on marine insurance. On these grounds I think our judgment must be for the plaintiffs.

MOMPOTON J.—I am of the same opinion. The construction is, that this policy was intended to follow the former one between these parties, and the object was to cover the excess beyond 5000*l.* of the Hong Kong Company might insure in any particular ship. They show that it was intended to keep on renewing this arrangement from time to time. It was intended to give the plaintiffs all rights under the new policies which they had under their former policies. The main question in the case is, whether this policy attached, and whether a declaration was made in time. I do not quarrel with that part of Mr. Lush's argument in which he said that it was meant that the risk should attach on all the ships in their order; but I think it is when the risk was appropriated to any particular ship by the company abroad, the policy attached. Whether that is so or not, I think the appropriation here was communicated in good time. Lord Chief Justice has pointed out during the argument that the whole voyage would not be covered by the construction contended for by Mr. Mill. I take what was intended to be this: "You apply the policy to any risk you please, but must be bound by the appropriation you make and communicate to us in London. In one sense a positive condition, and it means that the appropriation is to be declared in London according to the instructions from abroad." I adopt Lord Mansbrough's view that the naming of what it is which the policy is to attach is a power given to the assured, and that it may be exercised at any time so long as there is no fraud. There is nothing to show that that power was taken away when a declaration was made. The plaintiffs, therefore, are entitled to judgment.

WELLS J.—I am of the same opinion. The effect of the contract was, on the part of the defendants, to protect themselves against a double appropriation of the risk, and, on the part of the Hong Kong Company, to protect themselves against any excess beyond 5000*l.* insured by them in any particular ship. The loss of the ship was not the risk insured against, but the excess beyond the 5000*l.*, and in that view the knowledge of the loss of the ship is not material. I entirely agree in what my brothers have said, and I will not dwell over the same ground again.

WELLS J.—I am of the same opinion. The defendants' contract of the 19th March, have undertaken to insure the excess of risk above 5000*l.*, which the Hong Kong Company may have on goods in any particular ship. The *Red Gauntlet*, which had been insured by the Hong Kong Company for a risk of 5000*l.*, was one of that class of ships. On

the plain meaning of the words of the contract, the excess of risk on the *Red Gauntlet* would be within the contract. At the time the policy of the 19th March was effected, it was known to both parties that the *Red Gauntlet* was lost, but it was not known that the *Red Gauntlet* was one of the ships which had been insured by the Hong Kong Company. To vitiate the policy there must be knowledge that the risk insured against was terminated. It was not known that any risk on the ship *Red Gauntlet* had been taken by the Hong Kong Company. Then it was said by Mr. Bovill that the ship was not declared, and that therefore the policy did not attach. The contract is, that the defendants will insure, and the plaintiffs engage to declare the ship. That can only mean that the assured is to declare in what ship the Hong Kong Company have a risk exceeding 5000*l.* The appropriation is the thing done in Calcutta. The taking of the risk and the policy attached upon the appropriation. The declaration is of an appropriation made abroad. The defendants could not, in my opinion, have defeated the policy if they had known that the risk insured against, as well as the ship, had been lost.

Judgment for the plaintiffs.

Attorneys for the plaintiffs, *Amory, Travers and Smith.*
Attorneys for the defendants, *Freshfield and Newman.*

ADMIRALTY COURT.

Reported by ROBERT A. FRITHARD, D.C.L., Barrister-at-Law.

Tuesday, Jan. 26, 1864.

(Before the Right Hon. Dr. LUSHINGTON.)

THE CHESHIRE WITCH.

Damages—Wrongful detention.

A vessel wrongfully arrested in a cause of damage was, after sentence in the damage suit, detained for twelve days, the plaintiff intimating his intention of appealing against the sentence:

Held, that the plaintiff must pay damages for the twelve days' detention.

This was a cause of damage in which the vessel was arrested on Aug. 15, and continued in arrest until Nov. 26, when the cause was tried and dismissed with costs. Upon application on behalf of the plaintiff the Court ordered the vessel to remain in arrest, as the plaintiff declared his intention to appeal against the sentence. After twelve days, however, he gave notice of his intention to abandon the appeal, and the vessel was accordingly released.

Deane, Q. C., for the defendant, now moved to condemn the plaintiff in damages occasioned by the wrongful detention.

Clarkson contra.

Dr. LUSHINGTON.—This case is indeed one of great hardship to the defendant, as his vessel has been several months under arrest for alleged misconduct, of which he has been proved to be innocent. I do not remember an application like the present to have been hitherto made, but I think it right that the plaintiff should pay for the damages occasioned by the twelve days' wrongful detention.

The parties being unable to agree as to the amount of loss incurred,

The COURT ordered that the matter be referred to the registrar and merchants to report thereon.

ADM.]

THE ZEPHYR—THE UNIAO VENCEDORA (otherwise GIPSY).

[ADM.]

Feb. 16 and March 1, 1864.

(Before the Right Hon. Dr. LUSHINGTON.)

THE ZEPHYR.

*Liability for damage—Vessel and freight insufficient—Admiralty Court Act 1861, sect. 15.**If the value of the deflt.'s vessel and freight be not equal to the damage done, the plt. may, after judgment, obtain a monition against the deflt. personally to satisfy the deficiency.**Quære, whether a personal action can be combined with a real action already commenced.*

The plt. in this cause, Mr. Henry Teasdel, owner of the steam-tug *Emperor*, sued for damages occasioned by a collision between that vessel and the brig *Zephyr*. The action was entered for 700*l.*, and the *Zephyr* was arrested. The *Zephyr* being a vessel of eighty-nine tons, the liability of her owners, as limited by the 54th section of the Merchant Shipping Act Amendment Act 1862, to *s.* per ton, would extend to 712*l.* if damage to that amount were proved. Her full value was, however, found to be only 400*l.*, for which bail was given. This last sum being all that could be recovered by the present proceedings *in rem*,

Deane, Q.C., on behalf of the plt., now moved the court for leave to amend the præcipe to institute the cause by inserting therein the names of the owners of the *Zephyr*, so as to make them personally defts., and for a citation *in personam* against them. The application is novel, but unless some remedy of the nature prayed be given, the plt. would have no alternative but to commence another action in this court, or one of the courts of common law, for any sum to which he might be entitled over and above the 400*l.*

Clarkson contra.—The application is both novel and improper. The plt. has no right to assume what we deny, viz., that the damage done exceeds the amount for which bail has already been given.

Dr. LUSHINGTON.—I have only known of one instance in which a personal action has been engrafted on a suit *in rem*. There is some difficulty in altering the præcipe as prayed, and such a course appears to the court unnecessary, inasmuch as the 15th section of the Admiralty Court Act 1861, gives the court power to effect the object with which the motion has been made. That section (a) puts decrees of the Court of Admiralty upon the same footing as judgments in the Superior Courts of common law, and gives a remedy as well against the ships and goods arrested as against the person of the judgment-creditor. If, therefore, the occasion should arise, a monition might issue to compel the owners of the *Zephyr* to pay the amount of damages not covered by the bail bond.

Motion rejected.

(a) The following is the section referred to: All decrees and orders of the High Court of Admiralty, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the same effect as judgments in the Superior Courts of common law, and the persons to whom any such moneys or costs, charges, or expenses, shall be payable, shall be deemed judgment-creditors, and all powers of enforcing judgments possessed by the Superior Courts of common law, or any judge thereof, with respect to matters depending in the same courts, as well against the ships and goods arrested as against the person of the judgment-debtor, shall be possessed by the said Court of Admiralty with respect to matters therein depending, and all remedies at common law possessed by judgment-creditors shall be in like manner possessed by persons to whom any moneys, costs, charges, or expenses are by such orders or decrees of the said Court of Admiralty directed to be paid.

April 19 and 21, and May 3, 1864.

(Before the Right Hon. Dr. LUSHINGTON.)

THE UNIAO VENCEDORA (otherwise GIPSY).

*Possession—Sale in a foreign port—Dissent of the master.**Seemle, if an extreme necessity existed for the sale of a British vessel at a foreign port, the British vice-consul at the port might, if the master neglected to sell, sanction the sale, which would then be valid notwithstanding the absence of the master's consent.*

The facts of this case sufficiently appear from the judgment.

Brett, Q. C. and E. C. Clarkson appeared for the plts.;

Deane, Q. C. and V. Lushington for the defts.

Dr. LUSHINGTON.—This British ship of eighty-five tons was sold at Terceira on the 31st Jan. 1861 without the direct authority of the owners. She passed into the hands of the purchasers, and was sold again, and since such sale she has come into this country, and is arrested by the former owners, who allege that the sale was illegal and did not divest their title. The law upon this question is, I apprehend, entirely settled, and I am not about to discuss it. The sale is valid, if a prudent sale and under an existing necessity, for, assuming that the sale was with the master's consent, and to be for the benefit of his owners, it would nevertheless not be valid unless there existed a necessity for the sale. The first inquiry therefore is, was there the necessity? But there is also a subordinate question. Was the sale effected with the consent of the master, against his consent, or did he remain neuter? It would be rather a startling proposition that such a sale could be valid against the consent of the master; but I am not prepared to say that under circumstances it might not be so: an overruling necessity admits of no law. No one can say what may be the circumstances which will constitute a case of necessity, some, however, may be stated: First, that the ship cannot, save at a ruinous cost, be repaired in the place where she is; secondly, that even if the repairs can be done at a cost not destructive to the interests of the owners, the master has not the means of so doing without a delay equally injurious to his owners; thirdly, that if he has such means he must be without the power of reasonable communication with his owners, i.e. such means of giving them notice as would not expose their property to imminent risk in the meantime, for I think it cannot be successfully maintained that imminent risk of a total loss should be incurred on the bare possibility of an ultimate repair of the ship. [The Court then examined the evidence in the cause, and held that, upon the facts of the case, there existed such a necessity as justified the sale. The Court then proceeded.] It now becomes necessary to consider the conduct of the master with reference to this sale. Mr. Read asserts that the master consented to the sale; the master on the contrary swears that he objected to it. The master also swears that he was carried to the hospital and was under medical treatment for five weeks, three of which he was bedridden; but it clearly appears from the evidence, especially that of the lodging-house keeper, that he never was in the hospital at all. But what was the conduct of Mr. Read? Now, Mr. Read was, and had been for many years, vice-consul at Terceira, and it was his duty to render assistance to British vessels in distress, and especially where the master and mate were so seriously injured as they themselves represented. Mr. Read states the steps he took in the

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on of his duty. He advised that a survey be made of the vessel, and that there should be as well as Portuguese surveyors. The states that the vessel is entirely without without bulwarks, with her sides smashed, without bowsprit, her foremast and main-jack broken and nearly all her rigging and that all these damages proceeding from acts of the gale on the 26th inst., are of such re that the vessel cannot repair at Terceira, to insufficient resources. Now, I have not one word of argument calculated to convince that this is not a correct survey; and this being which is the more probable statement, that of said, that the master assented to the sale of vessel, or the master's representation to the jury? What did the master propose to do, to find money, how to do the repairs? What be done in the interval? There is no intimation that he said one word upon these matters, appears to me contrary to all probability that the master should declare an intention of pursuing another course. But I will assume for a moment that the captain might not have given his consent, at considering the state in which the master then were, Mr. Read had acted in carrying out without authority from the master. Then Mr. Read would have been justified, and I think the sale would have been valid if a case of necessity were proved, for it never can be said that the law would require the property of subjects to be sacrificed without reasonable cause. Looking at all the facts of the case, and at the law, as I understand it to be, I think the result is, that the plaintiffs who have entered to obtain possession of the vessel from the person who derived his title from the sale should succeed. I hold that the sale was valid, and dismiss this action with costs.

Monday, Aug. 29, 1864.

Before the Right Hon. Dr. LUSHINGTON.)

THE BLOOMER.

—Receiver appointed by the Court of Ch.—
Arrest by the Court of Admiralty.

Virtue of Ch. appointed certain persons receivers of the vessel, which, before they had obtained possession, was arrested in a suit in the Court of Admiralty.

Motion, in the latter court, on behalf of the receivers, release decreed, but without costs.

On the 9th June a bill was filed in the Court of Chancery, Messrs. Halliday, Fox and Co., of London, plaintiffs, claiming a lien upon the homeward-bound vessel *Bloomer*, for advances made to the vessel in respect of the freight. Under that bill an order of the 27th July was, upon an appeal motion, made by the Lords Justices, whereby they granted an injunction, and ordered that receivers of the vessel should be appointed, and on the 3rd Aug., Messrs. Stuart, V. C.; Messrs. Burn and others were accordingly appointed receivers. On the same day, and before the receivers were in possession, a cause of wages was instituted in the Court of Admiralty against the freight only by the vessel *Bloomer*, and in that suit, on the 4th, an order was made, by warrant from the court, that the vessel should be arrested, and the freight paid.

The action was also entered on behalf of the vessel for their wages. The court was now moved by the receivers to decree a release of the vessel from the master's action, and it was that the same question in the seamen's case should abide the result of this application.

Karslake (of the Chancery bar) and *Pritchard* (with him), on behalf of the receivers, was stopped by the Court, who called upon

The Queen's Advocate (*Tristram* with him) contra.

Dr. LUSHINGTON.—I have no doubt as to the course to be followed in this case. The hand of the court must be taken off the cargo to enable the decree of the Court of Ch. to be executed. In making a decree to that effect I do not stop the suits already instituted in this court, and I give no decision as to the priority of the various liens that may attach upon the freight. No costs.

UNITED STATES DISTRICT COURT OF ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate in Admiralty.

SOUTHERN DISTRICT OF NEW YORK.

(Before Commissioner C. W. NEWTON.)

Re THE EXTRADITION OF JOHN C. BENNETT (under the Treaty between the United States and Great Britain, for the killing or maiming of John West on the high seas, on board a British barque).

Extradition—Murder on the high seas.

Under the Extradition Treaty between Great Britain and the United States a person charged with murder on the high seas on board a British vessel must be given up when claimed by Great Britain.

Murder on the high seas on board a British vessel is not committed within the jurisdiction of the United States, though the vessel comes into a port of the United States.

Whether evidence of justification of the killing can be received in proceedings under the treaty (Quere).

The case of Ternan and others, before the Q. B. (10 L. T. Rep. N. S. 499), commented on and approved.

The accused, John C. Bennett, was brought before the Commissioner on a claim of extradition, he being charged with the murder of one John West on board the British brig *Raymond*, while on the high seas, bound to the port of New York. The evidence left no doubt of the killing.

After the evidence was closed the prisoner's counsel urged his discharge on the authority of a recent case decided by the Court of Q. B. (*Re Ternan and others*, 10 L. T. Rep. N. S. 499)

For the British Government *F. F. Marbury*; for the prisoner *H. S. Smith*.

The COMMISSIONER rendered the following decision:—Assuming that the case presented comes within the treaty of the 9th Aug. 1842, between the United States and Great Britain, I am clearly of the opinion that the facts developed on the examination would warrant me in committing the accused for extradition under the treaty. The evidence received, to my mind, is clear and uncontradicted that the accused, through violence, caused the death of the coloured man West on board the British brig *Raymond*, whilst on the high seas, and no successful attempt on the part of the accused has been made to justify the act. Even admitting that evidence of justification could be legally received—of which, however, under the treaty I have great doubt—it is not for me to determine what effect it might or might not have upon the mind of a jury on a final hearing or trial for murder. Under the treaty I am only to determine the question of probable cause. The simple question here to be decided is, whether there is sufficient probable cause to justify his return for trial to the country within whose jurisdiction

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the crime is charged to have been committed. The question, however, is raised as to whether this case does not come within the principles of law laid down in a recent case under the treaty, decided in the Court of Q. B., in the matter of *Ternan and others*, prisoners in the gaol of Liverpool, who were discharged by that court upon a writ of *habeas corpus* issued on their behalf. It is contended that the principles involved in that case are analogous to those arising in the case under consideration. It appears that the prisoners in the case referred to were arrested and detained under the treaty as pirates, and their extradition demanded by our Government. The opinions of the learned justices of the court in that case are certainly entitled to very great respect and consideration, and though their decisions are not absolutely binding upon me in determining the case under consideration, I should certainly feel bound to give great weight to their unbiased adjudication upon the principles of law therein passed upon, were the same questions involved in the case before me; but upon a careful analysis of the decision rendered in that case, I am at a loss to discover wherein the principles therein enunciated are in the least applicable, or can in any wise govern or control the present case. The learned justices of the Q. B., in that case, as I understand it, decided that the crimes for which extradition can be demanded under the treaty must have been committed within the exclusive jurisdiction of the power which demands the extradition; while crimes committed within the concurrent jurisdiction of both powers are not covered by the treaty—that the crime with which the prisoners in the case before them were charged was piracy by the law of nations, which is punishable wherever the offender may be found, and was not, therefore, committed within the exclusive jurisdiction of the United States; that the piracy which is especially named in the treaty is not piracy by the law of nations, but that other class of offences which are declared to be piracy by statute. Admitting, therefore, the full force and correctness of the decision in the Court of Q. B., I am unable to determine wherein the principles therein determined can in any way change the interpretation which has been universally given by our courts and Government to the treaty in cases of murder on the high seas. It cannot, in my judgment, be legally claimed that murder on the high seas, when committed on board a British vessel, is within the concurrent jurisdiction of both the United States and Great Britain, and unless that position can be sustained, the assumed analogy most certainly falls. In the case under consideration the crime charged and proved is murder on the high seas, on board the British brig *Raymond*, and I have not been able to find any adjudication, either in this country or in England, holding that there is a concurrent jurisdiction in such cases; all of the authorities upon this point agree, and I am compelled, therefore, to determine that the crime charged was committed within the exclusive jurisdiction of Great Britain. It has always been the policy of this Government to place the most liberal construction upon all her treaty stipulations with foreign states; and whenever it has been clearly established that a crime has been committed against a foreign state, which comes within our treaty stipulations, we have ever shown a readiness to surrender the criminal to justice—and justice certainly can be as fairly and impartially administered in the country within whose exclusive jurisdiction the offence has been committed, as within the asylum or country to which he may have fled. Ever sensitive as our Government is to the protection of its own citizens, it never will, I trust, assume, against treaty stipulations, to become the guardian and protector of escaped and fleeing crimi-

nals, when legally demanded. Assuming the truth of the position of the counsel for accused, that the British Government did, in that case, unfairly and illegally intervene to prevent the extradition of criminals when demanded by our Government, I cannot see that it would follow by any process of reasoning, or on any principle of law or justice (except it be that of retaliation), that we should be swerved from that high and honourable position as a nation which we have ever maintained, in carrying out treaty stipulations toward foreign Governments. I am, however, most happy to say that upon a careful examination of the case decided in the Court of Q. B. I am unable to discover any disposition upon the part of the learned justices delivering the opinions to render any interpretation of the treaty inconsistent with their heretofore high legal standing, or with that of the opinions of our ablest jurists. Applying, therefore the principles announced in that case to the one under consideration, I am not at a loss to determine as to the right or duty of granting the certificate. I shall therefore grant the certificate of extradition, and in the meantime the accused must stand committed to await the action of the Executive in the matter.

HAMILTON E. TOWLE v. THE GREAT EASTERN.

Salvage—Passenger—Ordinary and extraordinary duties.

A passenger can render salvage services to the vessel on board which he is a passenger, though his relation of passenger still continues:

But such services must be of an extraordinary character, and beyond the line of his duty, to render him a salvor.

Pumping and aiding in working a ship by usual and well-known means, would not be extraordinary services.

The Great Eastern, having disabled her paddle-wheels, and broken her rudder shaft in a gale, lay in the trough of the sea for about thirty-six hours, during which time the officers of the ship had endeavoured in vain to repair the damage. The libellant, a passenger on board, then, with the consent of the captain of the ship, undertook to put in execution a plan which he had devised for steering the ship himself, superintended the work, and succeeded in remedying the difficulty, so that the vessel was brought out of the trough of the sea, and came into port in safety:

Held, that these services were extraordinary services for which the court would award salvage compensation to him.

The vessel was valued at least at \$500,000. The time occupied in rigging the libellant's apparatus was about twenty-four hours.

Held, that the case is novel, and but little light can be obtained from precedents, in fixing the amount of compensation. On the whole case \$15,000 awarded.

Cases of The Brantson, 2 Hag. 3, and The Vrede, 1 Lush. 322, discussed.

The facts of the case need not be separately stated, as they are fully set forth in the opinion.

For libellant were, G. F. Curtis and Hall; and for claimants Erarts, Southmayd and Choate.

SHIPMAN, J.—On the 10th Sept., 1861, the steamship *Great Eastern* left Liverpool for New York, with about four hundred passengers and a considerable cargo, together with about four hundred persons as officers and crew, including engineers, firemen, servants, &c. She was, as is well known, the largest ship that ever floated the sea, and was of great value. Her original cost was very large, but owing

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to her great draft of water and unwieldy proportions, which limited in many directions her general usefulness as an instrument of commercial enterprise, it is difficult to state her exact value at the time the events occurred upon which this suit is founded. But from the evidence before this court, it is safe to conclude that she was at that time worth more than half-a-million of dollars. Beyond this, her value is not important for the purposes of this case. Among her passengers on this voyage was the libellant in this suit. On Thursday, the 12th Sept., two days after the ship left Liverpool, and about two hundred and eighty miles west of Cape Clear, she encountered a heavy storm, which did great damage to, and finally swept away, her paddle-wheels and several of her boats. Her screw, or propeller, however, remained substantially uninjured, and by this she could make very good headway, when under steam. During the evening or night of the 12th, she fell off into the trough of the sea, and rolled with such violence as to carry from side to side of the ship all the moveable objects on her decks and in her cabins. Much of her furniture was broken up and destroyed, several of her crew and passengers injured, and a great part of the luggage of the latter was drenched and crushed into a mass of worthless rubbish. The immense size of the ship rendered her motions, when rolling in the trough of a heavy sea, much more dangerous and destructive than those of a ship of ordinary dimensions. During the night it was discovered that her rudder-shaft, which was large, and of wrought iron, had been twisted off below all the points of connection with the steering gear. The ship, therefore, lay helpless in the trough of the sea, rolling heavily with every swell. Her sails were blown away in a subsequent attempt to control her movements by them, and no means were left by which her head could be brought up, and her position on the sea changed. She was as unmanageable as if her rudder had been entirely gone. The only way, therefore, to get any control of the motions of the ship, was to secure some kind of efficient steering-gear by attaching it to the rudder-shaft below the point of fracture, and connecting it with the wheel. This was a work of considerable danger, and of great difficulty. It was, however, finally done, and the ship was again got under control, taken out of the trough of the sea, and steered safely back to port. The libellant claims that he devised and executed the plan of this new steering-gear, and the means by which it was made available, and that the ship was thus saved from great peril chiefly through his instrumentality. To recover compensation, in the nature of salvage, for this service, he has brought this suit. Before passing to the questions of law which have been raised and discussed on this trial, I will state the facts which I hold to be proved by the evidence. In doing this I shall not detail the evidence further than may be necessary to enable me to state my own conclusions. 1. The ship was brought into a condition of great peril by the breaking of her rudder-shaft in the afternoon, or during the night, of the 12th. In consequence of this accident she fell off into the trough of the sea and there lay in a helpless condition. The storm was very violent during Thursday night, but began to abate on Friday morning, and had, in the main, ceased on Saturday evening. But the ground-swell continued, and kept the ship rolling more or less until about five o'clock on Sunday evening, when her head was brought up, and she was started on her course. During all this time she lay drifting on the waves, every attempt to get control of her rudder, or rig other steering apparatus, having failed. It requires no argument, and little evidence beyond what the common history of the sea furnishes, to prove that this immense and

unwieldy ship, on the ocean, nearly three hundred miles from land, with eight hundred souls on board, in this disabled and helpless condition, was in great danger and exposed to numerous perils. 2. Between Friday morning and Saturday afternoon the officers of the ship had made repeated attempts to get control of her motions. It is not necessary to detail these experiments. It is sufficient to say that they all proved fruitless. Finally, the chief engineer commenced unscrewing a large nut on the rudder shaft. This nut was on that part of the shaft which was below the upper deck, and in an apartment on the deck below at the stern of the ship. This apartment has been termed, in this case, the steerage-deck. The rudder-shaft passed up through it. On the shaft within this steerage-deck was the frustum of a ribbed iron cone, through the centre of which the shaft passed. The base of this cone rested on iron balls, the balls running in a circular groove sunk in an iron plate fastened to the deck, which constituted the floor of the apartment. The cone was fastened to the shaft firmly by appropriate means, so that they revolved together, as if one piece of iron. On the rudder shaft, at the top of the cone, was a large nut, the one already referred to, which was screwed down firmly on the head of the cone. This nut, it will thus be seen, kept the cone down to its proper position, so that the base was made to traverse on the balls, and the cone and nut formed, together, a head or collar which contributed to support the weight of the rudder and shaft. The rudder shaft had broken off at or near the top of this nut. The last attempted experiment of the chief engineer was to unscrew this nut, with the design to secure, if possible, a tiller up on the end of the broken shaft, and thus, with the aid of the wheel in the steerage deck, to steer the ship. He had partly unscrewed the nut, though it was a work of considerable difficulty, as the nut and shaft turned by every blow of the sea on the rudder blade, when the libellant learned the fact. The latter regarded the nut as a very important means of supporting the rudder and the shaft, and looked upon its removal with alarm, on the ground that, if this support were removed, it might lead to a total loss of the rudder. He communicated his fears to the captain of the ship, and the engineer was ordered to desist. It is impossible to tell what would have been the result of this experiment, had it been carried out, although by unscrewing the nut an inch the rudder fell half that distance; but it appears from the testimony of one of the witnesses that the engineer did not expect to be able to fit the tiller to the end of the broken shaft under three or four days. The captain seemed now to have lost confidence in the chief engineer's ability to restore the control of the rudder. His own efforts had failed. Attempts had been made to secure control by winding chains round the cone on the shaft and connecting them with tackles fixed to the ship's sides, to be worked by men at each end. This failed. A spar was rigged over the stern of the ship as a temporary means of steering, and that also failed. Sails had been hoisted to change her position, but had been blown to pieces. It is evident, from the testimony, that after the captain had arrested the unscrewing of the nut, both he and his officers had exhausted their expedients for getting control of the rudder so as to steer the ship, and bring her up out of the trough of the swell. The situation of the ship and the persons on board of her was now such as might well alarm the most accomplished and intrepid navigator, and lead him to welcome any aid which gave any hope of relief, especially when it proposed no experiment which could involve the ship in new dangers. 3. The libellant is a civil and mechanical engineer, regularly educated for his profession, and, prior to taking

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passage in this ship, had had considerable experience in responsible stations, both at home and abroad, where high professional skill was required. He had not been an indifferent spectator of such of the various attempts as he had seen made to get the ship under control prior to the commencement of the unscrewing of the nut. He had revolved a plan in his own mind, drawn a sketch of it, had shown it to the chief engineer, who had treated it with rudeness, which is not surprising, when we remember that in every profession men are apt to be impatient of outside interference in times of perplexity and danger. The captain, however, having exhausted his own expedients and those of his officers, and evidently alarmed for the safety of the ship, decided that the libellant should try his. He put a sufficient number of men at his disposal, and the libellant entered upon his work. He had already matured his plan, and after ascertaining by calculations the necessary strength of the materials which he knew he could use, he felt confident that his plan was secure from danger or failure. He proceeded to the steerage deck with the men detailed to work under his directions. This was about five o'clock on Saturday afternoon. There is some conflict in the evidence as to who superintended the operation of screwing the nut back again; but, on the whole evidence, I think the weight of it sustains the statement of Mr. Towle himself that he did. I will not here detail the progress of the libellant's labours. It is sufficient to state that, after three hours' labour, he succeeded in screwing the nut back to its place, and having obtained from the forward part of the ship an immense chain, weighing about sixty pounds to the link, which was let down into the steerage deck through a hole cut in the upper deck by his directions, he succeeded in winding round the cone on the rudder shaft a sufficient portion of this chain to constitute a cylinder or drum, and thus secured a leverage obtainable in no other way. The ends of the chain were then extended from the cylinder to two strong posts or bitts which came up through this deck. A turn was taken round each of these bitts, and the ends of the large chain were then connected with tackles fastened to the respective sides of the ship for taking up the slack and easing the strain on the wheel used immediately for steering. Smaller chains connected the wheel with the large chain before described, and the size of the shackles making the connections were arranged so that in the event of a break it would not occur in the great chain or its lashings, but in the smaller or connecting chains or shackles. The links of the large chain composing the cylinder were lashed to each other, and to the base of the cone, by smaller chains which were passed through the holes in its base. The alternate links of the large chain, on the inner coil, sank in between the ribs of the cone, and thus tended to prevent slipping and to diminish the strain on the lashings. The smaller chains connecting with the wheel were fastened to the large chain composing the cylinder and extending to and around the deck-bitts, at a point between the bitts and the cylinder, so that, in the event of the breaking of the smaller chains, the rudder would still be held in position by the large chain, as the latter was wound round the bitts by one turn, and the ends secured to tackles fastened to the sides of the ship and manned for the purpose of taking up the slack and easing away, as the rudder-shaft was turned one way or the other by the movement of the wheel. This is a brief and general outline of the plan devised and executed by this libellant for rescuing this ship from her perilous situation. It is difficult to make the description of the arrangement clear without drawings and illustrations addressed to the eye. This arrangement was completed during Saturday night and Sunday,

and at five o'clock p.m. on Sunday the ship was brought up to the sea and put on her course. 4. The labour of the libellant, both manual and mental, during the execution of his plan, was very considerable—so much so as to reduce him at one time to a state of great exhaustion. It was attended with some danger, owing to the size of the chain, and the spanner with which the nut was screwed back. The large chain weighed 60lbs. to the link, and the spanner or wrench weighed 130lbs. The latter was suspended from the upper deck by ropes or chains, and used by holding it to the nut, securing it to the latter by a pin, to prevent it from slipping, and then a blow of the sea on the rudder-blade drove round the shaft, and brought the nut down on the thread. As the cone turned with the shaft, the constant swell of the sea kept both in motion, which increased the difficulty of lashing the links of the large chain, and made it a more or less dangerous work. 5. While the libellant was engaged in perfecting his plan for steering the ship, Capt. Walker, who was in command of the *Great Eastern*, and his officers were also at work in connecting a large chain to the rudder, by passing it round the latter and securing it at the outer edge of the rudder blade by a shackle, and then bringing one end over the larboard and the other over the starboard quarter of the ship, and securing them on deck. The object of this arrangement was also to aid in steering the ship, by manning the ends of the chain on deck, so that the rudder could be moved either way, as either end of the chain might be hauled on. How much this contrivance was used it is difficult to determine exactly, from the evidence. I am satisfied, however, that it was greatly inferior, and subordinate, both in its use and capacities, to that arranged by the libellant in the steerage-deck. That the latter was the efficient and principal means by which this great ship, with her valuable cargo and priceless freight of human lives, was saved from a condition of peril, I cannot doubt in view of the evidence. Well might Capt. Walker exhibit a lively sense of gratitude toward the libellant, as the evidence discloses that he did, when the success of the latter's plan was demonstrated by trial. In view of these facts, and the well-settled rules of law applicable to salvage claims, had the libellant fallen in with this ship thus at sea, disabled, and at the mercy of the winds and waves, and had gone from his own vessel on board of her, and rendered these services, I should feel no hesitation in pronouncing him a salvor, and entitled to a liberal reward. It is well said by Dr. Lushington, in the case of the *Charlotte*, 3 Wm. Rob. 71, that "According to the principles which are recognised in this court, in questions of this description, all services rendered at sea, to a vessel in danger or distress, are salvage services. It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune, which might possibly expose her to destruction if the service were not rendered." This doctrine has been repeatedly sanctioned by the courts of the United States, and very recently by this tribunal: (*Hennessy v. The ship Versailles*, 1 Curt. R. 355; *Williamson v. The brig Alphonso*, 1b. 378; *Winer v. The Cornelius Grinnell*, MSS.) In the case last cited Curtis, J. remarks: "It has been strongly urged that both the peril and the service were too slight to bring the case within the technical definition of salvage; but I am not of this opinion. The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitute a state of salvage. It

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may be a case of more or less merit, according to the degree of peril in which the property was and the danger and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature." The authorities are abundant and decisive on this point: (*The Independence*, 2 Curt. R. 352-353; *The Reward*, 1 Wm. Rob. 174.) I come now to the consideration of much the most important question in this case, and one upon which the authorities are not very numerous, and, as I view them, not decisive. The claimants insist that, even if the elements of a salvage service were otherwise found in the case, yet the libellant is precluded from salvage compensation on the ground that, during the whole period of peril and of the performance of the service rendered, he was a passenger. The very able argument of the advocate for the claimants proceeds upon the ground that the connection of the libellant with the ship as passenger was not dissolved prior to the performance of the service, and that, as the relation of passenger imposed upon him the duty of aiding in the relief of the ship from the common peril in which he was involved with the rest on board, the law does not recognise him as a salvor. If this point is well taken, it is a complete answer to the libellant's claim for salvage compensation. The principal cases relied on to support this position are *The Branstons*, 2 Hagg. 3, and *The Vrede*, 1 Lush. 322. The report of the case in 2 Hagg. is in these words: "This brig, homeward bound, got into distress, and a lieutenant of the royal navy, a passenger on board, contributed his assistance and claimed to be remunerated. By the Court: Where there is a common danger, it is the duty of every one on board the vessel to give all the services he can, and more particularly this is the duty of one whose ordinary pursuits enable him to render most effectual service. No case has been cited where such a claim by a passenger has been established, though a passenger is not bound like a mariner to remain on board, but may take the first opportunity of escaping from the ship and saving his own life. I reject the claim." The facts in the case of the *Vrede*, decided by Dr. Lushington, are reported as follows: "The plts. were twenty emigrant passengers on board the Dutch bark *Vrede*, suing for alleged salvage services to that vessel and her cargo, after she had received damage from a collision. The collision took place about five o'clock a.m. of the 27th Nov. 1859, off the South Foreland, and the *Vrede* sustained great damage, and began to make water rapidly. The plts. manned the pumps and kept working them. At seven o'clock a steam-tug took the vessel in tow. The passengers continued to work the pumps, and about noon the vessel was safely brought into Ramsgate harbour. The petition alleged that the plts. might have left the *Vrede* in the boats or in the steam-tug, but remained on board to work the pumps at the request of the master, and that but for their services the *Vrede* must have foundered and been lost with her cargo. The answer admitted the facts generally, except as to the extent of the *Vrede's* danger." Dr. Lushington, after remarking that, although passengers must have often rendered services at sea, yet, except the cases of the *Branstons* and the *Salacia*, no claim had ever before been prosecuted in the Admiralty Court for salvage, and that this fact was sufficient to put the court on its guard against readily allowing the claim, says: "It is true, as the counsel for the plts. have urged to-day, that a pilot or master or ship's crew may sue as salvors in certain circumstances, and so I say that in certain circumstances passengers may also sue as salvors. But it is equally clear that it is only extraordinary circumstances, in the strict sense, which can justify a claim for salvage from persons so related to the ship as

the first class of persons I have named. A master cannot be a salvor so long as he is performing his duties as master under his contract; nor can a mariner until his contract is at an end; nor can a steam-tug under a contract to tow make a title, unless, unforeseen dangers arising, she performs different services from those stipulated for in the original contract. With respect to a passenger, there is no engagement on his part to perform any service, but there is a contract between him and the shipowner, that for a certain money payment the ship shall carry him and his property to the place of destination. To a certain extent, therefore, he is bound up with the ship." Dr. Lushington then proceeds to comment upon the case of *Newman v. Walters*, 3 Bos. & Pull. Rep., and to distinguish the one before him from it. He says, "The circumstances are not the same or nearly the same." After considering the case of the *Florence*, 16 Jur. 572, and 20 Eng. L. & Eq. 607, where salvage had been awarded to a mate and seaman for services rendered their own ship, by them, after they had been separated from it, he adds: "That case again is no authority to-day. I say, that in circumstances such as these, passengers could not claim as salvors. Here the passengers were never separated from the ship, and their only service consisted in pumping. They pumped first, as they themselves admit, to save their own lives and property. For such efforts in a time of common danger they were not entitled to salvage, by the authority of the *Branstons*. Then the steamer comes up and takes the vessel in tow. I am of opinion that all danger then ceased, whatever danger might have been. The tug and the pilot-cutter were present; the water was smooth and the weather fine, and a harbour at no great distance. The passengers might, if they chose, have left the ship, but they remained on board and continued working at the pumps. I cannot consider the ship to have been in any danger of sinking, and I think I should be furnishing an evil example, if I encouraged suits of this description. I pronounce against the claim of the plts., but without costs." It is obvious that the language of Dr. Lushington in this case of the *Vrede* is very guarded. There must have been a reason for this, and it is important to understand the extent to which his decision has carried the law, for I should hesitate long before I should pronounce judgment in conflict with the opinion of this eminent jurist. In order to arrive at a correct conclusion on this point, we must notice the scope of the *Branstons* as an authority. The latter case is a very simple one. The report is brief, and all that appears from it is that the libellant, a lieutenant of the Royal Navy, "contributed his assistance while the vessel in which he was a passenger was in distress." What the nature of that assistance was, or under what particular circumstances it was rendered, does not appear. I conclude that the service rendered was of the ordinary character, and consisted in assisting in working the brig in those ordinary ways well known to seamen. I can draw no other inference from the case, and upon such a state of facts I think it very clear that any court would have rejected the claim. In the case of the *Vrede*, the services rendered were also of the ordinary kind, and consisted solely in pumping. I understand it to be a well-known rule that passengers are bound to render all such ordinary aid to the ship when she is in distress. They are bound to man the pumps, the windlass, and the ropes, and to assist in working the ship in all ways known to seamen, as far as they may be able. The line of their duty extends, at least, thus far. But the question now before the court is, whether there are not extraordinary services which a passenger may render, that extend beyond the line of his duty, and which may entitle

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him to salvage compensation. That this question is not decided in the negative by the *Branstons* or the *Vrede* is, I think, clear. It has been strenuously urged on the argument, that no services that a passenger can render to avert a common danger, while his relation as passenger continues, can exceed the limit of his duty. This doctrine certainly is not laid down in the *Branstons* nor in the *Vrede*; for in the latter case the learned judge, in the vital part of his opinion, is careful to say: "Here the passengers were never separated from the ship, and their only service consisted in pumping." Surely, if he intended to lay down the rule that the passengers must in all cases be first separated from the ship before they can become salvors, he would have so declared in terms. The point is so sharp and decisive as to admit of no ambiguity in the language of a judicial opinion. I include in the term separation from the ship, both actual personal disconnection therefrom, and a severance of their ordinary relations as passengers, though they may still remain on the vessel. That there has been, for a long time, a general impression, that a passenger may become a salvor by rendering extraordinary services on board of his own ship, the language of decided cases and text writers abundantly shows. I am aware that this impression can, in many instances, be traced to the influence of *Newman v. Walters*, but I think it equally true that it has derived strength from sound principles. In the case of *Newman v. Walters*, the ship had struck on a shoal, and the captain and part of the crew had deserted her. The plt. took command of her and brought her safe into port. The jury gave him a verdict, and on a motion for a new trial Lord Alvanley, C. J., remarks: "Without entering into the distinctions respecting the duties incumbent on a passenger in particular cases, I think that if he goes beyond those duties he is entitled to a reward in the same manner as any other person. In this case the plt. did not act as a passenger when he took upon himself the direction of the ship; he did more than was required of him in that situation; and having saved the ship by his exertions, is entitled to retain his verdict in this action." Language substantially like this is used in various decided cases and by text writers. In several instances the doctrine is discussed and applied to cases where the capacity of a pilot to become a salvor was in question, but this strengthens the principle when applied to passengers: (*Hope and others v. the brig Dido*, 2 Paine C. C. Rep. 243; *Leu v. the ship Alexander*, Ib. 470, 471; *Hobart v. Drogan*, 10 Pet. Rep. 108; Abbott on Shipping, p. 560; note 1 of Story & Perkins; Marvin on Wrecks and Salvage, ss. 140 and 149; *Le Tigre*, 3 Wash. C. C. R. 567.) The learned author of Marvin on Wrecks and Salvage, p. 160, remarks: "It is agreed, too, that seamen may, while their legal connection with the ship still subsists, earn salvage for services rendered to ship or cargo, exceeding the line of their duty. But there is great difficulty in defining that line, and determining what services are within and what beyond it. No such determination can be made beforehand, and each case must be determined by its circumstances." In the *Neptune* Lord Stowell says: "I will not say that in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves that might induce the court to open itself to their claim of a *persona studii in judicio*." The authorities cited show that officers and crew, pilots and passengers may all become salvors when they perform services to the ship in distress, beyond the line of their duty. The duties of passengers are much more circumscribed than those of sailors or pilots; and it would seem that all the law imposes upon them is to assist in the ordinary manual labour of working and pumping

the ship, under the direction of those in command of her. If they assume extraordinary responsibilities, and devise original and independent means by which the ship is saved, after her officers have proved themselves powerless, I see no reason, and know of no authority, that can prohibit them from being considered as salvors. I think it follows, from the principles laid down by the authorities, first, that a passenger on board a ship can render salvage service to that ship when in distress at sea; secondly, that in order to do this he need not be first personally disconnected from the ship; but thirdly, that these services, in order to constitute him a salvor, must be of an extraordinary character, and beyond the line of his duty, and not mere ordinary services, such as pumping and aiding in working the ship by usual and well-known means. That the services of the libellant in the present case were of an unusual character cannot be denied. After the officers of the ship had exhausted their means of getting control of the rudder, he devised, and with the aid of a large number of men put under his directions by the captain executed, a plan which, in the judgment of this court, was the efficient means of rescuing this great vessel from peril. The whole work of accomplishing this result was intrusted to him and to his directions. If it is said that he got his main idea of the plan he carried out, from witnessing an experiment of the engineer, which I doubt; still the effort of that officer had entirely failed, and was an abandoned experiment. The merit of the libellant in overcoming the obstacles which had proved insurmountable to the engineer, is, in my judgment, enhanced rather than diminished by the unsuccessful effort of the latter. That the service rendered by the libellant was a very difficult one, is proved by the fact that the able and experienced officers of this ship had failed to accomplish the result which he finally secured. They had spent two days of fruitless effort, though stimulated by motives as powerful as can be addressed to the minds of men. It required no little moral courage for this libellant to interpose to arrest the unscrewing of the nut on the rudder-shaft, and then assume the responsibility of a new and different experiment, which would consume precious time, and might thus produce appalling consequences. Had he failed, the consequences to him would have been injurious and humiliating. The whole circumstances of the case are so extraordinary as to leave no doubt in my mind that the services which he performed were wholly beyond his duty as a passenger, and therefore entitled him to salvage compensation. In fixing the amount of compensation, it must be considered that, though the service was one of conspicuous merit, and the amount of property saved large, yet the personal danger encountered by the libellant was not very great; and the only things contributed by him were personal skill and labour. He supplied no materials and risked no property, though his labours were protracted and exhausting. On the other hand, he rescued the ship from great peril by his own ingenuity, courage and skill. That the peril of the ship was great, and her position critical in the judgment of her commander, is evident from the fact that he intrusted to this stranger a work, upon the success of which her salvation depended, and which for nearly two days had utterly baffled him and his engineers. The case is so novel a one, in all its leading features, that little light can be derived from precedents, to guide me in fixing the amount to be awarded; but I have concluded, on the whole, to allow fifteen thousand dollars. Let a decree be entered for the libellant for that amount with costs.

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COLLINS v. LAMPORT.

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COURT OF APPEAL IN CHANCERY.Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON,
Esqrs., Barristers-at-Law.

Dec. 8 and 9, 1864.

(Before the LORD CHANCELLOR (Westbury.)

COLLINS v. LAMPORT.

Mortgage of a ship—Rights of mortgagor—Power of mortgagor to contract—Merchant Shipping Act 1854, ss. 70, 71.

R., the owner of a ship, having mortgaged the same to the defts., contracted with L. for the sale of the ship to him, and before R. became finally bound by the contract, L. entered into a charter-party with the plts. It was held to be established on the evidence that the plts., though dealing with L., had knowledge of the fact of his imperfect title, and of R.'s ownership.

Before the vessel started on her voyage, R. stopped payment, whereupon the defts., the mortgagees, took steps towards selling the ship. It appearing that the terms of the charter-party would not damage the security, an injunction to restrain any dealings with the ship inconsistent with the terms of the charter-party, was granted at the suit of the plts.

The effect of the Merchant Shipping Act upon the status of the mortgagee of a ship is as follows: It first declares that the mortgagee is not the owner; then that the mortgagor has not ceased to be the owner; then that the mortgagor shall be the owner, save so far as may be necessary for making the ship an available security for the mortgage-debt.

Hence the mortgagor of a ship remaining in possession has full power to enter into contracts with respect to the ship, provided they do not impair the security; but the mortgagee may at any time enter into the benefit of such contracts by giving notice of his having required payment of his debt.

This was an appeal motion.

The bill was filed by Phineas Davis Collins and William Aubrey Chandler, carrying on business under the firm of "P. D. Collins and Co.," as merchants, at 35, Seething-lane, against William James Lamport, George Holt, Philip Henry Holt, Edwin Spencer Roberts, Thomas Lucecock, and (by amendment) James Webb, for an injunction against the defts. Lamport, G. Holt, P. H. Holt and Webb, to restrain dealings with a ship.

The plts.' case was that, early in September last, Thomas Ellis, a ship-broker, called upon the plts., and asked them if they would charter a ship which he had in view, and what rate of freight they would give. The plts. informed Ellis of their rate of freight, and handed him a form of charter-party. On the 10th Sept. Ellis sent to the plts. a charter-party of the ship *Maria*, then lying in the Thames, signed by the deft. Lucecock as master of the ship. The charter-party stipulated that the plts. should give their acceptance for 75*l.* on account of the freight, and a further acceptance for 260*l.* on the sailing of the vessel.

The plts., surprised at the largeness of the required advance, made inquiry of Ellis, who explained that Lucecock was negotiating the purchase of the ship from the deft. Roberts, who was the owner, and that the required acceptances were wanted to be delivered to the owner towards payment of the purchase-money. The plts. made no objection, but, in order to secure themselves, stipulated that Roberts, as owner, should confirm the transaction. This was agreed to, and Roberts, on the 12th Sept., addressed the following letter to the plts.:

Gentlemen,—In conformity with Captain Lucecock's wish, I hereby undertake that, in consideration of your giving him your acceptance for 75*l.* here dated the 12th Sept., and one for 260*l.*,

when the vessel be loaded at Newcastle, that I will not in any way interfere or permit any interference emanating from me to prevent her leaving London for Shields, or Shields to Seville, and that should she not proceed on her voyage from Newcastle, that I will return you your acceptance for 75*l.*

E. S. ROBERTS.

The plts. thereupon executed the charter-party, of the same date, whereby it was agreed that the ship should proceed to the Tyne or Middlesborough, as the plts.' agent might appoint, and there load, and being so loaded should proceed to Seville and deliver her cargo, agreeable to bills of lading, and having again loaded there or at one or two ports in Portugal, should return to England, or to the continent between Havre and Hamburg. Amongst other provisions was one that the master was to sign bills of lading or re-charter for more or less freight without prejudice to the charter-party.

On the execution of the charter-party the acceptance for 75*l.* was given.

In pursuance of the charter-party the ship *Maria* was sent to Newcastle, and there commenced loading. Whilst this was going on, on the 1st Oct. 1864, Roberts stopped payment. Thereupon Lamport, G. Holt and P. H. Holt, partners in the firm of Lamport and Holt, took possession of the ship as mortgagees for 800*l.* Roberts had discounted the acceptance for 75*l.*

The bill prayed that the defts. Lamport and Holt might be restrained from dealing with the ship in any way inconsistent with the charterparty, and from selling the ship without giving to the purchaser notice of the charter-party, and that the same might be specifically performed. The bill also prayed other alternative relief.

Since the bill was filed the defts., as alleged, had sold, or had agreed to sell, the ship to Webb.

Kinderley, V.C., on the 20th Oct. last, refused the motion for an injunction with costs.

From this order the plts. now appealed.

Glasse, Q.C. and T. H. Terrell for the plts.—The mortgagor is entitled to make contracts with respect to the ship. It would be impossible in all cases to search the various registers and procure the concurrence of the mortgagee. There is nothing to show that a charter-party entered into by the mortgagor, before the mortgagee has taken possession, is not binding on the mortgagee:

The European and Australian Royal Mail Company v. The Royal Mail Steam Packet Company, 4 H. & J. 676;

Marriott v. The Anchor Reversionary Company, 3 De J. F. & J. 177; 4 L. T. Rep. N. S. 590.

Baily, Q.C. and S. Osler for the mortgagees.—A mortgagee cannot absolutely dispose of the ship under the 71st section, if he is obliged to sell subject to the charter-party. The effect of the Merchant Shipping Act is to give the mortgagee a clear title, free from the engagements of the mortgagor:

The European Company v. The Royal Company (ubi supra);

Dean v. McGhie, 4 Bing. 45;

Dickinson v. Kirkhen, 8 E. & B. 789.

W. F. Robinson for Webb.

Glasse, Q.C. in reply.

Sects. 70 and 71 of the Merchant Shipping Act 1854 are as follows:

Sect. 70. A mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship, or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage-debt.

Sect. 71. Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but if there are more persons than one registered as

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mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee.

The LORD CHANCELLOR.—I will tell you how the case strikes me at present; but I may probably deem it requisite to reserve the further consideration of the point of law which arises. The first question to be looked at is one of fact; because, unless we arrive at the conclusion that there was a valid contract, as between Roberts, the mortgagor, and the plts., it will be unnecessary to consider the operation of the mortgage, or the legal *status* of the mortgagee. With regard to the purchaser *pendente lite*, I have placed him in the same boat with the mortgagee, and in speaking of the mortgagee, therefore, I include the purchaser, because the purchaser's case must of necessity be the case of the mortgagee as already made in the suit. Now, to determine the first question, whether there was a good charter-party, a good valid contract between Roberts and the plts., that is to say, binding Roberts by the contract made by Luccock, the facts appear to be these: The ship had been mortgaged by Roberts, the original owner, to Messrs. Lamport and Holt; Roberts was desirous of selling the vessel; he intended to send her round to Newcastle or into the river Tyne for that purpose; whilst he was minded so to do, Ellis, a broker, comes to him and tells him that he knows of a person who would be willing to purchase the ship and give him 1000*l*. That person was Luccock. Luccock is brought into communication with Roberts, and terms of sale, subsequently reduced into writing, were agreed upon between them. It appears from that instrument that Luccock, before he proposed finally to bind himself by the contract, had actually treated with the plts. for chartering the ship to them, and this renders that circumstance apparent, that in the contract between Luccock and Roberts for the purchase of the ship, which was made on the 12th Sept., being the day of the date of the charter-party, the deposit to be paid by Luccock to Roberts is the sum of 75*l*., which is there mentioned as the sum that Luccock was to receive from the plts. who had agreed to become the charterers of the vessel. What therefore is abundantly clear is this: that the intended position of the plts. as charterers of the vessel through the medium of a contract with Luccock, was perfectly well known to Roberts at the time when he entered into that agreement for the sale of the vessel to Luccock. Now the agreement itself would, in point of fact, give confirmation to the contract that Luccock had made, for it would have been impossible for Roberts, receiving through Luccock the money to be paid on the charter-party by the plts., to have afterwards turned round and repudiated that charter-party. But it is plain from the facts of the case that Roberts knew perfectly well that Luccock depended upon the charter-party for the means, or partly for the means, of completing his purchase. This also appears; that the charterers, namely, the plts., observing the singularity of the term, that they were to pay down at once 75*l*., and being aware, as appears from the internal evidence, of the facts, of the position in which Luccock stood relatively to Roberts, were not content with dealing with Luccock alone, and it is clear that they required the adhesion in a direct form of Roberts to the treaty which they had made with Luccock. It is quite plain, therefore, that Roberts placed Luccock, by what he did and agreed to, in a position of concluding a valid charter-party by his authority, no matter what might become of the contract to purchase between him and Luccock; and even, therefore, if that contract should fall to the ground (an event which was not anticipated, but

which was supposed to be possible), the dealing of Luccock with the plts., to which Roberts adhered, and of which Roberts partially received the fruit and benefit, would be a dealing binding Roberts, no matter whether Luccock did or did not ultimately acquire the *status* of becoming owner of the vessel, the subject of the charter-party. Now this appears—I throw aside the affidavits, the swearing by the one party that he did not know this, and the swearing by the other party that he did know it, because I derive the conclusions of the knowledge of the parties from that, about which there can be no mistake, the *evidentia rei* from the internal evidence afforded by the facts themselves. 75*l*., therefore, is paid over to Roberts, as being the first instalment of the freight money payable under the charter-party, and then the charterers, anticipating the possibility of Luccock's title failing, require from Roberts this engagement. The engagement is (it being contained in a letter by Roberts to the plts., the charterers): "In conformity with Capt. Luccock's wish, I hereby undertake that in consideration of of your giving me your acceptance for 75*l*." (here dated the 12th Sept.), "and one for 260*l*. when the vessel be loaded at Newcastle" (terms taken out of the charter-party), "that I will not in any way interfere or permit any interference emanating from me to prevent her leaving London for Shields, or Shields to Seville." Now, what is the meaning of those words? Why, that Roberts distinctly says, for these considerations I will permit the vessel to be navigated and dealt with in conformity with the terms of the charter-party—for these things which are extracted and expressed in the letter are the very terms contained in the charter-party. The letter must be read, therefore, as if Roberts had written, "Your engagement with Luccock is an engagement with a man who is not yet complete owner of the vessel, and who, therefore, has no legal capacity to enter into the contract with you; but inasmuch as I am to receive the first fruits of the contract in the shape of the 75*l*. and of the 260*l*., I will not interfere with your right to have the benefit of the contract and the performance of the contract, and if anything happens to annul this engagement between Luccock and you so that the ship shall not proceed on her voyage from Newcastle, then I return you the 75*l*." Well, but when the facts are known, nothing can be more demonstrative of what was the real position of the parties. I care not whether Roberts gave antecedent authority to Luccock, or whether it be that Luccock having negotiated these terms, Roberts afterwards accepted and ratified them, and interposed his authority and right as still remaining owner of the vessel to the extent of assuring the plts. that they should have the benefit of the contract. In that state of the circumstances (and I have taken them from the admissions of both sides, founding my conclusions merely upon what the circumstances themselves abundantly prove) it is impossible to deny that the contract made, as I take it to have been made, between the plt. and Luccock, in the expectation that Luccock would become the owner, was a contract afterwards accepted, ratified and confirmed by Roberts, and Roberts is as much bound by it as if Roberts' name had been written in the charter-party instead of the name of Luccock. If that be so, the material point in the case is determined, and determined in a manner which I think the parties will find proceeds upon a view of the facts of the case, which it is impossible to contradict as not being the correct view. We then come to the question whether this transaction, admitting it to have that legal character which I have ascribed to it, still admits of being overreached, controlled and set aside by the authority of the mortgagees? Now Mr. Bailly was desirous

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of introducing the case of the mortgagees by a statement that the ship anterior to this charter-party was already a ship destined for sale, and not, therefore, at liberty to be let. But, upon an examination of that, it turns out that there was no agreement whatever between the mortgagor and mortgagees that the ship should be sold and should not be chartered. All that does come out is the simple fact that the mortgagor was desirous of selling her, and had an intention to that effect, which having been carried into operation by the agreement with Luccock, the mortgagor, finding it necessary for the purposes of the purchaser that the purchaser should be at liberty at once to charter the ship, accedes to that being done. He was under no contract or agreement with the mortgagee other than that contained in the mortgage, that deprived him, by virtue of any agreement, of the right so to deal with his vessel: unless indeed there be in the mortgage, by virtue of the clauses in the statute, a power in the mortgagee *ad libitum* at any time to arrest everything that has been done by the mortgagor, and to take possession of the ship, stripping her entirely of any contract, of any engagement, to which she had been previously subjected by the mortgagor. Now the inconvenience of such a construction of the statute is palpable. The injustice of such a construction of the statute is also palpable. First, the inconvenience. No mortgagor could deal with his vessel in the ordinary way. Every operation would be incumbered by the necessity of resorting to the mortgagee for his concurrence or approbation. The circumstance of the mortgage, the position of the mortgagor, and the examination of the contract, all these things would, of necessity, cause infinite difficulty, delay, expense, and inconvenience in the transaction of ordinary mercantile business. I could not possibly attribute to the Legislature in passing this statute anything like an intention to introduce a different course of dealing from that which hitherto had always been adopted. But the true history of this enactment no doubt is, that which was adverted to by Mr. Osler and by Mr. Robinson. Antecedently, by reason of the earlier statutes, the mortgagee, the moment a mortgage was made and registered, became, in the eye of the law, the owner of the property, and the result was that the law was in the habit of regarding the mortgagor as standing in the capacity of *quasi agent* to the mortgagee, and the mortgagee frequently found himself bound either by the contracts of the mortgagor, or, at all events, by the necessary expenditure and outgoings of the vessel. That was a very serious injury and inconvenience to mortgagees, and it interposed considerable difficulty in the way of mortgagors getting money upon this species of security. Then the Legislature interposed by declaring a general principle. That principle, in its declaration, exactly fitted the *ratio decidendi* in the cases that had produced the inconvenience. The principle that was declared in opposition to the reasons of those cases was, that the mortgagor should be deemed and regarded as the owner of the vessel. First, there is a negative declaration that the mortgagee shall not, by reason of his mortgage, be deemed to be the owner. Then there is an affirmative that the mortgagor shall not be deemed to have ceased to be the owner; he shall continue to be the owner. The mortgagee, therefore, continues the owner; but it was necessary, of course, or at least in the prudent, cautious way in which Acts of Parliament are framed it was deemed necessary by the framer of the clause, to add these words in declaring in what position the mortgagor shall stand, namely, that he shall be the owner, save so far as may be necessary for making the ship or share available as a security for the mortgage-debt. As long, therefore, as the dealings of the mortgagor with the ship

are consistent with the sufficiency of the mortgagee's security, so long as those dealings do not materially prejudice and detract from or impair the sufficiency of the security of the vessel as comprised in the mortgage, so long is there parliamentary authority given to the mortgagor to act in all respects as owner of the vessel; and if he has authority to act as owner, he has of necessity authority to enter into all those contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and the full benefit of his property. Whenever a mortgagee is in a position to show that the act of the mortgagor prejudices or injures his security, then, I apprehend, the parliamentary declaration that the mortgagor shall be deemed the owner ceases to have any binding effect as against the mortgagee, and the mortgagee is in a position to claim and exercise the full benefit of the rights given to him by his mortgage. But, subject to that qualification, every contract entered into by the mortgagor remaining in possession is a contract which derives validity from the declaration of his continuing to be the owner. At the same time, it is a contract into the benefit of which the mortgagee may at any time enter, by giving notice to the party who is to pay the mortgagor under that contract that he requires the payment to be made to him, the mortgagee. I think that would be a reasonable interpretation, which would make the law with regard to this description of property in a great measure analogous to the law as it exists with regard to mortgages of real estate. But, as I am told this point is somewhat a novel one, and at present is not touched by any decision, I should not like to give any absolute and final opinion upon that point without further examination. If that is the view that I shall adhere to of the true interpretation of the statute, then it will be sufficient to say in this case, that nothing has been done, attempted to be alleged, or proved by the mortgagees, whereby this charter-party, if permitted to be carried into execution, is a charter-party that will at all prejudicially affect the sufficiency of their security. Therefore, if I adhere to that view of the statute, I should by no means allow the mortgagees to interfere with the execution of this charter-party, and I should grant an injunction in these terms: namely, to restrain the debts, the mortgagees, and the purchaser their assignee, from dealing with the ship in any way inconsistent with, or which may interfere with, or prevent the execution of the charter-party, and there let the order stop. I will consider the point and look at the different cases to which the counsel, to whom I am much obliged, have referred me, and I will mention it again in a day or two; but if I see no reason to change my opinion as to the construction of the statute, if I do not come to the conclusion that the mortgagee has a right to step in and arrest and stop all that has been done, then it will be considered that I am of opinion that this is a good charter-party made by the authority and by virtue of the ownership of Roberts; and that it is a charter-party, therefore, binding on Roberts and those claiming under him, binding the mortgagees, and binding the purchaser *pendente lite*, inasmuch as it is a charter-party that has not been shown to me in any way whatever to be prejudicial to the sufficiency of the security.

Dec. 9.—THE LORD CHANCELLOR.—I have again considered this case in regard to the relative positions of the mortgagor and mortgagee, and I see no reason to alter my opinion. Under the statute, so long as the mortgagee of the ship does not take possession, the mortgagor, as the registered owner of the ship, retains all the rights and privileges of ownership, and all contracts made by him are valid so long as

they do not impair the rights of the mortgagee. The order of the V.C. must be discharged.

Solicitors: for the plts., *Phillips and Son*; for the defts., *Field, Roscoe, Field and Francis*, agents for Thornely, Liverpool.

ROLLS COURT.

Reported by H. R. Young, Esq., Barrister-at-Law.

Dec. 20 and Jan. 11.

STRAKER v. EWING.

Injunction—Bill of lading—Costs.

The plts. sold and shipped goods for the deft. E., to be paid for on delivery. The goods were delivered, but were not paid for. The bill of lading of the goods was made out in the name of F. and Co., the shippers, as agents, without saying for whom. E. was in fact acting as agent in this transaction for the deft. N., to whom he was indebted. The plts. filed a bill against E., F. and Co., and N., alleging, but failing to prove, that E. was insolvent; charging, but not proving, that N. had fraudulently adopted the mode of obtaining the goods in question, and praying that F. and Co. might be restrained from parting with the bills of lading, and that the defts., or some of them, might be ordered to pay for the goods and the costs of the suit. By arrangement between the parties an interim injunction which had been granted until the hearing had been dissolved:

Held, that the bill must be dismissed with costs:

Held, also, that the rule that the costs of a suit follow the event means, not the result of any act of the parties to the suit, but the decision of the court in it.

This was an injunction suit, of which the facts were very shortly these:—

The plts. were coal merchants and coke manufacturers. They entered into a contract with the deft. Ewing for the supply of a cargo of coke to be sent to the East Indies, and to be paid for on delivery on board ship. The coke was duly shipped and delivered, but it was not paid for on delivery. The bill of lading was made out in the name of Messrs. Fraser, Bond and Co. as shippers, and was stated to be delivered to them "as agents," but it was not stated for whom they were agents. The deft. Ewing was in fact acting as agent for the deft. Nasmyth, to whom he was indebted, and whose solicitors forthwith gave notice to Fraser, Bond and Co. to deliver up to him the bill of lading, on payment of any balance due on account between Ewing and him. The plts.' agents in Liverpool then gave notice to them not to deliver the bill of lading to any one but the plts. The plts. then filed the bill in this suit against Ewing, Nasmyth, and Fraser, Bond and Co., alleging that Ewing had become insolvent, and charging that Nasmyth had adopted the aforesaid mode of obtaining the coke, in order that a debt previously due from Ewing to him might so be satisfied, while the plts. were to be left to recover from him so much of the price as they could. The bill prayed that Fraser, Bond and Co. might be restrained from parting with the bill of lading, and that the defts. or some of them might be decreed either to pay the price of the coke or deliver it up to the plts. Some time since an injunction had been obtained, but by a compromise or an agreement between the parties it was dissolved, upon payment into court of the price of the coke, with interest at 5 per cent. from the day of delivery.

The main question now to be decided was as to the costs of the suit.

Scheyn, Q. C. and E. E. Kay appeared for the plts.

Baggallay, Q. C. and Lindley for the deft. Ewing.

Stephens for the deft. Nasmyth.

Kay in reply.

The following authorities were cited in the arguments:

Goodhart v. Lowe, 2 Jac. & W. 849;

Brown v. Hare, 3 H. & N. 484.

And as to the costs:

New Brunswick and Canada Railway and Land Company v. Cuybeare, 9 H. of L. Cas. 711; 6 L. T. Rep. N. S. 109.

Jan. 11.—The MASTER of the ROLLS.—Although the main object of this suit was obtained by an interlocutory injunction, which was afterwards dissolved by an arrangement between the parties, I am bound to consider the suit as if it were now the hearing of the cause. The plts. maintained that, as the result of the suit had been virtually in their favour, they were entitled to their costs under the ordinary rule that the costs should follow the event. The defts. contended that, if this were to be treated as the hearing of the cause, the bill ought to be dismissed with costs, and that the injunction which was obtained was an abuse of the process of the court. There seems to me to be no evidence to show that Fraser, Bond and Co. held the bill of lading as agents for the plts. The proper course for the parties to have pursued was this: the plts. being the sellers, and Ewing the buyer, Fraser, Bond and Co. ought to have indorsed the bill of lading to him, on receiving from him an indemnity against the consequences of so doing. The plts. ought to have applied to Ewing for payment, and if he had refused, to have brought an action against him. Instead of that, without demanding payment from Ewing at all, they filed the present bill. I regard this case simply as one of goods sold and delivered, and I think that if the court interfered in such cases it would cause very great litigation. When the coke was delivered, all the plts.' property in it, and all their lien for the price, were gone. The delivery was, as they stated in their bill, complete; and, accordingly, no question could remain as to their right of stoppage *in transitu*. If a seller is not paid for his goods, his only remedy is by action at law. He cannot seize the goods in the hands of the purchaser, or of any one else; and precisely the same rights attach to a bill of lading as to goods sold and delivered. The plts. might have refused to deliver the coke until they were paid; but, having delivered it, they had no remedy except by an action at law. They, however, filed the bill in this suit without even asking Ewing for payment, relying on the representation of Fraser, Bond and Co. that he was unable to pay. They alleged by the bill that he was insolvent, and charged that he had obtained the coke by a fraudulent contrivance. There is not a tittle of evidence of his insolvency. They only say they think he might have been insolvent, because he left Liverpool. The charge of insolvency against a trader is a serious one. The other is a still graver one, and it is not only not proved, but entirely disproved, both by the oaths of the defts. and by the whole character and all the details of the transaction. The court always has seriously visited, and always will seriously visit, a charge of fraud when it is made but not proved. If the rule is to be applied in a more stringent way in one case than in another, it is when the interposition of the court is rested on the alleged fraud. Even if this case had been one of stoppage *in transitu*, the remedy would have been at law, and this court could not have interfered; unless there had been some unusual circumstances in the case. Hence the charge of fraud became necessary to sustain the bill. Treating this,

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then, as the hearing of the cause, and as if the plts. had not been paid, the case fails in every respect. The bill must be dismissed. The plts., however, argued that the general rule of the court was to make the costs follow the event, and that, as the event of the suit had turned virtually in their favour, they ought to have the benefit of that rule. But, in my opinion there is an obvious fallacy in their reasoning. The "event" intended by the rule is an event produced by the decision of the court, and not one resulting from the acts of the parties. I have been treating this as if there had not been any compromise or agreement between the parties. But if there had been, in fact, no such compromise or agreement, the bill in this suit must have been dismissed. The rule which the plts. claim to have applied in their favour is, in reality, adverse to them, and I must decide accordingly.

Solicitors: *H. C. Barker*; *J. and J. Hopgood*.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINNLOW, ESQs., Barristers-at-Law.

Jan. 13 and 14.

THE MOROCCO LAND AND TRADING COMPANY (LIMITED) v. FRY.

Specific performance—Underwriters' "slip"—Agreement to execute—Policy of marine insurance—Suppression of facts—Unstamped agreement.

The plts. (who were owners of a ship's cargo) alleged that by the custom of underwriters, before a policy of marine insurance was effected, a paper called a "slip" was offered by way of memorandum to the underwriters, and subscriptions were taken upon it; and that such slip, and the proposals on which it was founded, were regarded and usually acted upon by both parties as a valid contract. Plts. having by their agent offered such a slip to the deft. and other underwriters, and obtained their signatures thereto, filed a bill for specific performance of the alleged agreement to grant a policy.

The "slip" or agreement was not stamped, and the plts., though alleging that it could not be proceeded on at law on that account, refused to stamp it, but claimed the relief of the court on the unstamped instrument.

It appearing in evidence that the agent of the plts., in dealing with the deft.'s broker, had suppressed a material fact, namely, that the ship was about to be navigated, not, as they supposed, by the master, but by the mate:

It held, that this suppression of fact was a sufficient ground to induce the court to withhold its discretionary power of decreeing specific performance.

A fortiori, when the agreement sought to be enforced was an instrument which was not in itself a contract that could be sued upon at law, but merely an agreement to execute such a contract as could be proceeded upon at law.

This bill was filed for the specific performance of an alleged contract by the deft., John Gurney Fry, to execute a valid policy of insurance, duly stamped, of a ship's cargo belonging to the plts., the Morocco Land Trading Company (Limited), according to the terms contained on a paper writing called "a slip."

The plts. were a limited company registered under the Act of 1862, and in Oct. 1863, with the intention of sending a cargo of merchandise to Morocco, they chartered a vessel called the *Arthur Leary*, of which one Captain Augustus Collingridge was master, to carry the cargo to Gibraltar, calling on the way at Lisbon, and they appointed Captain Collingridge as their trading agent to manage the

adventure. The cargo, consisting of machinery, hardware, casks and other articles, the value of which was estimated at about 2300*l.*, was duly shipped through the Custom-house at London, on board the said vessel, by Mr. Thomas Sharer, a shipbroker. As soon as it was all on board and the vessel ready to proceed on her voyage, Captain Collingridge, as the plts.' agent, saw Mr. H. Skinner, of the firm of Skinner and Co., London, insurance brokers, for the purpose of insuring the cargo. It was, however, considered more regular that the insurance should be effected through Mr. Thomas Sharer, who had shipped the cargo for the plts., and accordingly Captain Collingridge instructed Mr. Sharer to effect an insurance on the cargo, on behalf of the plts., for 2262*l.* In pursuance of such instructions Mr. Sharer wrote to Messrs. H. Skinner and Co. a letter to the following effect:

London, Oct. 31, 1863.

Messrs. H. Skinner.

Dear Sirs,—Please insure against total loss only, for my account, cash next settlement day, cargo per *Arthur Leary* as under: London, Gibraltar, leave to call at Lisbon; ship safe at Gravesend and going uninsured. (Then followed items amounting in the whole to 2262*l.*)

(Signed)

THOMAS SHARER.

On receiving this letter, Messrs. Skinner proceeded to effect an insurance on the cargo with underwriters in the usual manner, and informed Mr. Sharer that, on Monday the 2nd Nov., they had arranged with certain underwriters for the same to the extent of 1700*l.* Mr. Sharer, however, on the 31st Oct. had already sent a telegram to Capt. Collingridge to the effect that the insurance was proceeding. On the 1st Nov. the vessel sailed down the Thames, anchored at the Nore on the 2nd Nov., and proceeded on her voyage on the 3rd.

On the 2nd Nov. a paper in writing called "a slip" was delivered to Messrs. Skinner on behalf of the plts. It was as follows:

2nd Nov. 1863.

Henry Skinner and Co.

Cash.

Arthur Leary.

London to Gibraltar, via Lisbon.

25*s.* Goods *l.* p. a.

£2262

£200 Fry and R.

200 F. and F.

100 Lidy

100 F. G. jun.

200 P. and D.

100 Walls

£1000

100*l.* C. W.

100 H. C. C.

100*l.* Leath

300 Higson, H. B.

The signature "Fry and R." signified that the deft. John Gurney Fry and another person named Rigge had accepted insurance for 100*l.* each.

On the 3rd Nov. the vessel arrived in the Downs, and Capt. Collingridge there received notice that the "slip" had been received from the underwriters, and, relying on such "slip" as forming a valid contract by the deft. and the other underwriters to insure the plts.' cargo, he left the vessel (but, as the plts. alleged, without their knowledge) in the temporary charge of his mate, intending to rejoin it on its arrival at Lisbon. On the 6th Nov. the vessel proceeded on her voyage, under the command of the mate, who was duly authorised by certificate to act as master. On the 7th Nov. Capt. Collingridge, on behalf of the plts., tendered to Messrs. Skinner and Co., on behalf of the deft. and the other underwriters, the premiums on the insurance, and demanded the policy; but Skinner and Co. refused to take the premiums, or to give any assurance that the policy would be granted, and requested that the matter might stand over until the 9th Nov. Capt. Collingridge, as alleged, did not consent to such proposal; but, as he could not alter the determination of Messrs. Skinner and Co., he went to Mr. Sharer and instructed him to tender the amount of the premiums on behalf of the plts., and demand the policy on their behalf. This was accordingly done, but with the same result. On the night of

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the 7th Nov. 1863 the vessel was wrecked (as the plts. alleged, in a gale of wind) in the Channel, and the cargo and ship were totally lost.

The plts. immediately informed the deft. and the other underwriters of the loss, and, through Skinner and Co., requested them to execute a valid policy of insurance, duly stamped, according to the terms of the slip, again offering to pay the premiums; but the deft. and the other underwriters refused to comply with such request. Subsequently the plts. tendered a stamped policy of insurance and the premium according to the terms contained in the slip; but the deft. refused to accept or execute the same.

The case of the deft. (the underwriter whose name happened to stand first on the slip, and who represented the rest) was, that the slip was void as evidence of a binding contract against him under the provisions of the Stamp Act of the 35 Geo. 3, c. 63. He further denied all knowledge that the alleged assurance was on account of the plts. He further said that his agent had appended his (deft.'s) initials to the slip on the faith of Capt. Collingridge having the charge of the vessel on her voyage out; instead of which, Capt. Collingridge, without acquainting the deft.'s broker of the fact, left the vessel in the Downs, and allowed her to proceed on her voyage under the care of the mate.

There was a further case of an improper attempt on the part of Capt. Collingridge to send the ship to sea without being properly manned, and that he went from Gravesend to the Downs for the purpose only of evading the provisions of the Merchant Shipping Act, and enabling him, if necessary, to contend, in fraud of the underwriters, that no objection could be raised to the validity of the insurance on the ground of illegality or unseaworthiness arising from non-compliance with the Act.

Deft. further denied that the ship was lost in a gale of wind, but said she was lost in consequence of her deviating from her course from the incompetency of those on board to navigate her; and in support of this, a report, made in answer to an inquiry specially directed by the Board of Trade as to the loss of the ship, was referred to. Deft. also denied that the cargo was totally lost.

On these grounds he denied that there was a contract, either binding at law or enforceable in equity; and that the loss of the ship arose from the misconduct of the master, against which he never intended to insure.

The plt.'s evidence was directed to the establishment of the fact that, by the custom of trade in the business of marine insurance, before a policy is effected, a slip of paper by way of memorandum of the proposal of insurance is offered to the underwriters in the form set forth above, and that subscriptions are then taken upon it until the requisite number is obtained, and such slip and the proposals on which it is founded are regarded by both parties as a valid and binding contract in writing. The parties underwriting on a ship would consequently within a few days afterwards have to give to the insured a valid stamped policy of insurance, according to the terms mentioned on the slip; and it was not an uncommon practice among shipowners and merchants to allow their ships and goods to go to sea on the faith of such slips, and before the policies were made out and delivered. If the vessels were lost before the execution of the policies, the underwriters who were parties to the slip were universally regarded as bound to execute a policy. It was also said that the custom at Lloyd's, on its being known there that a ship which had been insured by a slip had arrived safely at her port of destination before a stamped policy was actually issued, frequently was for the underwriters to claim and receive from the brokers without issuing the policy at all.

Malins, Q. C. and Bury, for the plts.—The effect of the "slip" was that it was really an agreement to execute a valid policy at the usual time, viz. the next settling day. Had the slip been stamped, it would have enabled the plts. to have sued on it at law; and they now asked that this defect might be remedied, and that it might be stamped as an agreement to grant a valid policy. It was the custom and understanding among brokers to consider such a document as a contract to deliver a policy. Difficulties might arise when they had obtained the policy, but at present the plts. were debarred by the Stamp Act, 35 Geo. 3, c. 63, s. 14, from taking legal measures. Several of the common law judges in similar cases, had referred to the court of equity as the proper tribunal to afford that relief which they now asked. They cited

Mead v. Darien, 3 Ad. & E. 303;

Mottet v. Governor and Company of London Assurance, 1 Atk. 544;

Xenos v. Wickham, 14 C. D., N. S., 435 and 452;

Parry v. Great Ship Company, 9 L. T. Rep. N. S. 379;

Arnould's Marine Insurance, 51, 52, 53.

Bacon, Q. C. and Druce appeared for the deft., but were not called on.

The VICE-CHANCELLOR.—In this case the jurisdiction of the court is invoked by the plts. on the principle of specific performance. Now if there be one rule of this court more settled than another it is this, that in exercising its discretionary jurisdiction in decreeing specific performance, the court always has regard to the conduct of the parties concerned. The plts., on the ground that this slip is not a valid contract at law, ask that it may be treated as such in equity, and that this court shall interfere and compel the deft. to execute such an instrument as will enable the plts. to sue at law. This is a most extraordinary claim. No authority has been cited for the proposition that the court will compel a deft. to execute an instrument comprising numerous provisions, and which if and when executed would form a contract. It has been said that a lease is an instrument of this description, and that the court would compel a person to execute an agreement for a lease containing covenants of which the parties were to have the benefit at law. But an agreement for a lease is an instrument of an entirely different kind to that under discussion. The purpose of a lease is to make the property of the lessor the property of the lessee on certain defined terms. There are always a number of subsidiary covenants, to be entered into upon the occasion of a lease, and the court, instead of settling all the minute points that may arise, directs the execution of the lease. What analogy can there be between a case where there is the foundation of the right to a valid contract, and a case like the present, where there is no contract, but the court is asked to make one? In this case the agent of the plts., who was also master of the ship, applied to the defts. for the purpose of taking the preliminary steps to effect the intended insurance. On the 2nd Nov. the master of the vessel having made an arrangement by which the care of the ship was to be handed over to the mate, suppressed this fact from the broker who acted on his behalf in procuring the execution of the slip. Now, the suppression of a fact which might have affected the conduct of the parties to an alleged contract, is always considered by this court as a ground for withholding its aid to a decree for the specific performance of a contract, and, *a fortiori*, for refusing that aid where the instrument in question is not an agreement which could be sued upon at law. The principle involved in this case is of so much importance, that I cannot too carefully follow the established authorities on

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the subject. The plts. have come into this court seeking specific performance, and on this subject Lord Redesdale, in delivering judgment in *Harnett v. Yeilding*, 2 Sch. & Lef. 534, said: "These cases show what were the grounds on which courts of equity first interfered, but they have continually held that the party who comes into equity for specific performance must come with perfect propriety of conduct; otherwise they will leave him to his remedy at law." And again in the same page: "There is also another ground on which courts of equity refuse to enforce specific execution of agreements; that is, when from the circumstances it is doubtful whether the party meant to contract to the extent that he is sought to be charged." Now, applying the principle here laid down to the present case, I do not think that the court can say that if the deft.'s agent had been told that the mate of the *Arthur Leary* was to have charge of the vessel, his conduct would not have been different. I should have been content to have left the decision of the case on these grounds alone; but there are other objections, one of which I cannot help mentioning. It has been argued for the plts. that the slip, though to a certain extent an imperfect instrument, was one well recognised and acted on by insurance brokers; and that it only wanted a stamp to make it effectual; that being, as it was said, the only objection to it. The court was asked not to order it to be stamped (for that might be done by either party without the aid of the court); but to make the deft. execute a contract in order to enable the plts. to sue at law upon that contract. It was further said that proceedings at law could not be taken upon the slip because it was not stamped, and this court was asked to give the plts. an opportunity of bringing the question before a court of law. For this purpose the authority of *Xenos v. Wickham*, 14 C. B., N. S., 452, was read, which stated that the only objection to the validity of the slip at law was its want of a stamp. If this is the case it is quite in the power of plts., on paying the penalty, to have the slip stamped; and the doctrines, both of the courts of law and equity, are precisely similar on this point. Upon the whole case I consider that the plts. have failed to establish any grounds for equitable relief, and I must, therefore, dismiss their bill with costs.

Solicitor for the plts., *W. H. Lammin*.
Solicitors for the deft., *Waltons and Buhl*.

V. C. WOOD'S COURT.

Reported by *W. H. BENNETT* and *EDWARD LLOYD, Esqrs.*,
Barristers-at-Law.

Nov. 24 and 25.

STRAKER V. HARTLAND.

Merchant shipping—17 & 18 Vict. c. 104, s. 514—25 & 26 Vict. c. 63, s. 54—*Collision—Limit of liability—Interest on damages—Time at which damages due.*

It is the settled practice of the Court of Admiralty to allow interest upon damages recovered in respect of a collision at sea, in the case of a vessel in ballast, from the date of the collision.

The same rule will be followed by this court in suits instituted under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 514.

A vessel proceeding homewards in ballast was run down by a steamer. The owners of the latter filed their bill, asking the protection of the court under the provisions of the above-mentioned Act:

Held, that they ought to pay into court, not only the amount of damages for which they had been held liable by a judgment of the Admiralty Court, but also interest at 4 per cent. from the date of the collision.

Motion for decree.

The bill in this suit was filed by the owners of the steamship *Joseph Straker*, on the 26th Oct. 1864, under the provisions of the Merchant Shipping Act 1854, sect. 514 of which empowers the owners of ships, in any case where liability has been incurred by them in respect of losses or damages at sea, and several claims are made or apprehended in respect of such liability, to take proceedings in the Court of Ch., or other competent court, for the purpose of determining the amount of liability, of distributing such amount rateably among the claimants, and of putting a stop to all other actions or suits in relation to the same subject-matter.

On the 26th Sept. 1863 a collision took place between the *Joseph Straker* and the deft.'s barque *Karla*, sailing in ballast from Antwerp to Cardiff.

By a decree of the Court of Admiralty of the 23rd Dec. 1863, confirmed by the judgment of the Privy Council of the 11th July 1864, the present plts. were held to be liable for the amount of damage thus occasioned. By the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 54, it is provided that when any loss is caused by reason of improper navigation of a ship without the actual fault or privity of its owners, they shall be answerable in respect of such loss to ships or goods to an aggregate amount not exceeding 8*l*. per ton of their ship's tonnage, calculated in the case of steamships on the gross tonnage without deduction on account of engine-room. So calculated, the amount for which the owners of the *Joseph Straker* were liable was 5711*l*.; the ship was arrested by virtue of the proceedings in the Admiralty Court, and the plts., to release it, gave bail to this amount; they now, therefore, desired to pay that sum, together with the costs of the proceedings in the Admiralty Court, into court, alleging that other persons unknown to them claimed to share in the amount of damages for goods on board the *Karla*, and that they were threatened with actions on this account, which the Court of Admiralty had no jurisdiction to restrain, nor to apportion the damages amongst the parties claiming.

The question to be discussed however was, whether the defts. were entitled to any interest on the sum of 5711*l*., and if so, from what date.

Rolt, Q. C. and *Druce* for the plts.—By the Act of 1854, in the case of a claim in respect of loss of goods only, the limit of liability has been fixed by decision of this court; it is not to exceed the value of the ship: (*Nixon v. Roberts*, 1 J. & H. 739; 4 L. T. Rep. N. S. 679.) By the Amendment Act 1862, this limit is altered, in like cases, to the amount of 8*l*. per ton. In cases decided under the former Act, the value of the ship, as fixing the liability of the owners, was held to be ascertained at the date of the collision:

African Steam Ship Company v. Swanzy, 2 K. & J. 660;

Leycester v. Logan, 4 K. & J. 725.

There is nothing in the later Act to alter this rule, therefore the amount of 8*l*. per ton is the "aggregate amount to be paid in respect of loss of goods," irrespectively of the time of payment. Admitting that some question might arise if there had been unnecessary delay in filing the bill, until that was done the amount could not be paid in, and the Act looks to that time to fix the limit of liability. They also cited *Re Hadfield's Patent Cask and Package Company*, 9 Jur. N. S. 997; 10 L. T. Rep. N. S. 917, as supporting their view of the case.

Sir H. Cairns, Q.C. and *Dickinson* for the defts.—The claim of interest is quite apart from the question of damages. We admit that the latter is fixed

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by the Act; as to the former the point is, what are the terms on which a party is to have the benefit of the protection of this court? The Act 53 Geo. 3, c. 159, first introduced the principle of limiting the liability of owners to the value of the ship by means of which the loss was occasioned, and under this and the later Act the point which generally arose was, when should that value be ascertained? The court will not look with the same eye upon parties who come at once for indemnity, and those who delay the payment of a debt for purposes of their own security. As the *Karla* was in ballast, interest ought to run from the date of the collision: (*The Dundee*, 2 Hagg. 137.) When a vessel was earning freight interest was allowed from the date at which the voyage, but for the collision, would probably have terminated:

The Amalia, 10 L. T. Rep. N. S. 826.

Rolt, Q.C. in reply.—Our liability was not ascertained until after the decision of the Court of Admiralty. After that there was no delay in coming to this court. The Court of Chancery is not bound by the decision of the Court of Admiralty.

The VICE-CHANCELLOR said:—It is quite clear on which side justice lies. Here is a debt due on which, if it be not paid, interest would be allowed in the shape of damages; the difficulty, no doubt, is in fixing parties with interest where there is no express contract to pay it. The Court of Admiralty says very truly, that interest is not given by way of indemnification for a loss, but because the loss was not paid for at the proper time. Under the old law the debt accrued at the date of the collision, and was then limited only by the value of the ship and freight; under that law the practice of the Court of Admiralty was to consider that interest ran upon the estimated value, taken at the time when the vessel would probably have arrived at its destination (because up to that time freight was calculated to make up for interest) down to the time of payment. Then the Legislature introduced the limitation of liability (and this I consider to include both ship and freight) to 8/ per ton; but the question still remains, on what day does the liability begin? Surely, if the debt is not paid on that day, then interest begins to run. There is a further difficulty, that this is a question of tort and not of contract, and it is hard to see how to give interest for a tort; but if you find that interest has for a long series of years been allowed by a given court—and this appears to be the result of the researches made by the Court of Admiralty in the case of the *Amalia*—then this becomes a settled rule of law, and will be followed by this court. I must also follow the rule laid down by the Court of Admiralty, in considering the next question, namely, when did the money become due? This I take to be at the date of the collision, and therefore, in accordance with that rule, I must order the payment of interest on the amount of damage from that date at the rate of 4 per cent.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SACNDERS, Esqrs.,
Barristers-at-Law.

Tuesday, Dec. 13.

CARR AND ANOTHER v. ROYAL EXCHANGE
ASSURANCE CORPORATION.

SAME v. MONTEFIORE.

Practice—Entering up judgment—Money paid into court
—Deducting from amount awarded.

*In an action on a sea policy, the plt. declared for a loss
by perils of the sea, and also for the return of the*

premiums. The defts. paid the premiums into court, which plt. took out; but the defts. failed in showing that the plt. was not entitled to recover on the policy. Afterwards the amount of the loss was adjusted, and the judgment of the court having by agreement been entered for a lump sum to enable the parties to take the opinion of the Ex. Ch., as to the right of the plt. to recover, it was

Held, that the plt. was only entitled to sign judgment for such an amount as, added to the sum paid into court, would make up the amount adjusted.

Rules nisi calling on the plts. to show cause why the judgment rolls should not be amended by reducing the amount for which the judgment was entered to the sum found by the arbitrator minus the amount paid into court.

These were actions upon a policy of marine insurance underwritten by the defts. The declarations contained a count for loss by perils of the sea, and also the common counts for the return of the premiums paid.

To the counts for the loss the defts. pleaded that the vessel insured was unseaworthy at the time. And in respect of the other counts the defts. paid into court the amount of the premiums paid, which the plt. took out of court in satisfaction of the demand in those counts.

At the trial, the defence of unseaworthiness was abandoned, and also the claim for a total loss by the plts., and a case was afterwards stated for the opinion of this court as to whether the plts. were entitled to recover for average loss, and it was agreed that the amount of damages should be settled by an arbitrator.

This Court gave judgment in favour of the plts., and to enable the parties to take the opinion of a court of error, it was agreed that the judgment should be entered up for the plts. for 4000*l.*, for which amount the judgment was signed. The arbitrator found the amount of the loss was 2082*l.*, which, being reduced by the amount paid into court, left a balance of 1775*l.* 10*s.*

Milward showed cause.—The plts. had a right to shape their case in two ways: either to treat the policy as a valid one and sue upon it for the loss sustained; and in case the policy should be held void in its inception, to sue for a return of the premiums paid. So also the defts. had a right to elect, and having elected to return the premiums which they paid into court, they have no right to ask now, because they have beaten on the other ground, to have the amount of loss reduced by their amount, and to have them treated as part payment. This was money recovered by a legal proceeding, and it cannot be recovered back again by the other side:

Marriot v. Hampton, 2 Sm. L. C. 325.

Watkin Williams and Arthur Cohen in support of the rules.—The plt. is not entitled to recover both upon the policy and for the return of the premiums. No doubt the common way of declaring for a long time has been as in the present case, but it has never been attempted by insurers to retain the money paid into court, as well as the whole amount of the loss. In cases at Nisi Prius, juries no doubt have taken into consideration the money so paid into court, and allowed it in the amount of damages they have awarded. Insurance is a contract of indemnity, and all that the insurer is entitled to is to be indemnified against the loss. And as the judgment must be amended, this court is asked not to allow it to be so amended as to enable the plts. to recover more than they are entitled to under their contract:

Early v. Borman, 1 B. & A. 889;
Gould v. Oliver, 2 M. & G. 208

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Cocker v. Tempest, 7 M. & W. 702;
Chit. Prac. 1806, note, edit. 10.

Cur. adv. vult.

CROMPTON, J.—In these cases, the plts. having declared on policies of insurance with counts for money had and received, the defts. paid the amount of the premiums into court on the latter counts, pleading to the count on the policies, so as to raise amongst other defences that of unseaworthiness. The plts. took the money out of court in satisfaction of the claim under the counts for money had and received. At the trial, the defence of unseaworthiness having failed, or having been abandoned, a special case was stated for the opinion of the court, which was afterwards taken into the Ex. Ch., and in both courts it was held that the plts. were entitled to recover as for an average loss. The amount of the average loss was referred to and ascertained by an arbitrator; but this not being done before the argument of the case, a nominal judgment for 4000*l.* was entered up, for the purpose of taking the case into error. The plts. now seek to enter up judgment and take out execution for the entire amount of the average loss, without giving credit to the defts. for the amount paid into court and taken out by the plts. The defts. obtained rules *nisi* in effect to restrain the plt. from taking judgment and execution for the entire amount of the loss, without giving credit for the sums paid in respect of the premiums. It is obvious that nothing could be more unjust than that the plts. should recover back the premiums, which they could only be entitled to on the ground that the risk under the policy did not attach, and also the whole amount of the loss, to which they could only be entitled if the risk did attach. It is plain that what the plts. were entitled to, in the event which happened, was the loss after deducting the premiums. It was said, however, on the part of the plts., that the state of the pleadings allowed them to perpetrate this injustice, and that the money which had been paid into court and taken out in satisfaction could not in any way be treated as reducing the amount to which the plts. were entitled in respect of their average loss. On the other hand, it was contended that the deduction in question was one which a jury ought on the trial to take into account in the reduction of the damages. It was said that the jury, having ascertained the amount of the loss, have to inquire what is the damage to which the plts. were entitled; and that there are many cases in which circumstances occurring after the *prima facie* damage has occurred, are allowed to reduce the damages. Thus, part payment after action has always been held to reduce damages. So, in trover, the return of goods goes in reduction of damages. In the case of an executor *de son tort*, who has interfered with the estate, and so converted it, if he has paid debts he is "recouped," as it is called, in damages. It is unnecessary to decide this question in the present case. We think that the court has the power of preventing the plts. from proceeding to carry out, by its process, such a piece of injustice as here contemplated. And in *Gould v. Oliver*, 2 M. & G. 235, where money was paid into court on a count inconsistent with that on which the plt. recovered, it was insisted that by taking the money out of court the plt. had estopped himself from recovering on the inconsistent count. The Court held that such an estoppel ought not to prevail, and that each count must be dealt with independently of the rest of the record; but Tindal, C. J. remarked "that the plts. would not be permitted to retain the whole amount of the loss under the first count, and the amount of the general average under the second." This remark, though said not to be necessary to the part of the matter decided, was strictly pertinent to the matter under the consideration of the court, being

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an answer to an objection that might have arisen—that if there was not an estoppel, the plt., having got the money, could not be made to part with what he had taken out of court, and that so the plt. could recover it twice over. "No," says the Chief Justice, "the court would not allow him to retain it and take the whole loss besides." Now, here the plts. would get besides their indemnity from loss on the policy, the amount of the premiums; in other words, they would get back the price they have paid, and the thing bargained for as well. We think they cannot be permitted to retain both. The expression of the Chief Justice seems to point to the power inherent in these courts, by stay of proceedings or otherwise, to prevent the abuse of their process. For these reasons we are of opinion that the defts. are entitled to the relief which they pray for, and that the rule should be made absolute, to prevent the plt. from signing judgment or issuing execution for any larger amount in respect of damages than the balance of the average loss ascertained by the average stater, after deducting the amount of the premiums paid into court.

Rule absolute.

Thursday, Jan. 19, 1865.

WILSON v. RANKIN.

Marine insurance—Deck loading—16 & 17 Vict. c. 107—Cargo.

A policy upon freight is not rendered void by the master, without any authority from the owner and without his knowledge, having loaded part of the cargo on deck contrary to the Customs Consolidation Act 1853 (16 & 17 Vict. c. 107), ss. 170 et seq.

A master loaded on deck spars and other articles for the use of the owner, but more than were required for the ship's use on the voyage:

Held, that the excess was cargo within the meaning of the Customs Consolidation Act (16 & 17 Vict. c. 107), ss. 170, 171.

Declaration on a marine policy of insurance at and from Restigouch to Liverpool, upon goods and merchandise, and also upon the ship, beginning the adventure upon the said goods and merchandise from the loading thereof, and including risks of craft until the said ship arrived at as above (valued at 1400*l.*) Averment that goods of great value were shipped on board at Restigouch aforesaid, to be carried as cargo on the voyage in the policy described, for certain freight therefore payable to the plt., and afterwards the said ship, with the said cargo on board thereof, sailed, &c., and was wholly lost, &c.

Fourth plea:

That the said policy was made, and the cargo, the freight in respect of which was insured as in the declaration alleged was shipped on board the said ship after the coming into operation of the Customs Consolidation Act 1853 (16 & 17 Vict. c. 107), and consisted of timber and wood goods, and that Restigouch was and is a British port in North America, and that the said ship with the said cargo sailed from Restigouch, and that the whole of the said cargo was not below deck, but on the contrary, the master of the said ship placed and permitted, and caused to be placed and remain, and be upon and above the deck of the said ship, part of the said cargo, contrary to the statute in that behalf, and that the master of the said ship had not obtained from the clearing officer any certificate that the whole of the cargo of the said ship was below deck, and that at the time of the said ship so sailing, and until and at the time of the alleged loss, the plt. was the owner of the said ship, and the said freight so insured as aforesaid was payable to him as such owner in respect of the said cargo.

The fifth plea was the same except that it alleged that at the time of the making of the policy it was known by the plt. that a considerable part of the cargo was then loaded, and was intended to be loaded, upon and above the deck of the said ship, and that it was intended by the plt. that the said

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ship should sail on the voyage with part of the cargo stowed and loaded above and upon the deck of the said ship as aforesaid.

Demurrers to fourth and fifth pleas.

There were also issues in fact raised which came on for trial before Shee, J. at Liverpool.

It was proved at the trial that the whole of the cargo on freight was loaded below deck, but that the master loaded above deck a quantity of spars and other articles for the use of the owner. These spars were more than were required for the ship's use on the voyage, but did not render the ship unseaworthy, and the owner was not, at the time of making the policy, aware of the spars being so loaded, and had given the master no instructions in this matter. The learned judge ruled that the spars, &c., were cargo within the meaning of the Customs Consolidation Act 1853, and directed a verdict to be entered for the deft. on both pleas, giving the plt. leave to move to enter a verdict for him.

A rule nisi was obtained accordingly, and it now came on for argument with the demurrers by order of the Court.

The following are the sections of the Customs Consolidation Act (16 & 17 Vict. c. 107) referred to in the argument.

Sec. 170 :

Before any clearing officer permits any ship wholly or in part laden with timber or wood goods to clear out from any British port in North America, or in the settlement of Honduras, for any port in the United Kingdom, at any time after the 1st Sept. or before the 1st May in any year, he shall ascertain that the whole of the cargo of such ship is below deck, and shall give the master of such ship a certificate to that effect; and no master of any ship so laden shall sail from any of the ports aforesaid for any port of the United Kingdom at any such time as aforesaid, until he has obtained such certificate from the clearing officer.

Sec. 171 :

No master of any ship, in respect of which such certificate as aforesaid has been obtained, shall place or permit, or cause to be placed or remain upon or above the deck of such ship, any part of the cargo thereof, until such ship has arrived at the port of her destination. Provided also that the store spars or other articles necessary for the ship's use shall not be taken to be cargo for the purposes of this Act.

Sec. 172 :

If any master of any ship for which such certificate as aforesaid is required, sails or attempts to sail without having obtained such certificate, or places or permits, or causes to be placed or remain, or be upon or above the deck of such ship, any part of the cargo thereof, except in the cases in which the same is not forbidden, he shall for every such offence forfeit and pay any sum not exceeding 100*l*.

Nov. 8.—Mellish, Q.C. (E. James, Q.C. and Cohen with him) for the deft.—The plt. is not entitled to recover. The master was the agent of the owner, and his knowledge was that of the owner. The case is like that of *Cunard v. Hyde*, 2 E. & E. 1, where the plt. having actual knowledge that part of the cargo was loaded on deck was held not entitled to recover. In *Cunard v. Hyde*, E. B. & E. 670, that did not appear. Secondly, the statute having been passed to prohibit deck loading and to protect life and property, there is an implied warranty on the part of the owner, when effecting a policy, that the statute has been complied with. Non-compliance with the directions of the statute in this respect amounts to a statutory unseaworthiness :

Law v. Hollingworth, 7 T. R. 160 ;

Bird v. Appleton, 8 T. R. 562 ;

Farmer v. Legg, 7 T. R. 186 ;

Bell v. Carstairs, 14 East, 374.

Brett, Q.C. (Milward with him).—There is no plea of unseaworthiness, and in point of fact the risk was not increased. There is no illegality in the voyage that disables the plt. from recovering :

1 *Arnould Ins.* 745 *et seq.* ;

1 *Phil. Ins.* sec. 214 ;

Metcalf v. Parry, 4 Camp. 123 ;

Carstairs v. Albright, 3 Camp. 497.

The knowledge of the master was not that of the owner for this purpose, as deck loading was contrary to the master's duty. The penalty is imposed by the statute on the master :

1 *Phil. Ins.* ss. 221, 717 ;

Havelock v. Handell, 3 T. R. 277.

Cur. adv. vult.

Jan. 19.—*COCKBURN, C.J.* now delivered the judgment of the Court.—This was an action on a valued policy on freight from Restigouch to Liverpool, for a total loss by perils of the sea. The fourth plea is to the effect that the ship cleared out and sailed from Restigouch, a British port in North America, after the 1st Sept. 1861, and before the 1st May 1862 ; that her cargo consisted of timber and wood goods, and that the whole of the cargo was not below the deck, but, on the contrary ; that the master, contrary to the stat. 16 & 17 Vict. c. 197, ss. 170, 171, 172, placed and kept a portion of the cargo on deck, and sailed without the certificate required by the statute, and that the plt. was the owner of the vessel. The fifth plea adds the additional averment that the plt. intended the vessel to sail so loaded and made the policy for the express purpose of protecting the said adventure so prohibited by the statute in question. Both these pleas were traversed and also demurred to. On the trial before Shee, J., at Liverpool, it appeared that the vessel did in fact sail, on the 18th Nov. 1861, with the whole of the cargo that was on freight properly stowed below deck, but that the master took on board a quantity of spars and other articles for his owner, to be carried to Liverpool, which were placed on deck. This he did in the exercise of his general authority as master, without any instructions from (the plt.) his owner to do so, his object, it would appear, being to save expense to his owner in obtaining the materials necessary for refitting the vessel in Liverpool after the voyage. The jury found that the vessel was not, in fact, rendered unseaworthy by this deck load ; that the spars and other articles on deck were more than were required for the ship's use on the voyage, and that the plt. was not aware of the conduct of the master till after the policy was made and the ship had sailed. The learned Judge ruled, on the construction of the proviso in the 171st section of the 16 & 17 Vict. c. 107, that the spars, &c. in excess of what were required for the voyage, were cargo within the meaning of the enactment, and he directed the verdict to be entered for the deft. on both pleas, giving the plt. leave to move to enter the verdict for him. A rule was accordingly obtained, which came on for argument along with the demurrers. On the argument it was not disputed that the fifth plea was good, and that the judgment on the demurrer to that plea must be for the deft. ; but it was also not disputed that this plea was not proved, and that the verdict on it must be entered for the plt. We expressed our opinion during the argument that our brother Shee's ruling that the spars in question were cargo was correct, and that consequently the fourth plea was proved in substance. It was objected that the plea was so framed as to aver that the portion of cargo loaded on deck was part of that which was carried on freight ; but we expressed our opinion that this was an immaterial variance, the substance of the plea being that cargo was illegally carried on deck, and that, if necessary, an amendment might be made in the plea accordingly. The verdict, therefore, on the fourth plea must stand for the deft. ; but the real question between the parties is, whether the fourth plea is good in substance, and on this we took time to consider. The result of our deliberation is, that in our opinion the plea is bad. While the cases of *Cunard v. Hyde*, E. B. & E. 670 ; 2 E. & E. 1, establish that where the

his cargo, which could be more speedily and cheaply obtained there, in consequence of which the ship was seized and confiscated. This proceeding on the part of the master, though within the general scope of his authority, and though done in the interests of his owners, was held to be barratrous, and the owner on a policy in which barratry of the master was insured against was held entitled to recover. Within the principle of this decision, the soundness of which has never been questioned, the conduct of the master in the present case would have amounted to barratry, as being an unlawful act done in contravention of his duty, though with the intention of benefiting his owner. Had the statute attached the forfeiture of the vessel as the penalty of the offence, and the vessel had been confiscated, the owner could have recovered on an insurance against loss by barratry. But to constitute barratry there must necessarily be an absence of consent and knowledge on the part of the owner. Where an act which would otherwise be barratrous is done with the assent and knowledge of the owner, it ceases to be barratrous. If, therefore, the knowledge of the master could be taken to be the knowledge of the owner, an illegal, and therefore barratrous, act done by the master would not, in case of loss occasioned thereby, give the owner a right to recover. But *Earle v. Roucroft* directly establishes that, on loss occasioned by the illegal act of the master without the authority of the owner, the latter may recover, and therefore shows that, where the master does an illegal act, which but for its illegality would be within the scope of his ordinary authority, but which being illegal is barratrous, this will not amount in point of law to assent or knowledge on the part of his employer. For these reasons, it appears to us that the plt. in this action cannot be taken to have constructively, any more than he had actually, knowledge of the illegal act of the master, and that consequently, within the decision of *Cunard v. Hyde*, he is entitled to recover, and that our judgment should be in his favour. I should add that this judgment must be taken as that of my brothers Blackburn and Mellor and myself. My brother Crompton having been obliged to leave the court before the argument was concluded, takes no part in the judgment.

Attorneys: for the plt., *Gregory and Rowcliffe*;
for the deft., *Field and Roscoe*.

The case stated "That at a petty session of the peace holden at the Guildhall, Weymouth, on the

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THE MAYOR, &C. OF WEYMOUTH v. NUGENT.

[Q. B.]

23rd Aug. 1864, an information and complaint came on to be heard before us the undersigned Edward Bayley, John Taylor, and Richard Cotterell, Esqrs., three of Her Majesty's justices of the peace acting in and for the said borough, by which the apps. complained that the resp., the above-named Charles Hodges Nugent had refused to pay the sum of 2s. 6d. wharfage duties on ten tons of block stone brought into the harbour of the said borough, on the 22nd Oct. then last past. The information was laid under an Act of Parliament passed in the 6th year of the reign of George the Fourth, intituled 'An Act to amend and enlarge the powers and provisions of several Acts relating to the harbour and bridge of the borough and town of Weymouth and Melcombe Regis, in the county of Dorset.' At the hearing the apps. and resp. duly appeared. It was proved by witnesses called by the apps., that the stone described in the information was, on the 22nd Oct. 1863, brought by a barge into the harbour of Weymouth, for the use only of Her Majesty's Government works on the Nothe; that it was brought there from Portland for such use, and delivered there by the resp.'s orders to persons in the employ of the Government for the use of the said works; that the resp., as one of Her Majesty's officers, took charge of it on behalf the Government; that the sum of 2s. 6d. would be the amount of wharfage dues payable in respect of the said stone so brought into the harbour, if any were payable; that the collector, on the 29th Oct. 1863, demanded of the resp. payment thereof, and that he refused to pay it; that such demand was made of him as commanding officer of the Royal Engineers taking charge of the stone. (The case then set out the form of receipt given on the delivery of the stone.) The resp. did not cross-examine the apps.' witnesses, nor was any witness called on his behalf. It was contended on behalf of the resp., that he was not liable for the wharfage dues claimed, inasmuch as the Act of Parliament did not give the apps. any right to petty customs or wharfage dues in respect of stone brought into the harbour of the said borough for the use of Her Majesty's Government works, and that by Her Majesty's prerogative the stone was exempt from such dues in such a case, and we the said justices, being of that opinion, dismissed the information and complaint. The question for the opinion of the court is, whether the said justices were right in dismissing the said complaint? If the court should be of opinion that our determination was wrong, we request them to remit the matter to us with their opinion thereon accordingly, or to make such other order relative to this matter as the court shall deem meet."

By the 6 Geo. 4, c. 116 (local), powers are conferred upon the corporation of Weymouth to levy and take certain petty customs and wharfage duties according as they are set out in two schedules for goods brought into the harbour of Weymouth.

The 2nd section enacts,

That from and immediately after the passing of this Act, the petty customs and wharfage duties mentioned and contained in the first schedule to this Act annexed, and the harbour dues and ballast duties mentioned and contained in the second schedule to this Act annexed shall be demanded and taken upon every ship, tow, or other vessel which shall be brought into the harbour of Weymouth and Melcombe Regis aforesaid, which said petty customs and wharfage duties, harbour dues and ballast duties shall be and the same are hereby declared to be vested in the said mayor, aldermen, bailiffs, burgesses and community of the said borough and town for the time being for the purpose of repairing, improving and maintaining the harbour, wharfs, quays and piers within the borough and town of Weymouth and Melcombe Regis aforesaid.

By sect. 23 there is an exemption from toll of the bridge for horses, carriages, &c., connected with the mails, and also the horses, carriages, &c. attending Her Majesty, &c.

Sect. 29 also exempts from duty all coal imported

into the said port for the use of Her Majesty's steam-packets, and actually used on board the same.

Lush, Q. C. (*J. Brown* with him) now appeared for the apps., and contended that the language of the Act was sufficiently comprehensive to include the Crown, and that there was no implied exception; that where the tolls are levied to make good costs incurred by individuals, or public bodies not connected with the Government of the country, there are always clauses inserted expressly exempting the Crown from liability to pay toll. He referred to

The Turnpike Act, 3 Geo. 4, c. 126;

The Harbours, Docks and Pier Clauses Act 1847 (10 Vict. c. 27), s. 28;

The Railway Clauses Consolidation Act 1845 (8 Vict. c. 20), s. 92;

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 4.

[COCKBURN, C. J.—If the Crown had granted the dues it would undoubtedly have been itself exempt, why not equally so when the grant is by the Parliament?] If the Legislature had intended any exemption, it would have enacted it. He referred also to the express exemptions in clauses 23 and 29. [COCKBURN, C. J.—The prerogatives of the Crown are never affected except by express enactment.]

The *Solicitor-General* (*Dowdell* with him) argued that the Crown not being bound unless expressly named, its prerogative cannot be affected by implication merely. That to this doctrine there is only the exception of cases where the enactment is for the general advancement of religion, the promotion of justice, or the general public good, which is not the case in the present instance. That it being admitted that the stone was to be employed by the Crown, no wharfage duty could be demanded. He argued also that the clauses themselves of the local Act altogether excluded the idea of the Crown being included. He cited

11 Co. 68;

Attorney-General v. Donaldson, 10 M. & W. 117-123;

Bac. Abr. tit. "Prerogative," 5;

Brooks's Abr. tit. "Prerogative," pl. 112;

Comyn's Dig. tit. "Prerogative," B. 1;

R. v. Cook, 5 T. R. 519;

Chitty on Prerogative;

Westover v. Perkins, 2 Ell. & Bl. 57, Lord Campbell's judgment.

Lush, Q. C. replied.

COCKBURN, C. J.—I am of opinion that the decision of the magistrates is right. There is a great principle or rule which, from an ancient period, has obtained, with regard to the prerogatives of the Crown: namely, that except with reference to certain matters of a public character, the Crown is not bound by statute unless specifically mentioned therein. It may be said that the *status* of immunity from toll or dues arose at a remote time, when the right to impose such was founded upon a grant from the Crown, and that the Crown, in such case, never intended to tax itself, and therefore it may well be assumed that, whether tolls and dues have been taken by grant from the Crown or by statute, the Crown never intended to include itself. But however this may be, the exemption has obtained from the earliest time, and we cannot suppose that the Legislature, in this instance, have intended to make the Crown liable without, in fact, making any direct reference to it. The rule I have mentioned applies to such a case as this, where dues are taken under a local Act of Parliament. Mr. *Lush* relies upon the exception in the Act as to the toll of the bridge, and upon the general rule that, where there is an express exception, cases not expressed are not to be included. We must, however, take it that the exception was merely inserted *ex abundanti cautela*. The case of *Westover v.*

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Perkins, which is strongly in point, justifies me in these views. The principle applicable to the two cases is identical. The prerogative of the Crown, which is clearly established from ancient times, would be materially affected by the adoption of Mr. Lush's views; and we should be acting directly contrary to the rule established by so many cases if we were to hold that the Crown is liable. The argument that it was intended by implication to bind the Crown has no validity for the reasons I have given, and there is, moreover, no evidence to show that there was any such intention.

CROMPTON, BLACKBURN and MELLOR, JJ. concurred.

Judgment affirmed.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATERSON, Esq., of the Middle Temple, Barrister-at-Law.

(Present—The Right Hon. Lord CHELMSFORD, KNIGHT BRUCE and TURNER, L.JJ.)

THE BETA.

Ship—Licence of pilot—Renewal—Date of renewal—
17 & 18 Vict. c. 104, s. 374.

A pilot produced a licence, last renewed on 22nd Jan. 1864. The licence purported to be conferred "from thenceforth up to the 31st Jan. next ensuing, and no longer." The 374th section of the Merchant Shipping Act enacts, that no licence shall continue in force beyond the 31st Jan. next ensuing the date of such licence, but the same may, on application, be renewed on such 31st day of Jan., or any subsequent day:

Held (affirming the judgment of the Court of Adm.), that the Legislature meant that the renewal was to operate from the 31st Jan., whether applied for on that day or not.

This was an appeal from a sentence of the High Court of Admiralty, in a cause of damage promoted by the barque *Fides* against the owners of the steamship *Beta*.

The screw steamship *Beta* (whereof Robert Minter Upton was master), of the burthen of 508 tons register or thereabouts, propelled by engines of 120 horse-power, and navigated by her master and a crew of twenty-five hands, left the East-lane Tier in the port of London, in charge of James Voss, a duly licensed Trinity pilot, at about 5.15 a.m. of the 6th May 1864, laden with a general cargo, and having on board passengers bound to Waterford and Belfast. At about 5.45 a.m. of the said day, the wind was easterly and the tide was about half ebb, and the *Beta* was proceeding down the river Thames at the rate of from five to six knots an hour, with a good and vigilant look-out being kept from on board her.

Whilst the *Beta* was so proceeding, and when she was about half a mile above the vessels lying in Deptford tier, she overtook several vessels drifting down the river. The pilot, James Voss, who was on the bridge of the *Beta*, conducting her navigation, shaped her course to pass such vessels, and by his orders the engines of the *Beta* were eased and stopped; and in order to cant her starboard-quarter clear of a schooner, which was one of such vessels drifting down, her helm was ported, which brought her head in towards the south shore. The helm was then steadied and her engines were, by order of the said James Voss, set on ahead, and her helm was starboarded for the purpose of bringing her out again from the south shore, and clear of the vessels in Deptford tier; but the said James Voss, finding

that there would be difficulty in passing clear of the tier, ordered the engines to be eased and stopped, which was done. But, notwithstanding, the *Beta* came into collision with the barque *Fides*, which was the outermost of such vessels in Deptford tier.

Under these circumstances, the resps. averred in the court below that the said James Voss was a duly licensed pilot for the place in question; that they were by law compelled to employ him; that the *Beta* was in his sole charge; and, that so far as the *Beta* was to blame for the collision, the fault was exclusively that of the said James Voss, and that neither the *Beta* nor the resps. were liable for the losses caused by the said collision.

The learned judge of the court below was assisted by Trinity Masters.

The evidence for the resps. was taken orally in open court. Upon the licence of the said James Voss being produced, an objection was taken to it by the apps. upon the ground that it had not been renewed in such manner as required by the provisions of the 374th section of the Merchant Shipping Act 1854.

The learned judge of the court below, after hearing counsel on both sides, pronounced the collision to have been occasioned by the fault or incapacity of the said pilot, James Voss, overruled the objection taken to his licence, and decided that the employment by the *Beta* of the said James Voss was compulsory, and pronounced against the damage proceeded for.

After the Trinity Masters arrived at their decision,

Dr. LUSHINGTON continued:—We are all agreed that the blame of this collision is imputable solely to the pilot. I must now give my judgment upon that 374th section. The licence which I hold in my hand has been duly entered at the Custom-house according to the Merchant Shipping Act in the year 1855, and it appears that the object of it is to confer the licence from "thenceforth," that is, whatever may be the date, and the original date of this licence is 1855, up to the 31st Jan. next ensuing, and not longer. Now, there have been several renewals of this licence, and the last of them was on the 22nd Jan. 1864, and this collision took place, I think, in the month of May, but some time after the 31st Jan. It has been contended, according to the terms of the statute, that this renewal of the licence only lasted till the 31st Jan. 1864, and that consequently, at the time of the collision itself, there was no operative licence; that, consequently, the pilot was not a licensed pilot; that, consequently, he was the servant of those who employed him, and that they are responsible for his acts. Now, I am fain to confess, with regard to this 374th section, that any construction I put upon it is subject to some difficulty, and attended with inconvenience; and this being so, I look to the consequences of the different constructions proposed, and if very serious consequences to the beneficial and reasonable operation of the Act necessarily follow from one construction, I apprehend that, unless the words imperatively require that construction, it is the duty of the court to prefer such a construction that *res magis valeat, quam pereat*. Now, on the one hand, it is stated in the argument adduced by Dr. Deane and Mr. Clarkson, that unless their construction of the statute be adopted, it will be next to impossible to have any licensed pilot at all at certain periods of the year, and that there would be the greatest possible inconvenience arising, if all pilots were compelled to come to London with their licences for the purpose of getting them renewed at a particular time. It must be recollected a pilot cannot separate himself from his licence, because he is bound always to have his licence with him.

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and bound to produce that licence when he boards a vessel and takes charge of her. That difficulty has been most rightly urged, and the consequences would certainly be most detrimental to navigation if I were to impose on the section the construction asked by the other side, for I can hardly conceive any greater inconvenience than that pilots should be without licences, or should be compelled to come in a body for the purpose of renewing them. That is the inconvenience upon the one side. On the other hand, I am aware that if I adopt the construction of Dr. Deane, the licence may be renewed at any part of the year, and that is certainly not the intention of the Legislature, and I quite agree with the Solicitor-General, that that would be contrary to the spirit of the Act of Parliament, and for this reason, that the licence ought not to be renewed until the appointed period of expiration, and when the conduct of the pilot has been such as to merit the renewal of such licence. The words of the section are, "Subject to any alteration to be made by the Trinity-house, no licence granted by them shall continue in force beyond the 31st Jan. next ensuing the date of such licences." Now that would be plain enough, if I were quite satisfied what is to be considered the date of such licence, but I am not satisfied what is meant by the Legislature by the date of such licence. I do not apprehend that it necessarily follows that the date of such licence is the day of the renewal, or rather of the application for the renewal of such licence (not necessarily), "but the same may, upon the application of the pilot holding such licence, be renewed on such 31st Jan. in every year, or any subsequent day." Now there are two modes of considering this, bearing in mind that there is a distinction between an application for a renewal, and a renewal itself. Now, my understanding of this section is, that the licence which lasted until the 31st Jan. might be renewed, that is to say, it might upon application upon that day be renewed on the 31st Jan. in every year, or it might be renewed on any subsequent day, and undoubtedly these are very strong words and very difficult for the court to get over; but it is the inclination of my opinion, admitting the doubt and difficulty, that the meaning of this was, that the renewal might operate from the 31st Jan. in every year, and that it was to be in the power of the Trinity-house at any subsequent date afterwards to renew that licence, if they thought fit, yet that the Trinity-house are not estopped by this section from ordering, not from renewing, for that is not the expression I mean to use, but from ordering licences to have fresh operation from the 31st Jan., that being the day on which the effect and operation of all licences necessarily ceases, under the tenor of the Act of Parliament. Looking at the mischief which would accrue from a contrary construction, though with considerable doubt, this is the construction I must put upon the section. I therefore hold this pilot to have been duly licensed, and dismiss the action of the plts. without costs.

The present appeal was brought from that judgment.

The *Queen's Advocate* (Phillimore) and *Twiss*, for the app., referred to
Earl of Auckland, 1 Lush. 180;
Himmond v. Blake, 10 B. & C. 424;
 6 Geo. 4, c. 125, s. 10;
 16 & 17 Vict. c. 129, s. 28.

Dr. Deane, Q. C. and *Clarkson* for the resp.

Lord Justice TURNER.—Although it would be going too far to say that there is no difficulty in construing this statute, yet their Lordships have come to a very clear opinion with regard to it. The section

seems to be capable of two constructions, either that the act of renewal was to be done, or that the renewal itself was to take effect, on the 31st Jan. Their Lordships, however, are of opinion with the learned judge of the court below, that the Legislature intended the latter to be the meaning. This construction avoids the great inconveniences which would result from the construction contended for by the app., which would admit of certain districts being for days, or possibly for weeks, without any qualified pilot. Their Lordships will, therefore, recommend that the appeal be dismissed with costs.

Decree affirmed with costs.

Apps.' proctor, *H. G. Stokes*.

Resps.' proctors, *Clarkson, Son and Cooper*.

Thursday, Feb. 9, 1865.

(Present—The Right Hon. LORD CHELMSFORD, KNIGHT BRUCE and TURNER, L.JJ.)

THE UNITED STATES.*

Ship—Collision—Negligence—River navigation—Launch—Duty as to look-out.

The U., a tug steamer, when being launched in the river Tyne, ran stern foremost into the starboard side of the steamer Otter, then passing down the river, and negligently being at that place:

Held, notwithstanding the O.'s negligence, the U. might, by ordinary care, such as giving a signal before launching, have avoided the consequences of such negligence, and therefore, both being to blame, half the damage only was payable by U.

This was an appeal from a decree of the High Court of Admiralty in a cause of damage by the steamer *Otter*, against the steam-tug *United States*.

The collision took place in the river Tyne, at half-past four o'clock on 9th March 1864, on the occasion of the launch in the river of the *United States*.

The Court below held the *Otter* was alone to blame, and made decree against her, whereon the *Otter* now appealed to Her Majesty in Council.

Dr. Deane, Q. C. for the app.

Brett, Q. C. for resp.

LORD CHELMSFORD.—The facts of this case lie in a very narrow compass. On the 9th March 1864, about half-past four p.m., the app.'s screw-steamer, the *Otter*, was proceeding down the river Tyne, on her outward voyage, and had arrived near to the Middle-dock at South Shields. She was in her proper course on the south side of the river, and to the north of several tiers of vessels which were moored in that part of the Tyne. The resp.'s vessel, the *United States*, an intended steam-tug, was upon the slip, where she had been built, in a yard below the Middle-dock, and was about to be launched. She was decorated with flags, as is usual upon occasion of the launch of a vessel, and was prepared for launching at high water, which on the day in question, was at twenty-five minutes past four. The launch took place at 4.40. There was a tier of vessels moored nearly opposite the yard from which the *United States* was to be launched, and which it was necessary to move out of the way. The deputy harbour-master, who was on the spot in his boat, had given notice to the last vessel of the tier, called the *Columbine*, to leave the place where she was lying, and she was proceeding up the river in tow of a tug-steamer, when the *Otter* approached. The *Otter*, in order to avoid a collision with the tug-steamer and the *Columbine*, left her course, turned her head to south-

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ward, and came into the place which the *Columbine* had just left. At that moment the launch took place, and the *United States* ran stern foremost into the starboard side of the *Otter*, and occasioned the damage for which the suit was instituted. The learned judge of the Court of Admiralty was assisted by the Trinity Masters, and all the witnesses were examined *viva voce* before them, and in the result they expressed an opinion that the *Otter* was solely to blame for the collision, and a decree was pronounced against the damage proceeded for. Upon the appeal from this decree two questions have been raised on the part of the apprs.: first, whether the *Otter* was at all to blame; secondly, if she were, whether there was negligence on the part of the *United States* which mainly contributed to the collision? The case presented by the apprs. is that the *Otter* was proceeding down the river, on the south side, in her regular and proper course, outside the tiers of vessels, when the *Columbine* in tow of the tug-steamer came out from the berth where she had been lying athwart the hawse of the *Otter*. That the *Otter* immediately stopped and reversed her engines, and turned her head in to the southward, but that her way not being entirely stopped, she reached the place which the *Columbine* had left, within the tier of vessels, and quite out of the regular course of her voyage, and the instant she arrived there the launch of the *United States* unexpectedly took place, and the collision occurred. The case on the part of the *United States* is, that her intended launch was announced to vessels upon the river in the usual way. That although it may be true that the *Otter* stopped, and as many of the resps.' witnesses say for at least five minutes, yet that she afterwards steamed ahead again, and thus brought herself into the way of the *United States* at the moment of her being launched, and that if she had remained in the place where she stopped, she would entirely have avoided the collision. The resps.' view of the case is supported by a great number of disinterested witnesses of great respectability, and it was adopted by the learned judge in the court below. Their Lordships are not prepared to say that they would not have come to the same conclusion on this part of the case if it had been originally before them upon the same evidence; but even if they entertained any serious doubt, or were inclined to take an opposite view of the matter, considering that it is a question of fact upon which there is conflicting evidence, of which the learned judge had decided after a *viva voce* examination of the witnesses, affording him better means than their Lordships possess of forming a judgment as to their credibility and truth, they would hardly have felt justified in expressing a different opinion from that which he has pronounced. It being then established that blame is imputable to the *Otter* for the collision, the only remaining question is, whether she is solely to blame? In considering the question, it must be taken to be the fact that the *Otter* was in the place where the collision occurred by her own negligence. This circumstance will not of itself discharge the *United States* from all liability for the damage, for, as was said by Parke, B., in *Dacres v. Mann*, 10 M. & W. 549: "The rule of law is, that although there may have been negligence on the part of the plt., yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the left's negligence, he is entitled to recover." Was there, then, any negligence on the part of the resps., the consequences of which could not have been avoided by the exercise of ordinary care by the *Otter*, after she had placed herself in the way of the launch? This seems to depend entirely upon whether the *United States* was launched prematurely, and without waiting for a signal which it had been

previously arranged should be given. Although there seems to be no bye-law or other regulation upon the river Tyne making it part of the duty of the harbour-master to be present at launches, yet it seems to have been customary, and it certainly seems a very proper precaution, to require his attendance upon these occasions, for the purpose of guarding against accidents. In this case notice of the intended launch was given to the harbour-master the day before it was to take place, by a person in the employ of the shipbuilder; and the deputy harbour-master attended to discharge whatever duty he was accustomed to perform on these occasions. Whether in general, when present, he was the person by whom the signal of the exact time when the vessel was to be launched was given is not very material, because it seems to be agreed on both sides that, in the present instance, the time was in some way to be regulated by the harbour-master. The resps.' witness, Stephenson, who was in charge of the *United States*, says "that the harbour-master told them they were to launch as soon as the *Columbine* got out of the way, and that he would attend to getting her out of the way." And the only difference between the parties upon this point is, whether the harbour-master, besides getting the *Columbine* out of the way, was to give some orders, or to make some signal that the way was clear. Now Smith, the deputy harbour-master, states that at three o'clock on the day of the launch he went to the shipbuilder's and told some person at the yard that they were not to launch till he told them: that as soon as he sang out "Let her come," she might come, and he added, "Don't let her come till I tell you." It was said by Dr. Deane that Smith was not to be believed, because he was desirous of sheltering himself from the blame that was imputable to himself for having removed the *Columbine* at an improper time; and the evidence of the pilot on board the *Otter* is referred to in support of this charge. But the pilot does not say that it was an imprudent thing or an improper time to have removed the *Columbine*; but, on the contrary, he says it was a convenient time, although "he himself would not have started her then." It may be observed in favour of Smith's statement, that it seems highly probable that an arrangement should be made with respect to launching a vessel upon some preconcerted signal; because it appears that where the duty of giving such signal is cast upon the harbour-master, no regular and established form is invariably employed. Mr. Lee, the resps.' witness, says, "They generally hold up their hat on their hand, that is the usual course." Some signal or other is made by the harbour-master that the launch may take place. In this unsettled and varying practice as to the sort of signal to be given, it seems almost necessary that some arrangement should be made as to what shall be the signal on each particular occasion; and there is no fair ground for distrusting the testimony of the deputy harbour-master that such an arrangement was made in the present case. If then the harbour-master was to give the signal, and the particular signal to be given had been previously arranged, it is immaterial whether the communication said to have been made to the person in charge of the *United States* shortly before the time of launching was merely not to launch till the barque (the *Columbine*) was out of the way and all was clear, without the addition of the words "until they got further orders;" because it must have been understood that at all events they were to wait for a signal from the harbour-master that the way was clear. This signal he never gave, and, of course, could not have given, when he saw the *Otter* occupying the place from which he had just removed the *Columbine*, until she was out of the way also. Without waiting for this signal the *United States* was

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launched, and the collision took place, being thus mainly attributable to the neglect of the precaution to avoid an accident, which had been carefully arranged beforehand. It does not appear from the judgment whether this view of the case was presented to the learned judge of the Court of Admiralty; but whether it was or not, their Lordships are unable to agree in the conclusion to which he arrived, that the *Otter* was solely to blame for the collision. They are of opinion that both parties were in fault, and therefore that, according to the usual course in such cases, the apps. are entitled to receive from the resps. half the amount of the damage sustained by the *Otter*. They will, therefore, recommend to Her Majesty to reverse the decree, and to refer it to the registrar to ascertain the amount to which the apps. are entitled upon this view of the case. Their Lordships think that there ought to be no costs of this appeal or in the court below on either side.

Judgment reversed.

Apps.' proctors, *Dyke and Stokes*.

Resps.' proctor, *H. C. Coote*.

ADMIRALTY COURT.

Reported by ROBERT A. FRITCHARD, D.C.L., Barrister-at-Law.

Thursday, Nov. 17, 1864.

(Before the Right Hon. Dr. LUSHINGTON.)

THE CORNER.

Arrest—Bail—Release—General Rules, 1859, rr. 51, 54.

A vessel having been arrested, bail, which was afterwards pronounced sufficient, was tendered to the plts., who nevertheless entered a caveat against the release of the vessel, and she was consequently detained for some days:

Held, that the detention not being justifiable, the plts. must be condemned in the damages and costs arising from the detention.

This was a motion for costs and damages caused by the detention of the ship *Corner*.

A cause having been instituted against the ship and her freight in the sum of 1800*l.*, the vessel was arrested and an appearance entered on the 24th Oct., and on the same day the warrant was extracted. At one p.m. upon that day notice was given to the London attorney for the plt. that the defts. tendered Mr. Widdicombe, of Liverpool, shipbroker, and Mr. Bell, of Liverpool, shipbroker, as bail in the amount of 1800*l.*, and at the expiration of the twenty-four hours required by the rules of the court after the service of the bail-bond with the usual affidavit at the office of the plt.'s attorney, a præcipe for release was filed, and, there being no caveat on the file, the ship was released.

On the 27th Oct. the plt.'s attorney left with the defts.' attorney a notice of objection to the bail, and of intention to move the court to grant a second warrant, by reason of the fact that the two sureties were partners, and also that sufficient notice of bail had not been given to the plt.'s attorney, and that he had not had time to communicate with Liverpool before the release; and on the 3rd Nov. the learned judge allowed a second warrant to issue, and the vessel was again arrested. At 2:40 p.m. on that day the defts.' proctor served a notice upon the plt.'s attorney, that he had tendered Mr. M'Calman, of Liverpool, ship chandler, and Mr. Widdicombe, as bail, and the twenty-four hours having been again allowed to elapse, and the bail-bond and usual affidavits filed, a præcipe for release was again applied for, when it was found that a caveat had been entered. The defts.' proctor being informed

that the objection was to the sufficiency of Widdicombe, application was made to the court on the 10th, and the court referred the matter to the registrar. The names of several firms in London were supplied to the plt.'s attorney as references as to the sufficiency of the bail objected to, and the registrar appointed the 13th Nov. for the inquiry. After the registrar had made his appointment, and on the 12th Nov., the plt.'s attorney gave notice to the defts.' proctor that the caveat was withdrawn, and the vessel was again released. Damages, demurrage and costs were now asked for from the time of the entry of the caveat to the second release.

V. Lushington, for the defts., drew attention to the rules 51 and 54.

R. G. Williams for the plt.

Dr. LUSHINGTON.—When once a vessel has become entitled to a release, the onus of proving a right further to detain her clearly lies on the plt., and it is for him to make out that the circumstances of the case warranted him in the further detention. The first caveat was justified because it was asserted that the sureties offered were partners—an assertion which was not and is not contradicted, and so far the plt. was not blameable; afterwards, however, an objection was taken to Mr. Widdicombe which was utterly unfounded, and which, as the party objecting confesses now, was not tenable. By rule 54 a party delaying the release of any property by the entry of a caveat, shall be liable to be condemned in costs and damages unless he shall show to the satisfaction of the judge good and sufficient cause for having so done; and I am of opinion that no such good and sufficient reason has been made out, and therefore condemn the plt. in damages from the time such objection was made until the release of the vessel, viz., from the 4th to the 12th Nov. The plt. must also pay the costs consequent upon the detention.

July 20, 21, 22 and 23, and Nov. 22, 1864.

(Before the Right Hon. Dr. LUSHINGTON.)

THE NORWAY.

Breach of duty and breach of contract—The Admiralty Court Act 1861, s. 6—"Assignee"—Charter-party—Bill of lading—Guarantee as to capacity and draught of ship—Fresh or salt water—"Freight"—Lump freight—Jettison and sale—Non-production of papers—Constructive waiver of tender—Delivery.

Through the negligence of a pilot not compulsorily taken, a vessel got aground in the course of the voyage, and part of the cargo (rice) was thereby damaged, and other parts it became necessary to throw overboard. The vessel subsequently put into the Mauritius for repairs, where the damaged portion was sold. On the arrival of the vessel at her port of discharge the master, who was under the circumstances entitled to land and warehouse the cargo, neglected to cause it to be assorted, and also wrongfully refused delivery to the consignee:

Held that the consignee was entitled to damages for, first, the goods jettisoned; secondly, the goods sold at the Mauritius; thirdly, the non-assortment of the cargo at Liverpool; fourthly, the loss of interest occasioned by the wrongful withholding of the cargo.

A vessel was chartered in London to bring a cargo from a river port in India, and guaranteed "to carry 3000 tons upon a draught of twenty-six feet of water:"

Held, that the stipulation was not a promise absolutely to bring home 3000 tons; but a guarantee.

First, that the ship was large enough to carry 3000 tons;

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that the build of the ship was such that she carry 3000 tons upon a draught of twenty-six water:

o, that the guarantee as to the vessel's draught erence not to her ordinary sea-going draught, her draught during the whole time of her taking o in a river port and until she reached the open bat is, her draught in fresh water.

res of short delivery under a bill of lading, a ion may be made from the freight of such pro- of the freight as would have been payable if ds had been delivered, and this, even though ight be lump freight; but the value of the goods ight to destination may not be deducted from , but must, if necessary, be the subject of a le action.

luction by the master of papers and information le the consignee of the goods comprised in a bill ng to verify the justice of the claim made for and general average, together with a refusal rer except on payment of the sum claimed, is a h of duty," within the 6th section of the Admi- ury Act 1861, and exempts the consignee from eassy of making a tender.

sal of the master to deliver, except on payment unjust demand for freight, and his persistent n of any compromise, constitute a constructive of tender.

delivery of cargo shipped is not necessary; the y trade constitutes a delivery on a wharf, with o the consignee, sufficient.

ting the damages for non-delivery of cargo, the will not take into account that the consignee ave prevented some damage if he had availed 'of the 70th and 71st sections of the Merchant ng Act Amendment Act, to obtain possession of go; that privilege being conditional upon the ee depositing with the wharfinger the full claimed by the master.

Its. in this case, Ashburner and Co., the : of the bill of lading and owners of a cargo shipped on board the *Norway*, at Rangoon, ght to Liverpool, sued the vessel in respect re done by jettison and sale abroad of part rgo and in respect of various breaches of l contract on the part of the master.

etition, to which objection had previously en (*ante*, p. 17), set forth the various facts use.

ended petition now came on to be heard on s. Oral evidence was taken and the case gned by counsel, and with regard to the the judge found the following facts

iginal agreement between De Mattos and er that the homeward shipment should be account of De Mattos and the firm of r and Co., each a moiety; the firm of er and Co. to purchase the cargo and to the matter of the shipment; the cargo at Rangoon by the Burmah Company, on Ashburner and Co., and the bills of lading by the Burmah Company and their agent rner and Co. at Calcutta; that Ashburner drew bills upon De Mattos for the whole of the purchase-money and sent these bills the bills of lading to the Union Bank in with instructions to the effect that De ould accept the bills of exchange and when was due pay their amount into the bank to t of Ashburner and Co., and that when this , and not before, the bank was to hand over of lading to De Mattos; that the bank had, ; had a lien upon the bills of lading to secure nt account of Ashburner and Co. with the

bank; that De Mattos did accept the bills, but that the delay of the vessel at the Mauritius, which prevented her from arriving before the bills became due, caused him to make a new arrangement with Ashburner, the plt., to the effect that the plt. should withdraw the bills from circulation at a cost of about 3500*l.*, and that the plt. should have an assignment from De Mattos of his moiety of the cargo upon trust to appropriate the proceeds as follows: first, to satisfy one-half of the price of the cargo; second, to reimburse himself the 3500*l.*; third, to apply the remainder towards paying off the debt (then 18,000*l.*) due from De Mattos to the plt. personally upon their general account; and that on the arrival of the vessel at Liverpool the Union Bank gave up the bills of lading to the plt. and De Mattos stopped payment pending the negotiations between the plt. and the master as to the freight.

The Court also found as follows:—The vessel had been loaded at Rangoon and Hastings to the full extent named, as safe, by Capt. Brooking, the master-superintendent in conjunction with Mr. Cator, the freighters' agent, namely, to 25 feet, and at that draught she carried only 2698 tons. At a draught of 26 feet, she would, in the fresh water of the Irrawaddy, have been able to carry 2918 tons; but in salt water she would have been able to carry full 3000 tons. With this cargo on board, the *Norway* went down the Irrawaddy in charge of a pilot, who was voluntarily employed by the master, and in doing so she got aground upon a shoal, and this grounding was attributable to the negligence of the pilot; the *Norway* was got off after a few hours, and then proceeded on her voyage, it being thought she had received no mischief, but after a few days the vessel began to leak. Jettison was made by the master of some part of the goods, and eventually the vessel put in at Mauritius, where the cargo was discharged, and the ship repaired, the damaged part of the cargo sold, and the rest reladen. On the arrival of the vessel at Liverpool a dispute arose as to the amount of freight due, and the plt. offered to pay the undisputed portion into a bank, to abide a reference, but the master claimed an excessive sum, and, though not refusing to deliver any part of the cargo until the whole of the sum claimed had been paid, nevertheless insisted upon retaining in his possession sufficient of the plt.'s goods to answer his full demand, and thus never relaxed his lien for the full sum claimed, and throughout rejected any compromise; the master also failed to establish that he had furnished the plt. with the papers and information necessary for him to verify the justice of the master's claim. The master did not take the vessel into one of the closed docks as he was requested by the plt., but into the Canada Dock, which is an open dock furnished with sheds, but it appeared that rice cargoes were not unfrequently discharged there, and could there be assorted if sufficiently skilled servants were employed. The master, on failure of the negotiations, entered the cargo in his own name, and employed a master-porter to superintend the unloading, and the cargo was unladen, but no assortment made. The plt. then instituted this suit, and the plt. subsequently applied for and obtained an order that on payment by him to the master of 8461*l.* 13*s.* 2*d.* (the balance of freight stated by the plt. to be due in respect of the cargo), and on the plt. depositing in the registry a note for 5250*l.* to answer any further claims of the master for freight and general average, and on the bills of lading being filed in the registry, and an undertaking being given by the plt. to indemnify the defts. against any loss that they might sustain through the delivery of the cargo, the cargo should be released and possession given to the plt. And on the 5th April, under another order of the court made by consent, the plt. paid to Messrs.

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Taylor, the defts.' agents, in respect of the cargo, 845*l.* 6*s.* 8*d.* landing charges, reserving any question in respect of the same for the decision of the court. The cargo was then taken possession of and sold by the plt.

Lush, Q.C. and F. Lushington for the plt.—First, the plt. had the beneficial interest in the whole of the cargo, and was therefore entitled to sue under the 6th section of the Admiralty Court Act 1861. Secondly, as to the charter-party. (a) The guarantee in the charter-party was a promise to carry 3000 tons, and therefore there was deficiency of about 300 tons. (b) The master had no lien for the one-third of the freight payable before delivery of the cargo on the arrival of the vessel at Liverpool. That was not freight. Thirdly, as to damages for jettison and sale. (a) The shipowner is responsible for the loss thus occasioned, because it was the ulterior consequence of the negligence of himself or his agents:

Daris v. Garrett, 4 Moo. & P. 540;

Sjordet v. Hall, 4 Bing. 607;

Lloyd v. Iron Screw Navigation Company, 4 N. R. 292.

(b) Though the freight was lump freight the plt. was entitled to deduct so much as would have been payable as freight for the goods jettisoned and sold, for by strict right, if the master fails to bring home any part of the cargo, he loses the whole of his lump cargo: (*Bright v. Cooper*, 1 Brown. 21.) Fourthly, as to damages for goods brought to Liverpool. (a) The plt. was exempted from making a tender, because, first, the master made an exorbitant demand for freight, and would not listen to any proposition for compromise (*Kerford v. Mondel*, 28 L. J. 303, Ex); secondly, the master did not furnish the proper papers showing what freight was due: (*Macl. 587.*) (b) The master was bound to unload the vessel in one of the closed docks, because, first, they were the docks named in the charter-party (Merchant Shipping Act Amendment Act 1862, s. 67, par. 3); secondly, they were the only customary docks for the discharge of rice cargoes (Ib. par. 4); thirdly, the plt. so directed the master. (c) The sound goods were not separated from the unsound. (d) The rice was not assorted. (e) The plt. is entitled to the interest upon the value of his cargo, from the time when the master ought to have given him possession to the time when he did give possession.

Brett, Q. C. and Cohen for the defts.—First, the plt. is not entitled to sue, at all events, alone. Besides the plt., his partners and De Mattos, and also the bank, were interested in the cargo. Secondly, the guarantee in the charter-party was only that the ship was capable of carrying 3000 tons, and that upon a draught of twenty-six feet of water. Water means salt water, the reference being to the ordinary sea-going draught of the vessel: (*Pust v. Dowie*, 33 L. J. 172, Q. B.) The guarantee was therefore fulfilled. Thirdly, as to damages in respect of jettison and sale. These were the results of the perils of the seas; but if of the pilot's negligence, the defts. are not responsible. The freight is lump freight. If any part of the goods arrive at their destination, the whole lump freight is payable; it cannot be apportioned. Freight can be deducted only when it is payable by the tale: (*The Salacia*, 7 L. T. Rep. N. S. 440; 9 Jur. N. S. 27; 32 L. J. 41-43, Adm.) Fourthly, as to damages in respect of goods brought to Liverpool. (a) The plt. made no tender, and nothing was done to waive tender. (b) The master was not bound to go into a particular dock in order to deliver:

Brown v. Johnson, 10 M. & W. 331;

Brevelon v. Chapman, 7 Bing. 559.

(c) The master was not bound to assort, as the plt.

had not made entry of the goods: (Merchant Shipping Act Amendment Act 1862, s. 67, par. 6. It is no part of the ordinary duty of the master porter to assort (Mersey Docks Consolidation Act 1858, s. 35); but, if otherwise, it is he and not the defts. who are answerable to the plt. The plt. might have got possession of his cargo under the Merchant Shipping Act Amendment Act, s. 70.

Dr. LUSHINGTON.—I will first deal with the preliminary objection taken by the defts. to the right of the plt. to sue on the ground that he was not beneficially entitled to the cargo comprised in the bills of lading assigned by him. I adhere to my decision in the *St. Cloud*, 8 L. T. Rep. N. S. 55, that under the 6th section of the Admiralty Court Act 1861, the court will not entertain a claim made by a bare assignee of a bill of lading. But in this case under the new arrangement made with De Mattos the plt. remained, as before, the legal holder of the bills of lading, free from the lien of the bank, as free also from any undertaking to assign them to De Mattos, and as to the cargo comprised in the bill he, as representative of his firm, remained as before entitled to one-half, and as to the other half he became equitable assignee from De Mattos, up to trusts substantially for the benefit of Ashburn personally, and also as the representative of his firm. De Mattos ceased to be interested in the cargo, except that it was to his advantage that the cargo should turn out well, for the higher price fetched the greater of course would be the reduction of his debt to Ashburn. Under these circumstances I am of opinion that the plt. not only was the legal holder of these bills of lading, but also that by the assignment the "property comprised in the bills of lading passed to him" as an individual person, and as the representative of his firm, and I am therefore of opinion that he has a right to sue the defts. under the 6th section of the Admiralty Court Act 1861. Then, as to the construction of the charter-party and bills of lading. The freight is stated in the bills of lading to be "freight payable as per charter." The court is therefore referred to the charter-party, but only for the purpose of ascertaining the amount of freight. What are the stipulations in the charter as to freight? I think they occupy the whole clause beginning with "in consideration of" and ending "less the months' interest." After naming 11,250*l.* as freight payable if the ship is ordered to the United Kingdom, the charter-party contains these words, "the master guaranteeing to carry 3000 tons dead weight of cargo upon a draught of twenty-six feet of water or to forfeit freight in proportion to deficiency." I think this guarantee is a twofold one, viz., first, that the ship was large enough to carry 3000 tons; secondly, that her build was such that she could carry the 3000 tons upon a draught of twenty-six feet of water. It was not therefore a promise on the part of the master that in this particular voyage home he would carry 3000 tons; for at a time when the charter was executed, it was not settled for certain from what port the vessel should reload for her home voyage. The selection lay with the freighter; he might choose either Calcutta, Rangoon, Akya or Bassein; and it was not impossible that the river channel, from one of these ports, might not be navigable for a vessel drawing twenty-six feet of water; and the shipowner could not with prudence have covenanted absolutely to carry 3000 tons. What he covenanted was, that his vessel was capable of carrying 3000 tons and upon a draught of twenty-six feet of water, and further that he could take on board a full cargo compatible with safety. Hence after the guarantee added the clause, "the vessel to be loaded at port of loading to such draught of water

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This, for shortness, I may call the net value. There are three modes by which this indemnity may be effected. First, that the plt. should deduct from the full freight his full loss, namely, net value. Secondly, that he should deduct nothing, but, in the first instance, pay the full freight, and then recover by action his full loss, viz., the net value. Thirdly, that the plt. should deduct from the full freight the freight of the goods thrown overboard and sold, and then by action recover the residue of his loss. In the end, if all parties are solvent, each of these modes comes to the same thing; but it is important to distinguish between them, in order that the shipper may be able to ascertain the amount of freight for which the shipowner has a lien; and when he, the shipper, is bound to tender, he can become entitled to claim delivery of the rest of his goods brought to their destination. Now the first of these modes, by which the shipper would deduct the net value from the full freight, is not recognised by English law. The cases of *Meyer v. Dresser*, 10 L. T. Rep. N. S. 612, *Dakin v. Ozley*, 10 L. T. Rep. N. S. 268, and the *Salacia* (*supra*), amongst other cases, decide that under no circumstances can the shipper insist upon deducting from the full freight the value of his goods wrongfully disposed of during the voyage. He must seek his remedy for that value, as distinct from their freight, by cross-action. The third of these modes (by which the shipper would make a deduction from the full freight of the goods improperly disposed of, but no other deduction) is permitted to the shipper, if the freight is payable per tale. But this is lump freight, not freight per tale. For I cannot accede to the argument that the freight is not freight per tale, because 11,250*l.* freight for 3000 tons would be equivalent to the sum of about 3*l.* 15*s.* per ton, and 11,625*l.* for 3000 tons to another sum per ton. This argument, besides being inherently weak, is based upon the assumption (which I have already declared to be without foundation) that the master covenanted absolutely to carry 3000 tons. The freight is lump freight, and it is urged on behalf of the deft. that lump freight cannot be apportioned, that the deduction would be difficult if not impossible to calculate, and consequently that the only remedy open to the shipper is that of an action for damages. On the other hand, Mr. Lush argued for the plt. that if there was any difference between lump freight and freight per tale, it was, that in the case of lump freight if any part of the cargo shipped was not brought to the port of destination the shipowners in an action for freight could not recover any freight at all, because he would not have observed his own part of the covenant, and in favour of this proposition he cited the old case of *Bright v. Cowper* (*supra*). There seems to have been no recent decision on the point, and on consulting the various text-books on the subject I find that they all speak doubtfully as to what would be decided if a case like the present was to arise, and the court must, therefore, fall back upon considerations of equity. It certainly would be unjust that the master should forfeit the whole of his freight for not bringing a small portion of his cargo; but, on the other hand, it would be harsh upon the shipper that he should in the first instance pay full freight, though his cargo had not been delivered, and in ascertaining the proper amount of freight to be deducted no such difficulty would arise as would detain the master and his vessel in port. I am therefore of opinion that, in the present case, the plt. would have been entitled to deduct from the lump freight a sum equivalent to the freight for the goods jettisoned and sold, and then to have recovered the residue of his loss by a separate action. The exact sums will be ascertained by the registrar and merchants. As to the plt.'s claim for damage in respect of the goods brought to the port of desti-

nation, the defts. question his right to sue at all for damages in this respect, and they do so upon the ground that the plt. was never entitled to delivery, for that he never made a sufficient tender, or a tender at all. The plt., on the other hand, contends that he was exempted from the obligation of making a tender by reason of the improper conduct of the master. This conduct of the master is said to have consisted, first, in making an unjustifiable demand and insisting upon it throughout; and, secondly, in withholding the necessary information. As to the first point, the making of an exorbitant demand does not alone constitute an excuse to the plt. for not making a tender, but it is a very different case when the master not only makes an exorbitant demand, but persists in it; and I think the case cited for the plt., *Kerford v. Mondel*, 28 L. J. 803, Ex., is an authority for the position that in such a state of circumstances the owner of the goods is not bound to make a tender. As to the second point, it was strongly argued on behalf of the defts. that it was no part of the master's duty or contract to furnish the plt. with papers. But to this doctrine the court cannot accede. Where a creditor has a lien upon a debtor's goods for an unliquidated amount, that amount being dependent upon a complicated account, the particulars of which are at all events partly in the possession of the creditor alone, in seems only common sense that the creditor cannot be justified in enforcing his demand, unless he has communicated to the debtor full information, and by full information, I mean, not merely the statement of the total amount claimed, but a detailed account, and a production of all papers in his possession necessary to enable the debtor to verify the account and satisfy himself that the sum claimed is justly due. I see no reason why this rule should not apply to the master of a vessel in his relation to the owners of the goods. Nor do I think that in the present case this duty was the less incumbent upon the master of the *Norway*, because Ashburner, as a representative of his firm, was aware of some of the advances made to the shipowner, and to be deducted from the freight. That was an accidental circumstance. Besides, the particulars of which Ashburner was in possession were neither complete nor undisputed. If, therefore, the master failed to furnish to the plt. the papers necessary to enable him to ascertain the extent of the defts.' lien, and damage arose to the plt. therefrom, I shall hold that the master was guilty of "a breach of duty" within the terms of the 6th section of the Admiralty Court Act 1861, and also that, in consequence, the plt. cannot be prejudiced in this case from not having made a sufficient tender. For how could he make a sufficient tender if he had not the means of knowing as to its sufficiency. To use the words of Lord Denman in the case of *Ashmole v. Wainwright*, 2 Ad. & E. 843, "It is said that the plt. (who was the owner of the goods), ought to have tendered the proper charges; the answer is, that the defts. (who were the carriers) ought to have told him the proper charges. In the present case there is great conflict of testimony as to whether the papers were produced; and therefore the only course, after considering the probabilities of the case, is to determine on whom lies the burden of proof, and if the party on whom the burden lies leaves the case in doubt, the decision must be against him. In this case I deem it clear that the burden of proof lies upon the master, and the only result that the court can arrive at is, that it is not established to the satisfaction of the court that the master fulfilled his duty by producing the requisite information. On these two grounds then—first, that the master having made an excessive demand for freight, persisted in it, and refused to entertain the idea of reduction; and secondly, that he withheld from the plt. the

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papers necessary to show what was the amount of freight and general average due—I shall hold that the plt., if he did not make a sufficient legal tender, was not thereby disqualified from prosecuting his claim for damages for non-delivery of his cargo. As to the particular dock in which the cargo should have been discharged, Mr. Lush cited the 67th section of the Merchant Shipping Amendment Act 1862, par. 3, which directs that if any wharf or warehouse is named in the charter-party or bill of lading, the shipowner shall land the goods at that wharf or warehouse, and argued that the bill of lading, in stating that the *Norway* was bound to Cowes for orders as per charter-party, rendered it incumbent upon the master to obey the orders of De Mattos to discharge the cargo at one of the three named closed docks. But, on reference to the charter, it appears that the orders there mentioned were orders to proceed to London, Liverpool, Bordeaux, &c.; that is, to specified ports, but not to any particular dock in those ports. This argument, therefore, I think cannot be maintained. Reference also was made by Mr. Lush to the 67th section of the Merchant Shipping Act Amendment Act 1862, par. 4, which provides that the shipowner, in landing goods in virtue of that enactment, shall place them in or on some wharf or warehouse on or in which goods of a like nature are usually placed; and it was contended that the Canada wharf was not such a place as contemplated by the section. I think, however, that the evidence before me shows that rice is not unfrequently landed in the open as well as the closed docks. Mr. Lush then argued that, irrespective of any statutory obligation or any express contract, the master being bound to deliver to the owner of the goods was bound to deliver at the dock named by that owner. But on this point I think the law is correctly represented in the following observation of Mr. Parsons in his "Treatise on Maritime Law," vol. 1, p. 152: "The general rule applicable to carriers and other persons contracting to deliver goods, is, that a personal delivery is necessary. But this rule does not apply to the case of ships, the usages of trade having constituted a delivery on the wharf with notice to the consignee sufficient." The court would be reluctant in any way to diminish the responsibility of masters of vessels to attend to the instructions given to them by the owners of the goods on board those vessels; but in the present case, looking to the absence of any provision in the bill of lading that the goods should be delivered in any particular dock, to the difficulty and even danger of taking the *Norway* into the Stanley or Wapping dock, to the attempt of the master to take her into the Stanley dock, and lastly, to the fact that the goods might have been as well handled in the Canada dock as in one of the closed docks, I think that the plt. is not entitled to any damages for the discharge of the cargo in the Canada dock. As to the second point, the claim for damages for not separating the unsound from the sound rice, in the conflict of testimony I must conclude that the plt. has failed to prove that, in this respect, the cargo was improperly handled. As to the claim for damages for non-assortment, that the cargo was not assorted, and thereby its sale was prejudiced, is admitted. The question is, whether the deft. was bound to assort. Mr. Brett relied upon two statutes as constituting a valid defence. He cited the 35th section of the Mersey Docks Consolidation Act 1858: "The cargo of any vessel for any foreign or colonial port entering and using any open dock shall be received, weighed and loaded off by one set of porters only, who shall be in the employ and under the direction and orders of one of the master porters appointed by the board," as showing that the duty of the master porter was limited

to receiving, weighing and loading off (which in this case was done), and that he is not bound to assort unless specially required and paid extra for the work. He cited also the evidence of Messrs. Taylor as going to the same effect. Mr. Brett also cited the 6th paragraph of the 67th section of the Merchant Shipping Act Amendment Act: "If any goods are for the purpose of convenience in assorting the same landed at the wharf where the ship is discharged, and the owner of the goods has made an entry, and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty-four hours after assortment, and the expense of and consequent upon such landing and assortment shall be borne by the shipowner;" and his argument was, that entry by the owner of the goods, and an offer to make delivery, and to convey the goods to some other warehouse was a condition precedent to assortment, and that in this case the owner had not made an entry, and therefore that the duty to assort never arose. It is true that, as a fact, Ashburner did not make entry, but in my opinion the evidence establishes that this was occasioned by the wrongful act of the master. The master enforced his lien for an excessive sum, and at the same time withheld the papers necessary to enable the plt. to ascertain what was a sufficient tender. This being so, I must hold that the plt. having been wrongfully prevented by the master from making entry must, as regards the defts., be in as good a position as if he had actually made entry. The master had received express notice from the plt. to have the rice assorted, and, irrespective of that, he was bound to take as good care as a prudent owner would have taken, and it appears in evidence that it is the custom to assort Rangoon rice, and that the cargo was depreciated from not having been assorted. I think, therefore, that the plt. is entitled to damages for the non-assortment of his cargo. Then Mr. Brett contended that, even if the assortment of the cargo had been improperly omitted, the remedy of the owner of the goods would be against the master porter personally, and not against the shipowner. No doubt this would generally be the case, because usually the master porter is employed by the consignee of the cargo, but in the present instance the master porter was employed by the master of the vessel. I think, therefore, that the defts. were bound to have assorted the cargo, and that whether the non-assortment arose from their neglect to give the order, or from the act of their agent in not doing it, they are equally responsible. The amount thus incurred by the damages will be estimated by the registrar and merchants. Lastly, the plt. claims damages for non-delivery of the rice. As in the result the market did not fall, and the sale consequently was not injured by postponement, the only way in which the plt. could be damaged by non-delivery is in loss of interest. He might have realised his cargo in December. As it was, he did not do so till April or May, and meantime his capital to the extent of the value of the cargo was locked up. It is for the loss of interest upon this principal for this period that the plt. claims damages, and I think the plt. is entitled to be recouped his loss. If, indeed, he might have saved part of this loss, and by culpable neglect did not do so, then, to the extent of the consequences of his neglect, he could not have recovered from the defts. But I think the plt. was not bound to avail himself of the means provided by the Merchant Shipping Act Amendment Act 1862 (sect. 70-71), to obtain possession of his cargo, for that would have involved his depositing with the wharfinger the full sum claimed by the master, and this was an exorbitant sum. Such course was not imperative

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upon the plt. I shall therefore refer it to the registrar and merchants to estimate this interest. It will be convenient that I should sum up the results of this judgment. I shall endeavour to do full justice in the case, and to effect a complete adjustment of all outstanding claims against the parties. I am of opinion that in this case the master had a lien upon the cargo for freight and general average. The freight will be the sum contracted for by the charter-party (11,250*l.*), less the following deductions: first, the advances; secondly, the commission, interest and insurance; thirdly, the proportion of freight forfeited for breach of the guarantee; fourthly, the proportion of freight that would have been payable in respect of the cargo jettisoned, and in respect of that sold at the Mauritius, if they had been brought to their destination. I shall refer it to the registrar and merchants to take an account thereof, and to ascertain the net freight due on the principles stated in my judgment, taking into consideration the amount which has been paid on account of freight by the plt. during the progress of this cause, and the period at which it was paid. I shall also refer it to the registrar and merchants to ascertain the amount (if any) due from the owner of the cargo in respect of general average. I am also of opinion that the plt., under the provisions of the Admiralty Court Act 1861, is entitled to damages in respect of, first, the goods jettisoned; secondly, the goods sold at the Mauritius; thirdly, the non-assortment of the cargo at Liverpool; fourthly, the loss of interest occasioned by the wrongful withholding of the cargo. I shall direct the registrar, with the assistance of the merchants, to assess these damages, and having done so, to take an account between the parties, and ascertain the balance (if any) due, and to which of them. He will also report to the court as to whether interest is properly due on this balance, and for what period. The plt. must have the costs of this suit.

Tuesday, Dec. 13, 1864.

THE BAHIA.

Bill of lading—Duty to carry on, tranship, or deliver—Reasonable time—Law of the flag—Lex loci contractus—Lex fori.

A bill of lading in English, of goods to be delivered in a French port, was given by the master of a French vessel lying in the port of New York. The vessel during her voyage suffered injury, and was compelled to put into an English port. The cost of repairs would have exceeded the value of the vessel, and the master therefore gave notice of abandonment, which the underwriters refused to accept, and litigation ensued, pending which the master was, by French law, unable to complete the act of abandonment. The cargo was discharged, warehoused, and various offers were made to the master as to payment of freight, and amongst them to deposit in a bank the whole sum claimed and sign the usual average bond; but the master insisted upon payment of the whole freight, without any deductions. The litigation in France having ended:

Held, in a suit brought immediately afterwards by the assignee of the bill of lading (an English subject) against the master for breach of contract and breach of duty,

That the law of the vessel's flag governed the contract, and that, therefore, the duty of the master to carry on or tranship the goods, or to deliver them at an intermediate port, must be ascertained by reference to the law of France;

That the master was entitled to a reasonable time within which to carry on or tranship the goods, and that until

that time had elapsed he could not be called upon to deliver, except upon payment of full freight;

That the delay occasioned by the litigation in France must be considered as reasonable;

That the offer to pay into a bank the whole freight was not equivalent to an offer to pay the freight;

And that, under the circumstances, the master had not been guilty of a breach of duty or contract.

Messrs. Dumas, Hankey and Co., of Fenchurch-street, merchants, as assignees of the bill of lading of the cargo of the *Bahia*, sued the vessel and her master for breach of duty within the provisions of the 6th section of the Admiralty Court Act 1861. While the *Bahia*, a French barque, was lying in the port of New York in Nov. 1862, the master, on the 5th of that month, signed the usual bills of lading to carry a cargo of corn or Indian maize from New York to Dunkirk, in France. The *Bahia* having in the course of the voyage suffered damage, put into Ramsgate for repairs, the costs of which it was found would exceed the value of the vessel. The master accordingly proceeded to execute, according to the French law, an act of abandonment to the underwriters in France, with whom the vessel had been insured. The underwriters refused to accept the abandonment, and considerable litigation took place in France, pending which the master was unable to obtain a certificate of innavigability, so as to complete the act of abandonment, and without doing so or cancelling the act of abandonment he had by the law of France, as was alleged, no power or control over the ship. The cargo having been taken out of the ship and warehoused, various offers were made by the plt. to the deft. for the purpose of obtaining the cargo, the plt. offering to pay "the whole freight from New York to Dunkirk as regulated by the considerations mentioned in the charter-party, less the cost of transport from Ramsgate to Dunkirk." The deft., however, insisted upon immediate payment of the whole freight without any deductions, and a further offer was made on behalf of the plt. to deposit in a bank the whole sum claimed, and to sign the usual average bond. This offer was also declined by the deft., and thereupon the present suit was brought for damages by reason of breach of contract and breach of duty in neither carrying on the cargo by transhipment or reshipment, nor delivering it to the plt. upon the terms proposed by them.

Sir G. E. Honyman and Clarkson appeared for the plt.

Brett, Q.C. and V. Lushington for the deft.

The arguments of counsel were directed to the following questions:—First, as to what law was applicable to the case, whether the law of England, France, or New York; secondly, as to what was the effect of each of these laws under the circumstances of the case. These arguments will be found set forth in the judgment.

Dr. LUSHINGTON.—Great part of the argument was upon the question as to which country furnished the law for regulating the obligation of the master to the plt. under the actual circumstances. This point I will proceed to consider, though I am doubtful whether this will prove to be necessary for the decision of the case. First, then, this cannot properly be called a question of construction, for there is little or no dispute as to the meaning of the terms of the bill of lading. The question rather may thus be stated generally: given an agreement between two parties, what is the law that was actually contemplated, or must be taken to have been contemplated by them as the law for determining

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ing what mutual obligations not expressed should be implied. Judged by this test alone, the British law would not, I think, be applicable, for neither of the parties to this contract, which was evidenced by the bill of lading, contemplated the application of the British law. Neither of the parties was a British subject, nor was the port where the contract was made a British port, nor was it intended that the vessel should go into a British port. If, then, British law is applicable, it must be that it was brought in by after circumstances, irrespective of the original contract. As to this, it was said that though the shippers were American, the indorsees of the bill of lading were British subjects. But this was a mere accident, and may be disregarded. Then it was said that the place where the alleged wrong was committed by the master was a British port, and that the *lex fori* which has to adjudicate upon this alleged wrong is British law. Now there is no doubt that, in the case of a foreign ship coming from distress of weather within local British jurisdiction, both ship and cargo are in many respects subject to British law. They would be so, e. g. in respect of pilot dues, port dues, quarantine regulations and other matters of that description, and also as to many particular enactments which, by the law of the land, are expressly applicable to ships in general; but it does not, therefore, follow that the terms of a contract of affreightment of the cargo should be governed by English law. For were this the rule, then, if a British ship were found in a French port, her owners would have to submit to French law, and all charter-parties and bills of lading would be governed accordingly. Save, therefore, so far as the *lex loci* is applicable, *ratione loci* or *ratione fori*, I cannot hold that British law is applicable to this case, and I think that a British court having to adjudicate with respect to the contract, should adopt the foreign law which had from the beginning been contemplated as binding between the contracting parties. In the present case this must be either the French law or the New York law; for it was not contended that the law of St. Thomas, where the charter was made, governed the contract between the master and the shipper. Which then of these two laws ought to prevail? The facts on which reliance is placed in order to prove the New York law to be applicable, are, that the bill of lading was made at New York, and in English—that is the language of New York—and in terms not unusual in American contracts of affreightment. On the other hand, the circumstances in favour of the applicability of the French law are, that the vessel was a French vessel, owned by a resident in France, and that the contract was to be finally executed in France, for the port of destination was Dunkirk. Now, if the court were to pronounce in favour of the law of New York, as the *lex loci contractus*, the practical effect would be that a master of a ship touching at ports of different countries, and taking goods from thence, would, on his arrival at any intermediate port, or at the port of destination, find himself and his ship subject at the same time to the different laws of several foreign countries, a result nothing short of confusion. Again, it is to be remembered that the master was but an agent acting for an absent principal, that principal being a domiciled native of France. If, therefore, the law of the flag of the vessel be adopted, but not otherwise, the shipowner would be able to measure beforehand the character of his duties and liabilities as a carrier, and all the contracts of the same nature entered into by his agent abroad would be regulated by a uniform principle. Nor would the shipper have any reason to complain, for the flag of the vessel would be sufficient notice to him of the law by which his contract of affreightment, if he chose to enter into

one, would be governed. The *Bahia*, being a French vessel, I incline to consider that, so far from inserting by implication into this bill of lading any agreement to accept the law of New York as to the mutual rights of masters and consignees of cargo as to transshipment, &c., the master had no authority to bind the shipowner to accept the law of New York, and that the shipper must be taken to have known beforehand that, if circumstances like the present should arise, the dispute would have to be settled by the French law. I should add that, if I were to decide this case by the law of the State of New York, I could not hastily come to the conclusion that it was the same as that of England without some direct proof. However, although my opinion is strongly in favour of the applicability of the French law exclusively, I think it will be more satisfactory if I consider, not only what would be the results according to French law, but what would be the results according to New York law, supposing that to be the same as British law. The laws of both countries, France and England, as to contracts of affreightment, however they may differ in particulars, have one object—to secure to each party the full benefit of the contract, so far as it is not unfair to the other. Suppose, then, a ship, through injuries occasioned by perils of the seas, is forced during her voyage to put into any intermediate port, it would be unjust to the owner of the goods that his goods should be detained there an indefinite time; but, on the other hand, it would be unjust to the master that he should forthwith be prevented from earning his freight. The question is, within what limits of time, or other conditions, the laws of the two countries allow to the master the option of repairing and carrying on, or transshipping or delivering. First, then, as to the French law. The materials on which the court has to found its judgment are the articles in the Code de Commerce; secondly, the opinions of French lawyers which have been produced in evidence; and thirdly, the decrees of the French courts in this particular case. As to these last, it is perfectly true that the judgments of the Tribunal of Commerce at Marseilles, the Imperial Court of Aix, and the Court of Cassation, all given in the action between the underwriters and the shipowner, may not be binding upon the *plts.*, who are owners of the cargo, and were not parties. But it is not to be forgotten that the *plts.* would have been allowed to intervene, and had notice of this liberty in *M. Bonnefoi's* letter to them of the 4th March. So, too, it is true that the judgment of the Tribunal of Commerce at Dunkirk, though given between the parties, is not absolutely conclusive in the present case, for it is conceivable that, in an action for freight, the shipowner may be entitled to full freight, and yet that a cross-action may lie against him by the owner of the goods for damages. I apprehend, however, that the declarations of the French tribunals in each of these several judgments are admissible as evidence to show what the French law is. By the French law, in the event of the ship being forced to put into an intermediate port from injuries received, there is, in the first place, no absolute obligation upon the master to reshhip and carry on. That, indeed, is often impossible; the ship may have been lost, or have received irreparable injuries. Secondly, there is no absolute obligation to transship; the obligation arises only in the event of the ship having been declared unnavigable by competent authority: (Code, art. 296, 390, 391.) Thirdly, there is no unconditional obligation to deliver. The master may, if he think proper, insist on delivering, and then he is entitled to freight *pro rata itineris*: (Code, art. 296.) In the present case, the master did offer to deliver, but only on terms of receiving full freight, without even any deduction for freight already paid in advance.

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This clearly was a demand for more than the master was entitled to, as was admitted at the bar. On the other hand, the French law gives delivery to the owner of the goods, if he thinks proper to demand it, but in that case requires him to pay the full freight due: (Code, art. 293, 296.) This entire freight the plts. never offered to pay; they only offered to deposit it with a bank. No French authority was produced to show that an offer to deposit is equivalent to a tender of payment, so as to entitle the owner of the cargo to delivery. The plts., however, did also make an offer of payment, but that, so far from being an offer to pay the whole freight less the advances, was not even an offer to pay freight *pro rata itineris*; it was an offer to pay the whole freight less the expenses of carrying on the cargo from Ramsgate to Dunkirk. A *pro rata* freight is quite a different thing, being calculated upon the distance actually accomplished of the whole voyage, and independent of the consideration of the expense required to complete the remainder. The plts., therefore, were by French law never entitled to delivery. It is true that the master made an exorbitant demand, but of this the plts. cannot complain, if they were never willing to pay what was legally due from them. The plts. had in their possession all the knowledge necessary to enable them to ascertain what was the amount of freight due. The negotiations for delivery having thus failed, the master had still the option either to repair and carry on, or to tranship. The plts. contended that the master did decline either to carry on or to tranship. But I think this is not proved by the evidence. It is true that the deft. never offered to tranship; but the question of transhipment never arose; it could not in fact arise while the question of abandonment was still in abeyance; and beyond all doubt it was in abeyance. The master indeed was desirous to abandon, and had executed a deed of abandonment; but this was ineffectual until he had obtained a certificate of unnavigability from the authorities. For this certificate he applied, but was prevented from obtaining it by the action of the underwriters in the French courts. Indeed, so far was the master from having finally abandoned his vessel, that if the Dunkirk surveyors had reported unfavourably to the right of abandonment, it is fair to conclude he would have had the vessel repaired. The fact was, the question of abandonment was a question, to use the French phrase, "awaiting solution;" and, till it was settled, the master could neither abandon nor tranship. Then I think it clear that the French law will allow the master a reasonable time to determine whether he will carry on, and, in the event of his determining not to carry on, a further reasonable time whether he will tranship or deliver. The only question is, whether the delay required to settle the litigation in France between the shipowner and the underwriters can be considered a reasonable delay as between the master and owners of cargo. A consideration of the 296th article of the Code, of the opinions of the French lawyers given in evidence, and of the judgment of the Tribunal of Commerce at Dunkirk, leads me to the conclusion that, according to French law, the plts., as owners of cargo, were bound to await the solution of the question pending between the shipowner and his underwriters. This may seem hard upon the plts., seeing that the litigation did not finally close until the judgment of the Court of Cassation on the 22nd March 1864—after the lapse, that is, of more than a year from the date of the vessel putting into Ramsgate, and that this final judgment, like its precursors in the inferior tribunals, was against the shipowner, and is conclusive that the shipowner was, by French law, not justified against the underwriters in resisting their application. But as against this must be set several

considerations: first, that the plts. are estopped from denying the right of the deft. to resist, at all events in the first instance, the application of the underwriters, inasmuch as the plts. have admitted the accuracy of the Ramsgate surveys, showing that the repairs of the vessel would exceed her value; secondly, that though the final sentence by the Court of Cassation was not delivered for fourteen months, the date of the first sentence in the Marseilles court was on the 4th March 1863, a little more than a month after the date of the Ramsgate survey, and that the sentence being "*exécutoire sans appel*," might have been enforced immediately, and by the plts. themselves, to whom liberty to intervene was expressly reserved; thirdly, that on the 14th March 1863, the plts. arrested the vessel and took possession of the cargo partly on the 23rd March and partly in the following month of April. These acts of the plts. reduce the total delay to a few weeks only, and during this period, assuming that the surveys were right as admitted by the plts., the deft. was not idle; he sought to abandon the vessel; he exerted himself to procure the certificate of unnavigability, and, with this view, resisted the application of the underwriters to have the vessel removed to Dunkirk. Under these circumstances I must hold, that if the case be judged by French law, the plts. are not entitled to recover from the deft. But, in holding this, I do not decide that the master of a vessel would not be answerable to owners of goods for a long and unreasonable delay caused by a litigation improperly carried on by himself with his underwriters. But that is not the present case. Now, as to the law of the State of New York, assuming it to be the same as the English law, it will be found in many important respects to coincide with the French law. The chief authorities on the subject are collected in Mr. Brett's argument, in the case of *Blasco v. Fletcher*, 9 L. T. Rep. N. S. 169; 14 C. B., N. S., 147, to which the court is much indebted. The result may be stated as follows:—First, there is and can be no absolute obligation on the part of the master towards the owner of the goods to forward them in the original vessel, although of course it is the duty of the master in his capacity of agent to the shipowner to do so if he can: (*Benson v. Chapman*, 2 H. of L. Cas. 720.) Secondly, it has never yet been decided that the master in any case is bound to tranship; all that has been decided is, he is at liberty to tranship: (*The Hamburg*, 32 L. J. 162, Adm.; 8 L. T. Rep. 175, and cases there cited.) Thirdly, there is no absolute obligation to deliver at the intermediate port unless full freight be paid; and in the present case, as I have previously stated, full freight has never been offered by the plts.: (*Tyndall v. Taylor*, 4 El. & Bl. 227.) The only exception to this rule is, where the master declines either to carry on or to tranship—in short, abandons his contract altogether; in that case the consignee is entitled to his goods, without payment of any freight at all: (*Hunter v. Prinsep*, 10 East, 394.) In the present instance, I have already held, that the deft. did not decline either to carry on or to tranship. Indeed, supposing the deft. to have declined to carry on, the court could not, without positive evidence of the fact (which is here wanting), conclude that the deft. had declined to tranship; because, looking to his own interest, he would have preferred to tranship from Ramsgate to Dunkirk rather than pay the penalty under British law of forfeiting the whole of his freight. Fourthly, British law, like the French law, allows to the master a reasonable time within which he may exercise his option: (*Cargo ex Galam*, 3 N. R. 257.) And by "reasonable," I think must be meant that which, all circumstances being considered, is reasonable, and amongst these circumstances would be the *vis major* of the decree of a judicial committee: (*Hedley v.*

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Clarke, 8 T. R. 259.) Nor does it make any difference that the tribunal was a French one. Because it is for the British law to determine the rights of the owner of the goods against the master (as, for the purpose of the argument, I am now assuming), that is no reason that the British law should overlook the fact that the relations of the shipowner, the master and the underwriters were all governed by the French law; and the consequences of that fact, viz., that the master could not abandon or sell the vessel without having obtained a formal certificate of unnavigability, and that if the shipowner intended to insist on abandonment it was necessary for him to oppose the application of the underwriters. In short, in estimating what is a reasonable delay, the British law would practically take into consideration the same circumstances as the French law would. And I have already held that by the French law, as it appears to me, the *pts.* are not in a position to complain of a delay so far as it was occasioned by French litigation. The claim of the *pts.* then fails equally whether tried by the French law or by New York law, and I must pronounce against it with costs.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,
Barrister-at-Law.

Wednesday, March 8, 1865.

(Present—The Right Hon. Lord CHELMSFORD,
KNIGHT BRUCE and TURNER, L.JJ.)

THE FUSILIER.

Salvage of life—Liability of owners of cargo—Reasonable amount—Ratio to value of ship.

The owners of the cargo of a vessel, to which salvage services have been rendered, are liable to contribute to that portion of the claim of the salvors which arises from saving the lives of the passengers on board the vessel.

In such cases the first consideration is, the value of the services with reference to the amount of property rescued from peril; and the next is, how far the merit of these services is enhanced by the risk to life or property which has been involved in them.

In salvage services for the saving of life, passengers stand on the same footing as the crew, for they are equally "persons belonging to such ship."

The benefit to property is not the criterion of liability to the payment of life salvage.

This was an appeal from a decree of the Court of Admiralty.

A cause of salvage was promoted by the owners and crews of certain steam-tugs against the ship *Fusilier*, and the cargo and freight, in the circumstances stated below.

The owners of the ship and of the cargo entered separate appearances. The value of the ship, freight and cargo was: ship, 2500*l.*; freight, 2581*l.*; cargo, 52,000*l.* It was argued in the court below that neither ship, freight, nor cargo was liable. The learned Judge of the Court of Admiralty decreed that a sum of 2200*l.* should be paid for salvage services, and apportioned that sum among the salvors: (see 10 L. T. Rep. N. S. 699.) The owners of cargo appealed against that decree.

The *Queen's Advocate* and *Potter* for the apps.

Manisty, Q. C. and *V. Lushington* for the owner of ship.

Dr. Deane, Q. C. and *Clarkson* for salvors.

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The following authorities were referred to:

Merchant Shipping Act, sects. 458, 459;
The Westminster, 1 W. Rob. 229;
The Johannes, 1 Lush. 182;
Abbott on Shipping, 504;
The Vrede, 1 Lush. 322;
Toole v. Great Eastern, 11 L. T. Rep. N. S. 518;
The Undaunted, 1 Lush. 90.

Cur. adv. vult.

LORD CHELMSFORD. — The principal question raised upon this appeal is, whether by the 458th and 459th sections of the Merchant Shipping Act 1854, the owners of the cargo of a vessel to which salvage services have been rendered are liable to contribute to that portion of the claim of the salvors which arises from the saving the lives of the passengers on board the vessel. There was another subordinate question as to the amount of salvage awarded to some of the salvors, which will require a short notice. It is unnecessary to state the facts of the case, which were all agreed to on both sides. The apps., the owners of the cargo on board the *Fusilier*, the vessel salvaged, admitted that owners, masters and crews of the different vessels to whom salvage was awarded were entitled to remuneration for their services. The value of the ship was 2500*l.*; of the freight, 2581*l.* 17*s.* 8*d.*, and of the cargo, 52,000*l.* The learned judge of the Court of Admiralty pronounced the sum of 2200*l.* to be due to the salvors for the salvage services rendered by them to the vessel *Fusilier* and her cargo, and for their services in saving the lives of the passengers on board the said vessel, namely, to the masters, owners and crew of the steam-tug *Aid*, the sum of 700*l.*; to the master, owners and crew of the life-boat *Northumberland*, the sum of 700*l.*; and to the masters, owners and crews of the luggers, *Champion* and *Lotus*, the sum of 800*l.*, together with costs." The services rendered by the luggers were these: On the 3rd Dec. 1863, the *Fusilier* was aground on the Girdler Sand. The steam-tug the *Aid*, and the life-boat *Northumberland*, had been rendering assistance, and had succeeded in taking all the passengers out of the *Fusilier* and placing them in safety on board the *Aid*, to be conveyed to Ramsgate. The *Aid* received an order from the *Fusilier* to bring an anchor and chain from Ramsgate to be used in getting her off the sand. The weight of the anchor and chain procured for this purpose was found to be too great for the *Aid*, and it was necessary to employ the two luggers, the *Champion* and the *Lotus*, to carry them off to the *Fusilier*. These vessels anchored near to the *Fusilier* at midnight of the 4th Dec., and remained by her the whole night. On the following day unsuccessful attempts were made to tow the *Fusilier* off the sands. In the course of the afternoon of the 5th Dec. the gale, which had been blowing from the westward, changed to the southward, thereby lessening the chance of the *Fusilier* being got off the sand, and the luggers were ordered to proceed to the Nore and remain there till the weather moderated. They remained at the Nore from the 6th to the 10th Dec.; then, according to instructions, they returned to the *Fusilier*, which not being sufficiently light to float, although part of her cargo had been removed, they were ordered back to the Nore, still with the anchor and chain on board, and the *Fusilier* having been got off the sand on the 11th Dec., they followed her to the Blackwall Docks, and finally arrived at Ramsgate on the 14th Dec. The app. objected that the amount of 800*l.* awarded to the *Champion* and the *Lotus* for their services was excessive, and urged, as proof of the excess, that it exceeded the value of the two vessels. Their Lordships would always be slow to disturb an award of salvage by the learned judge of the Court of Admiralty, on the ground of his having given too large a sum to the

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salvors, unless they were satisfied beyond all doubt that he had made an exorbitant estimate of their services. The accident of salvage exceeding the value of the vessels is wholly immaterial. Undoubtedly the placing valuable property in peril may enhance the merit of salvage services, but it does not follow, on the contrary, that the trifling character of the property endangered will necessarily detract from the value of such services. It was not quite correctly said in argument at the bar, that what is risked is the first thing to be regarded, and the next the services which are rendered. It would have been more accurate to have reversed the order of these considerations, and to have said that the first thing to be regarded is the value of the services with reference to the amount of property rescued from peril; and the next, how far the merit of these services is enhanced by the risk to life or property which has been involved in them. Taking the grounds of claim to salvage in this order, it is obvious that it never can be an argument against the amount awarded to the salvors, that it exceeds the value of their property put in peril by the services. And even if such an argument could ever be urged, it hardly belongs to the apps. in this case. No complaint was made by them of the total amount of salvage awarded to the salvors in one entire sum of 2200*l*. It is only in the distribution of this sum amongst the different classes of salvors that there is any opening for their objection. Now the award of salvage is not of such a sum to one set of salvors, and such a sum to another, making a total of 2200*l*., but of that sum as the whole value of the salvage services which is afterwards apportioned amongst them according to their respective merits. The amount allotted to the *Champion* and the *Lotus* might be made the subject of dispute by the owners and crew of the other vessel, but it can hardly be objected to by the apps., who have never once suggested that, taking into account the value of the property rescued from peril, and the number of lives saved, the sum of 2200*l*. was too great a reward for the whole of the services rendered. There is, therefore, no valid objection to the decree upon this ground. The principal question in the case is one of great importance, and of some difficulty. Prior to the passing of the Merchant Shipping Act 1854, the Court of Admiralty, in a cause of salvage where no property had been rescued from peril, but where life had been saved, had no power to award anything to the salvors. But where both property and life had been saved, it was the well-established practice of the court to increase the amount of salvage, and thus indirectly remunerate the salvors for the merit due to their having saved life as well as property. Of course, as the salvage was awarded in one entire sum, the owners of the cargo as well as of the ship and freight contributed their proportion to the payment of this increased salvage, and so in a certain sense were rendered liable to the payment of what is called life salvage. Before the passing of the Merchant Shipping Act 1854, the Legislature had provided for the payment of a reward or compensation by way of salvage for the saving of the life of any person on board a ship or vessel in distress, by the 19th and 21st sections of the 9 & 10 Vict. c. 93, "An Act for consolidating and amending the laws relating to wreck and salvage." The provisions of these sections are substantially re-enacted in the Merchant Shipping Act 1854, and therefore need not be further noticed. In construing the 458th and 459th sections of the Act, on which the principal question arises, the recognised practice of the Court of Admiralty of indirectly rewarding salvors for the saving of human life by giving an increased rate of salvage on that account must always be borne in mind. The Legislature, in dealing with the subject of life salvage, must be

taken to have been aware of this practice, and to have intended to confer upon the Court of Admiralty a power of doing that directly which they had been so long in the habit of doing indirectly. And it must also be remembered that, by the established practice of the court, the owners of cargo were always rendered virtually contributory to the reward and compensation given to salvors for the preservation of life. Under these circumstances the provisions in the sections in question were introduced. The 458th section is in these terms, "Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal waters situate within the limits of the United Kingdom, and services are rendered by any person: first, in assisting such ship or boat; secondly, in saving the lives of the persons belonging to such ship or boat; thirdly, in saving the cargo or apparel of such ship or boat, or any portion thereof; and whenever any wreck is saved by any person other than a receiver within the United Kingdom, there shall be payable by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services or any of them are rendered, or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services or the saving of such wreck, the amount of such salvage (which expenses are hereafter included under the term salvage) to be determined in case of dispute in manner hereinafter mentioned. It is, perhaps, hardly necessary to advert to a point which was raised in the Court of Admiralty, but barely mentioned here, and certainly not insisted upon, that the persons saved being passengers on board the *Fusilier* were not in terms of the Act "persons belonging to such ship." It would be strange, indeed, if an Act intended to encourage and reward the saving of life which is in peril in consequence of the distress and danger of the vessel in which it is embarked, should be construed so as to make a distinction between those who are on board in different capacities and different relations to the vessel. It is a sufficient answer to such an objection to say that nothing is more common in popular language than to speak of the "passengers belonging to such vessel." The salvors, therefore, are entitled to a reasonable amount of salvage for the services rendered in saving lives of the passengers on board the *Fusilier*, and the only question to be considered is, whether the owners of the cargo are liable to contribute towards its payment? The general rule as to the parties liable for salvage is, that the property actually benefited is alone chargeable with the salvage recovered. But this rule is inapplicable in the case of life salvage, because it is difficult to imagine a case where the saving of the lives, either of the crew or of the passengers of a vessel in distress would be of any benefit, either to the vessel or to the cargo. The Legislature, therefore, could not have intended that the benefit to property should be the criterion of liability to the payment of life salvage. All that seems to have been contemplated is, that there should be included in the entire sum payable for salvage of ship and cargo, a distinct reward for the preservation of human life. It was argued on behalf of the apps., that when the 458th section, describing the services to be rendered in assisting the ship or boat, in saving the lives of the persons belonging to the ship or boat, and in saving the cargo or apparel of the ship, goes on to say, "and whenever any wreck is saved by the owners of such ship or cargo, or apparel, or wreck, a reasonable amount of salvage, the words must be read *reddere singulis*. But, although this might very well be if the section had confined the claim to the saving of the ship and cargo and apparel, then each species of property benefited would be

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have been chargeable; yet where, amongst the other subjects of claim, the saving of human life is included, there is no reason why that should be referred to the ship any more than to the cargo, since the one derives no more benefit than the other from the services rendered. The Legislature seems merely to have had in view the rewarding at a higher rate persons whose services were more meritorious from having rescued human life as well as property from peril, and almost to have assumed that the liability to the salvage would attach without any distinction upon all the owners of property exposed to the common danger. And as the salvage is always awarded in a gross sum, and under this section is to be increased by the reward for the saving of life, the owners of cargo since the Act are liable exactly to the same extent as before, with this immaterial difference, that there now is a distinct and express item of claim to increase the amount of salvage to which they are contributory, instead of the whole being estimated on a higher scale. But it is said that the 459th section of the Act shows that it must have been intended by the Legislature that the owners of the ship should alone be liable to the payment of life salvage, for it enacts that "salvage in respect to the preservation of the life or lives of any person belonging to any such ship or boat shall be payable by the owners of the ship or boat in priority to all other claims for salvage, and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives, the Board of Trade may in its discretion award to the salvors of such life or lives out of the Mercantile Marine Fund such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives." There is no doubt that this section creates some difficulty as to whether the Legislature intended that life salvage should be payable by any other persons than the owners of the ship; but if such was the intention it would have been easy to have expressed it, and the language of the section is capable of the construction that it merely fixes the limit of the shipowners' liability, and does not mean to render him solely liable to the payment of this description of salvage. And whatever doubt may be thrown upon the subject by this section, there are two subsequent sections of the Act, the 468th and 469th, which appear to be susceptible of the other interpretation than that the owners of cargo were intended to bear a proportion of the payment for life salvage. The 468th section enacts, "that whenever any salvage is due to any person under this Act, the receiver shall act as follows, that is to say: If the same is due in respect of services rendered in assisting any ship or boat, or in saving the lives of persons belonging to the same, or the cargo or apparel thereof, he shall detain such ship or boat, and the cargo and apparel belonging thereto, until payment is made or process is issued by some competent court for the detention of such ship, boat, cargo, or apparel. And thus expressly provided that, in the case of salvage being due for services rendered in saving the lives of persons belonging to the ship, the cargo is to be detained. And it is not intended that it is merely held as additional security with the payment of the salvage, for the 469th section enacts that whenever any ship, boat, cargo, apparel, or any sums so due as aforesaid (that is, for services rendered "in saving the lives of persons belonging to the ship"), the receiver may sell such ship, boat, cargo, wreck, and out of the proceeds of the sale all sums of money due in respect of

salvage. Whatever difficulty, therefore, may be supposed to be created by the 459th section, it seems impossible to read the two last-mentioned sections without being satisfied that they proceeded upon the ground of the owners of cargo being liable to the payment of life salvage. The object of the Legislature in different sections referred to seems to have been to give a legislative sanction to the practice of the Court of Admiralty of indirectly rewarding salvors for the preservation of human life by allowing the value of their services to be made the subject of a distinct estimate, but without intending to fix the responsibility of payment upon one class of owners of property involved in the common peril more than on another. Their Lordships, after much consideration, have arrived at the same conclusion with the learned judge of the Court of Admiralty, and they will therefore humbly recommend to Her Majesty that the decree appealed from be affirmed, and that the appeal be dismissed with costs.

Decree affirmed.

Waltons and Bubb, solicitors for cargo of *Fusilier*.R. Marshall for *Fusilier*.

Rothery and Co. for salvors.

HOUSE OF LORDS.

Reported by JAMES PATERSON, Esq. of the Middle Temple, Barrister-at-Law.

Friday, March 3, 1865.

GANN v. FREE FISHERS OF WHITSTABLE.

Fishery—Grant by Crown—Sea-shore—Right of navigation—Ancient grant—Anchorage tolls—Immemorial user.

The bed of all navigable rivers and of estuaries is vested in the Crown; but this ownership of the Crown is for the benefit of the subject, and is subservient to the paramount right of the subject to free navigation, and the right to anchor is a necessary part of the right of navigation. The grantee of the Crown takes the soil, subject to the same public right of navigation. Where, therefore, a subject claims anchorage tolls in respect of ships, it is not enough to prove a grant of the soil and immemorial user, for such a claim can only be sustained by proving that some consideration was given for the right to levy tolls, or a corresponding advantage to the public, such as the right of haven.

Where the proprietors of an oyster fishery claimed to levy tolls on all ships anchoring within the limits of their fishery, and proved immemorial user:

Held (reversing the judgment of the Ex. Ch.), that such a claim could not be sustained without proof of a consideration given.

Seemingly, the bed of the sea, to the extent of three miles from the shore, is not vested in the Crown, but merely the part lying between high and low water mark, the three miles limit being adopted by a conventional rule of international law: (per Lord Chelmsford.)

This was an appeal from a judgment of the Ex. Ch. affirming a judgment of the C. P.

The action, brought by the Company of Free Fishers and Dredgers of Whitstable, in the county of Kent, was *indebitatus assumpsit* for the anchorage, groundage and other toll and charges for and in respect of divers vessels before then brought and anchored by the deft. William Gann, and then being in, upon, and over certain ground and soil of the pts.

Plea, never indebted.

At the trial, which took place before Erle, C. J., at Maidstone, on 12th March 1861, the jury found a verdict for the pts., the learned judge holding, that

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under the circumstances the claim for anchorage was valid, but reserving leave to move for a new trial. On this motion a rule *nisi* was granted, which the Court of C. P. discharged (11 C. B., N. S., 387). Thereupon the deft. appealed to the Ex. Ch., which affirmed the judgment of the C. P., (9 L. T. Rep. N. S. 263). The deft. then appealed to the H. of L.

Prentice and White, for the app., contended for the following propositions:—1. That the soil of the sea where the app.'s vessel was anchored, being below low-water mark, was vested by law in the Crown, and could not be held by a subject. 2. That the Crown holds the soil of the sea as trustee to the public, and could only grant such soil to a subject subservient to the public rights. 3. That the finding of the jury did not affect the case, as if any charter was ever granted by the Crown affecting to grant a right to take toll for anchoring on the high seas, such charter would be void, and a grant of such charter could not be presumed. 4. That the public have the right to navigate the high seas without any exaction or toll being made or imposed upon them, and the Crown had no power to impose any toll on the public for passing or anchoring on the high seas without the authority of Parliament, unless the public had a *quid pro quo*.

Lush, Q. C., Denman, Q. C. and Needham for the resp.s.

The following authorities were cited:

Mayor of Colchester v. Brook, 7 Q. B. 339;
Blundell v. Catterall, 5 B. & Ald. 294;
Mayor of Nottingham v. Lambert, Willes, 111;
Duke of Somerset v. Fogere, 5 B. & C. 875;
Carter v. Murcot, 4 Burr. 216;
Fitzgerald's case 1 Mod. 106;
Bagot v. Orr, 2 B. & P. 479;
Mayor of Oxford v. Richardson, 2 H. Bl. 182;
Rogers v. Allen, 1 Cowp. 309;
Malcolmson v. O'Dea, 9 L. T. Rep. N. S. 93.
Mayor of Exeter v. Warren, 5 Q. B. 773;
Attorney-General v. Burridge, 10 Pri. 350;
Williams v. Wilcox, 8 A. & E. 333;
Hale De Jure Maris;
Chitty's Prerog. 143.

Cur. adv. vult.

The LORD CHANCELLOR.—My Lords, in consequence of some uncertainty in the statements of the special case, it was admitted by the app. at the bar of the House that the payment demanded by the resp.s. had been made to the lords of the manor of Whitstable from time immemorial, and that the vessel of the app. cast anchor within the limits of the oyster bed or fishery claimed by the resp.s. The case appears to me to depend on principles which have long been settled. The bed of all navigable rivers where the tide flows and re-flows, and of all estuaries or arms of the sea, is by law vested in the Crown; but this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with, the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown, therefore, grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right; and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right. The resp.s. claim to be entitled by Royal grant to a portion of the bed or soil (below low-water mark) of the arm of the sea which forms the estuary of the Thames, opposite to the manor of Whitstable, in the open sea, a sea way being the high road for the passage of vessels; and they claim

a sum of one shilling for every vessel that cast anchor within the precincts of that part of the bed or soil which is claimed by them. But this claim interferes with the free enjoyment of the right of navigation, subject to which the original grant must be taken to have been made, and cannot be supported on the ground of ownership of the soil. If the payment be claimed as an ancient anchorage due, some facts must be shown which either prove, or from which it can be inferred, that the soil claimed by the resp.s. was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public in respect of which the alleged grant was made; but nothing of the kind appears, and no such case can be presumed or inferred from the mere fact of an immemorial payment. No such case is made by the resp.s., and the payment is demanded merely on the ground of its having been immemorially made to the lords of the manor of Whitstable and they assigns in respect of the ownership of the site—an ancient oyster fishery now vested in the resp.s. Anterior to *Magna Charta*, by which such grants were prohibited, a several fishery in an arm of the sea or navigable river might have been granted by the Crown to a subject. The present fishery of the resp.s. must be taken to have been so granted; and the grant might include a portion of the soil for the purpose of the fishery. But this, like every other grant whenever made, must have been subject to the public right of navigation; and I cannot suppose that the establishment of oyster-beds for the private emolument of the proprietors could be regarded by the law as an equivalent to the public for the imposition of this tax (at its commencement no inconsiderable) on the right of navigation. Speaking with great respect to the learned judges in the court below, it appears to me that the error of the judgments consists in not adhering to the clear principle that the grant by the Crown of any part of the bed or soil of this estuary below low-water mark, whether for a fishery or not, must by the common law have been subject to the public right of navigation, of which the right to anchor is an essential part; that no property can be claimed in the soil except subject to this overriding right, and that there is no fact or circumstance to warrant a presumption that any corresponding benefit was given to the public in return for the imposition of this anchorage due. It is not suggested on either side that any further facts remain to be ascertained and I see no utility, therefore, in directing a new trial. I shall therefore humbly move your Lordships that the judgment of the court below be reversed.

LORD WENSLEYDALE.—My Lords, from the loose and unsatisfactory manner in which this case has been stated, I think that your Lordships will find difficulty in giving a satisfactory opinion upon some of the questions proposed to be raised. Speaking for myself I must say that I should wish a further inquiry to take place, and should therefore have advised to direct a new trial between the parties but having heard what my noble and learned friend the L. C. has said upon that subject, and being acquainted also in some degree with the opinion of my noble and learned friend opposite, I do not mean to persist in that, although my own notion is that it is consistent with the statement made upon the record that some real legal ground might be found for the establishment of the right of anchorage and therefore, so far as I am concerned, I would rather that the case should undergo further investigation. I perfectly agree that, from long enjoyment of a privilege in this case of demanding the payment of anchorage for a period of ninety years from 1776 to 1864, every reasonable presumption

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may be made that it has continued from time immemorial, but where the privilege requires more than immemorial enjoyment in order to be legal and valid some facts must exist besides mere long enjoyment; there must be some proof of these facts. Now to make a grant of anchorage in an arm of the sea where the *fundus maris* is the property of the Crown, but where every subject of the Crown has a right to navigate and cast anchor when and where he thinks fit as a necessary means of safe navigation, he cannot be deprived of that right by an usage, however long, unless there is some evidence of a sufficient consideration, of some advantage to the subject to enable the Crown to confer upon a particular individual the privilege of receiving compensation from the subject, and thus depriving the subject of his undoubted right. On this record it appears to me there is not sufficient evidence of any such facts. It is much to be regretted that the great inconvenience of the technicalities of a bill of exceptions or special verdicts, being now in many cases done away with, and a statement of facts allowed on rules to show cause instead, that somewhat more pains and care should not be taken to state all that is really material. I think that this case is wanting in this respect. Here is no proof, I think, except the enjoyment of anchorage for rather less than ninety years. The case is extremely defectively stated on both sides. Upon the case, as found, some matters are very clear. The manor of Whitstable existed before the statute of Quia Emptores, 18 Edw. 4, c. 15, and there was an immemorial company of oyster dredgers there, who had established before time of legal memory, and before the statute of Magna Charta, an oyster fishery on the sea-shore of Whitstable within the limits of that fishery as claimed by that company, but not occupied by oysters. The deft.'s vessel cast anchor. Whether the place in which the anchor was cast was actually within the limits to which the company were really entitled, and whether the anchor was cast because the vessel was in danger, or without absolute necessity, and purely voluntarily, is not stated. A claim for anchorage of 12 had been paid regularly since 1775 for anchoring within that portion of the manor in which the deft.'s vessel had cast anchor, and that was claimed to be taken as a customary payment for the use of the soil. In 1791 the manor of Whitstable and the fishery of Whitstable, being a royalty of fishery or oyster dredging within the said manor, were conveyed to Edward Foord and James Smith in equal moieties, as tenants in common in fee. By deeds of 24th and 25th Oct. 1792 (between whom does not appear), the manor was declared to be the property of Foord, Smith and Salisbury; and the rights of the lord of the manor in the fishery and the ground and soil thereof from the land boundaries of the fishery, and the customary payments usually made to the lords of the manor, for or on account of the anchorage of any ship or the landing of any goods, and also wrecks of the sea, were declared to be the property of Thomas Foord, his heirs and assigns. And the release contains a clause that the south-east and south-west sides of the sea beach at Whitstable, as the same is or shall be thrown up by the sea, shall be taken to be the boundary between the lands of Foord, Smith and Salisbury, and their heirs, and those of Foord and his heirs; and from thence into the sea as far as his fishery extends, whether the same be more or less than the quantity of land then belonging to the fishery. On the 30th April 1793, an Act of Parliament passed for incorporating the Company of Free Fishers and Dredgers; and on the 4th and 5th June 1793, Foord conveyed the royalty of fishery and fishing oysters, and the dues of anchorage and loading, to the Company of Free Fishers and Dredgers. The separation of what has

been termed the terrestrial parts of the manor from the fishery has been very properly held to be immaterial by the judges of both courts. Evidence was then given of a charter of Edward IV., exempting the inhabitants of the Cinque Ports from tarrage, and that the deft. was an inhabitant. But it is wholly unnecessary to trouble ourselves with the question whether anchorage was included in the word tarrage or not; for the lord of the manor of Whitstable's title dated for a period long before the reign of Edward IV., and the charter of Edward IV. could confer no exemptions. There is no difficulty also in saying that the jury would be perfectly right in presuming that the payments which had been made ever since 1775 were made from beyond time of legal memory to the lord of the manor of Whitstable; though that question does not appear to have been regularly put to them. Again, it might be properly presumed that the oyster fishery was granted to the lord of the manor. Again, it is hardly necessary to discuss the question whether the vessel, on the occasion that she cast anchor, was in peril or not, or the casting of anchor was, in a sense, voluntary. If the company have a right to anchorage in any case I should think they had it in all cases. But the principal difficulty I feel is, that the right to the soil of the *fundus maris* within three miles below low-water mark and to the fishery in it, though granted before Magna Charta, is undoubtedly subject to the rights of all subjects to pass in their vessels in the ordinary and usual course of navigation and to take the ground there, or to anchor there at their pleasure, free from toll, unless the toll is imposed in respect of some other advantage conferred upon them, or at least on the public. Subjects may have that advantage where they anchor in a port, in respect of the owner of the port being obliged to maintain it and keep it sufficiently repaired and ready for the reception of ships, and it may be that the Company of Dredgers may have had the anchorage assigned to them, beyond the time of memory, by the owners of the port, who may have had the rights of anchorage immemorially by virtue of the rights of the port. But the case supplies no materials to enable us to come to that conclusion. We are told nothing about the port, its position, or the obligation of the owners. It would be our duty, if the case admitted of it, to find a legal origin for a right so long enjoyed. It might also be due by right as a compensation for the injury, by anchoring within the limits of the oyster fishery, to the breed of oysters. The grant of an oyster fishery beyond the time of legal memory which would require some expense and trouble to establish and keep up, would, I am strongly inclined to think, justify the imposition of such toll within the limits where oysters are placed to breed. Colman, J., a very able judge, in the case of the *Mayor of Colchester v. Brooke*, 7 Ad. & Ell. 355, held that the party might be liable by ancient custom to pay to the lord of the manor a reasonable payment, as the owner of a soil where there were oyster beds, for grounding on the soil. But whether the place where the anchor was cast in this case was within the true boundaries of the immemorial oyster beds does not appear to be distinctly stated in the case; or whether the particular place where the anchor was laid was near an oyster bed or anchorage there, did then, or could at any time, prejudice the actual fishery, or its extension, does not appear. It might be perfectly innocuous. For these reasons I think that the plts. are not entitled to succeed. If my noble and learned friends agreed to it I should prefer that there should be a new trial; but I do not wish to persist in that against their opinion.

Lord CHURCHILL.—My Lords, the principal question intended to be raised between the parties

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in this appeal is, whether the resps., the Company of Free Fishers and Dredgers of Whitstable, who are owners of a fishery for the growth and improvement of oysters within the limits of the manor of Whitstable, are entitled to demand from the app. a payment for anchoring his vessel within the manor; their title to demand such payment being derived from the lord of the manor, whose predecessors have from time immemorial received a customary payment "for and on account of the anchorage of any ship or vessel within the said manor." The special case upon which the judgment of the Court of Ex. Ch. was given is very loosely and imperfectly drawn, and omits many facts which are necessary to raise with proper precision the point to be decided. For instance, it is not stated whether the claim for anchorage applies to all vessels, whether anchoring within the manor without any actual necessity, or driven to do so by stress of weather or by the exigencies of navigation. Again, it is said that the app.'s vessel was anchored upon a part of the land "claimed by the company," and that their claim was for anchoring on the soil alleged to be theirs, not stating that it actually was theirs. And instead of claiming the anchorage due, as a payment made from time immemorial, it is only alleged that "the pls. gave evidence to prove, and the jury found, that from 1775 continually, down to the present time, they, and those under whom they derived title, had from time to time claimed as of right to take, and had taken, the sum of 1s. from vessels casting anchor within that portion of the manor on which the deft.'s vessel had cast anchor, and that they claimed to take it as a customary payment for such use of the soil." The learned counsel on both sides expressed their desire to have the important question, whether, under the circumstances of the case, the anchorage due could have a lawful origin, decided by the House; and for this purpose it was admitted on the part of the app. that the payment for anchorage had been received by the lords of the manor of Whitstable without interruption from time immemorial, and that his vessel cast anchor upon the soil of the company within the limits of their oyster fishery, and that there was no particular necessity for her coming to an anchor there. It may be observed, that if the payment can legally be claimed in respect of the soil, there is the more reason why it should be paid by those who are driven by necessity or led by their own convenience to anchor upon it, because they are the persons who really derive benefit from it. In considering the question, it is necessary to bear in mind that it applies exclusively to the claim of a toll or due for anchorage on the high seas, and not in any port or haven. I mention this in the outset, because Mr. Lush, towards the close of his argument, contended that the toll might be regarded as being claimed in respect of a port, Whitstable being a limb of Faversham, one of the Cinque Ports. The claim had never been put upon this ground in all the former discussions in the courts below, and it is clearly insufficient to sustain it. Mr. Lush admitted that the resps. were not the owners of the port, but suggested the possibility of the lords of the manor having obtained the port by devolution from the original owner. There is no ground whatever for this presumption, and even if there were, the anchorage due is claimed, not in respect of the ownership of a port, but as a payment "of right made to the lord of the manor." The claim, too, is made solely in his character of lord, and not as the owner of a fishery, so that no question of competition between the right of passage of the public in the highway of the sea and the right of an individual to have a several fishery there can possibly arise. The question is thus simply raised, whether, at any period of the history of this country, the Crown

could have imposed upon the subjects a toll for anchoring their vessels upon the high seas within the limits to which its right to the soil of the sea shore extends, without any other consideration moving from the Crown but the permission to use the soil for this purpose. The case of the resps. is very shortly and distinctly stated by Erle, C.J. in his judgment in this case. He says: "The soil of the sea-shore to the extent of three miles from the beach is vested in the Crown, and I am not aware of any rule of law which prevents the Crown from granting to a subject that which is vested in itself. If the Crown did grant the soil of the shore in question, it may well be that the right of taking an anchorage toll of one shilling was granted with it. With great respect for the learned Chief Justice, I do not think it can be assumed as an unquestionable proposition of law that, as between the Crown and its subjects, the sea-shore to the extent mentioned is the property of the Crown in such an absolute sense as that a toll may be imposed upon a subject for the use of it in the regular course of navigation. In stating the right of the Crown in the sea-shore, the text writers invariably confine it to the soil between high and low water mark. The three miles limit depends upon a rule of international law by which every independent state is considered to have territorial property and jurisdiction in the seas which wash their coast within the assumed distance of cannon-shot from the shore. Whatever power the Crown may impart with respect to foreigners, it may be questioned whether the Crown's ownership of the soil of the sea to this large extent is of such character as of itself to be the foundation of a right to compel the subjects of this country to pay a toll for the use of it in the ordinary course of navigation. In the case of the *Mayor of Colchester v. Brooke* Lord Denman, in delivering the judgment of the court said: "The right of soil in arms of the sea on a public navigable rivers which the Crown has, independently of any ownership in the adjoining lands must in all cases be considered as subject to the public right of passage, however acquired, and a grantee of the Crown must of course take subject to such right." Now, if the public possess this paramount right of passage, it seems to be rather inconsistent with such right that they should be compelled to make any payment, however small, for the liberty to exercise it. And the resps. must be driven to contend, either that the right in its origin was no an absolute one, but that the Crown might permit only under certain conditions, or that the right to navigate does not include in it the power to anchor at pleasure. We were properly told in argument that in considering the question we ought not to confine our view to the present time, but should look to the early period of our history, when the powers of the Crown were much more ample and unfettered than they have since been. But I have searched in vain amongst the earlier authorities to find any clear and distinct proof of the Crown ever having claimed such a toll as that in question, without giving some benefit to the subject as a consideration for it. Indeed it was admitted in the argument for the resps. that some consideration for the right to take anchorage dues was necessary to be shown; but it was said that the mere use of the soil of the Crown by casting an anchor upon it was a sufficient consideration. None of the authorities referred to, however, support so wide a proposition. As far as I can discover, a payment for anchorage has always been claimed in respect of a port or harbour, the creation or erection of which is for the common benefit of navigation, and constitutes in itself a sufficient consideration. Lord Hale, in enumerating the duties which arise from the *jus domini* or franchise of a port mentions, "Anchorage, as a prestation or toll for every anchor cast there;" (*De Portibus Mar*

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p. 74.) It was said by the counsel for the resps., that it appears from the same high authority that toll might be taken for anchorage in a haven. This is true, but apparently only where the haven is within the limits of the franchise of a port. Hale describes "a haven" to be a place of a large receipt and safe riding of ships, so situate and secured by the land circumjacent that the vessels thereby ride and anchor safely, and are protected by the adjacent land from dangerous and violent winds: (p. 46.) But he afterwards uses the word to denote a portion of the port itself, as in p. 54, where he says, "In the consideration of a port there are these two things involved, viz., first the consideration of the interest of the soil both of the shore or town, which is the *caput portus*, and of the soil of the haven itself wherein the ships do ride and apply." And that the ownership of the soil of a haven, unless it is within a port, will not entitle the owner to take anchorage dues for the use of it, is laid down in p. 73, in these terms: "The ownership or property is where the King or common person, by charter or prescription, is the owner of the soil of a creek or haven where ships may safely arrive and come to the shore. This interest of propriety may, as hath been shown, belong to a subject. But he hath not thereby the franchise of a port, neither can he so use or employ it, unless he hath had that liberty time out of mind, or the King's charter." And after stating that the owner may bring in his own goods not customable, &c., he adds, "but he may not use it as a public port, nor take toll or anchorage there." Williams, J. quotes this passage in delivering his judgment in the C. P., and says that "it clearly assumes that if the owner had a Royal grant he might take anchorage." I do not, however, understand this to be Lord Hale's meaning. It appears to me that the correct interpretation of his language is, that without the King's grant or charter a subject cannot have the franchise of a port, and without having a port he cannot take toll or anchorage, which are dues arising from and pertinent to it. The counsel for the resps. in their argument in support of their claim insisted strongly upon the analogy presented by the public fishing in the sea, which, *prima facie*, all subjects of the realm possess, and of which they might formerly have been deprived by a grant from the Crown to an individual of an exclusive right of fishing. But, in the first place, it does not appear that such a right of several fishery was ever granted in what may be called the open sea. Lord Hale states that "the King may grant fishing within a creek of the sea, or in some precinct, that hath known bounds, though within the main sea" (p. 17); and, again, that "a subject may by prescription have the interest of fishing in an arm of the sea, in a creek or part of the sea, or in a certain precinct or extent lying within the sea" (p. 18). But even if such a grant could have been lawfully made so as to extend beyond these defined limits, yet the right of several fishery appears to have been always subservient to the right of navigation; and the King could not enable the owner of a fishery to do anything which, though within the competency of an exclusive owner, was an obstruction to the passage of ships upon the seas. In the *Mayor of Colchester v. Brooke*, Colman, J. suggested that although parties who wish to go up a navigable river are not obliged to wait for a particular time of the tide, yet it might be law that if they take the ground they may be liable to make a reasonable payment to the owner of the soil. This opinion is not stated with any positiveness; but yet it may be correct as applicable to a navigable river, because the owner of the soil may have given consideration for the payment by rendering the river

navigable. The necessity of discovering a *quid pro quo* for the claim in this case has driven the resps. to contend that the establishment of the oyster fishery belonging to the resps., being for the public benefit, might be considered to be a sufficient consideration for the imposition of the toll upon anchorage. It is difficult to understand how a benefit wholly unconnected with navigation, and extending to the public generally, can be made the legal foundation for a local payment from vessels anchoring within a particular district. There is no reason why, if good to this extent, it should not be sufficient for a similar charge for all vessels casting anchor upon the soil of the Crown in any other part of the seas round this island. I have, therefore, arrived at the conclusion that the undoubted right of the public freely to navigate the highway of the sea cannot be restricted by the imposition of any payment whatever, unless some good consideration can be shown for it; and the resps. have failed to establish any other ground of title in the lords of the manor to the anchorage due than the mere use of their soil. This I consider to be wholly insufficient to justify the demand in question, unless it can be held that the right of navigation does not include the right of anchoring, which can hardly be seriously contended. I admit that every intendment ought to be made in favour of a payment which has been uninterruptedly received time out of mind, supposing it presumably capable of a lawful origin; but, not being able to discover any ground upon which this claim of an anchorage due could have had a legal commencement, the case of the *Mayor, &c. of Nottingham v. Lambert*, in Willes, is an authority for showing that no length of prescription can give it validity. I think the facts sufficiently admitted to render a new trial unnecessary. I am therefore of opinion that the judgments of the Ex. Ch. and of the Court of C. P. ought to be reversed, and judgment to be entered for the deft.

Judgment reversed.

App.'s attorneys, Mercer and Mercer, for Josiah Towne, Margate.

Resps.' attorneys, Nethersole and Speechly, for S. and E. Plummer, Canterbury.

COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

Nov. 16, 1864, and Jan. 30, 1865.

HOBBS v. HENNING.

Marine insurance—Concealment of material fact—Contract of war—Neutral ship—Judgment of foreign prize court—Grounds of condemnation—Estoppel.

To a declaration against an underwriter on a policy of insurance on goods on board ship from London to Matamoras, with leave to call at any intermediate port, alleging a loss by one of the perils insured against, the deft. pleaded that the goods were contraband of war, shipped by the plt. for the purpose of being imported into a port in a State in North America engaged in hostilities with the United States of America, and were liable to be seized by the cruisers of the United States, and that the ship mentioned in the policy was carrying goods and papers which rendered her liable to be seized by such cruisers, and that the ship and goods were seized accordingly, which was the loss complained of. The plea further averred that the deft. at the time of making the said insurance was ignorant of the said circumstances:

Held, that the plea was a bad plea, because it was consistent with it that the goods were being sent from a neutral port to a neutral port in a neutral ship, ~~and~~

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therefore were not liable to seizure; because the plt. was not shown to be responsible for the ship's papers or the character of any goods besides his own; and because the carrying of the papers did not alone work a forfeiture, but was only evidence from which a cause of forfeiture might be inferred:

Held, further, that the allegation of the deft.'s ignorance of the facts stated in the plea did not make the plea good.

The sentence of a prize court condemning a vessel is not conclusive as to any matter of fact which was the ground of condemnation, unless that matter of fact is clearly and certainly stated in the judgment as a ground of condemnation:

Held, also (per Erle, C. J. and Byles, J.), that although the finding of a matter of fact in the judgment of a prize court may, when adduced in evidence, be conclusive evidence of the fact so found, it cannot be pleaded as an estoppel.

The declaration was on a valued policy of insurance on goods shipped on board the *Peterhoff*, from London to Matamoras, with leave to call at intermediate ports, underwritten by the deft. The policy was in the ordinary form, and was set out in the declaration, which alleged that the goods were shipped by the plts., or J. Wetherall and Co. on their behalf, and that they, or one of them, was interested in the goods to the amount insured at the time of the loss; that the ship sailed on the voyage, and during the voyage and the continuance of the risk, the goods were, by the perils insured against, wholly lost.

Third plea:

That the said ship, with the said goods on board thereof did not sail on the voyage covered by the said policy as in the declaration alleged.

Seventh plea:

That the said goods were contraband of war, and were shipped by the plt for the purpose of being sent to and imported into a port in North America, situate in a state then and now engaged in hostilities with the United States of America, and were liable to be seized by the cruisers of the said United States as contraband of war, and that the ship in the policy mentioned was, during the continuance of the risk, and at the time of the loss, carrying goods and papers which rendered her liable to be seized by such cruisers, and that the said ship and goods were seized accordingly, which is the loss complained of; of all which the deft. before and at the time of making the said insurance and subscribing the said policy was wholly ignorant.

Eighth plea:

That before action brought the said ship and goods were during hostilities between the United States of America and the Confederate States seized by the cruisers of the said United States of America, and carried into a port of the said United States, and such proceedings were thereupon duly and according to the law of nations had that afterwards and before action brought, it was duly adjudged and determined by the United States Prize Court, held at New York, in the said United States, and there having competent jurisdiction in that behalf, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea, and that the said ship with her said cargo was not truly destined to the port of Matamoras, but on the contrary was destined to some other port or place, and in aid and for the use of persons then at war with the said United States of America, and in violation of the law of nations, and that the ship's papers were simulated and false as to her real destination, and thereupon it was considered and adjudged by the said court then having competent jurisdiction in that behalf that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly, which is the loss complained of. And the deft. says that before action brought all things had happened and all times had elapsed necessary to make the said judgment binding on the plt., and to entitle the deft. to plead the same as an answer to this action, and the said judgment so pronounced was absolutely final and conclusive, and is still in full force and effect, not reversed, annulled, or otherwise vacated.

First replication issue on the pleas.

Second replication to the seventh plea:

That the voyage in the declaration and in the policy of insurance mentioned was a voyage to a certain port in Mexico, to wit, to Matamoras, and not a voyage to any port in North America, situate in a state then or now engaged in hostilities

with the United States of America, and that the said goods, while proceeding on the said voyage to the Matamoras, were seized as in the declaration alleged.

Demurrer to the seventh and eighth pleas.
First rejoinder to so much of the first replication as related to the third plea:

The deft. says that the plt. ought not to be admitted to issue on the third plea, and deny the truth thereof, says that before action brought the said ship and goods were during hostilities between the United States of America and the Confederate States, seized and carried into a port of the said United States, and such proceedings were thereupon duly and according to the law of nations had that afterwards and before action brought it was duly adjudged and determined by the United States Prize Court held at New York in the said United States, and there having competent jurisdiction in that behalf, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea, and that the said ship with her said cargo was not truly destined to the port of Matamoras, but on the contrary was destined to some other port or place, and in aid and for the use of the enemies of the said United States, and in violation of the law of nations; and that the said judgment was simulated and false as to her real destination, and that the said judgment was considered and adjudged by the said court to be competent jurisdiction in that behalf, that the same should be condemned and forfeited, and that the same was and is still in full force and effect, and is not reversed, annulled, or otherwise vacated.

Third rejoinder to the second replication to the seventh plea:

The deft. says that the plt. ought not to be admitted to plead the second replication to the seventh plea, says that, before action brought, the said ship and goods were during hostilities between the United States of America and the Confederate States seized by the cruisers of the said United States, and carried into a port of the said United States, and such proceedings were thereupon duly and according to the law of nations had that afterwards and before action brought it was duly adjudged and determined by the United States Prize Court held at New York in the said United States, and there having competent jurisdiction in that behalf, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea, and that the said ship with her said cargo was not truly destined to the port of Matamoras, but on the contrary was destined to some other port or place, and in aid and for the use of the enemies of the said United States, and in violation of the law of nations; and that the said judgment was simulated and false as to her real destination, and that the said judgment was considered and adjudged by the said court to be competent jurisdiction in that behalf, that the same should be condemned and forfeited, and that the same was and is still in full force and effect, and is not reversed, annulled, or otherwise vacated.

Demurrers to the second replication and to the first and third rejoinders. Joinders in demurrer.

Temple, Q.C. (Hannen with him) was for the plaintiff.—As to the seventh plea, his argument was that which was adopted in the judgment of the court, which was adopted in the judgment of the court. He cited 1 Arnould's Marine Ins. 766. As to the eighth plea he contended that the judgment of a prize court is conclusive fact upon which condemnation proceeded, so unless that fact is distinctly stated in the judgment; and that the judgment of the United States Prize Court had not in terms decided that the goods were not bound for Matamoras:

Dalgleish v. Hodgson, 7 Bing. 495;
Fisher v. Ogle, 1 Camp. 418;
Bernardi v. Motteux, 2 Doug. 575;
Calvert v. Bovill, 7 T. R. 523;
Polard v. Bell, 8 T. R. 434;
Salucci v. Woodmass, 3 Doug. 345;
Duchess of Kingston's case, 3 Smith's L. C. 691;
Arnould's Marine Insurance, 734, 2nd ed.
Bell v. Carrstairs, 14 East, 374;
Horneyer v. Lushington, 15 East, 46;
Oswell v. Vigne, 15 East, 70;
Bell v. Bromfield, 15 East, 864;
Steel v. Lacy, 3 Taunt. 285.

Lush, Q.C. (Sir G. Honyman with him) was for the defendant.—As to the seventh plea, referred to in *Wheaton's International Law*, 727, 806, 1 Kent's Com. 139, 142;

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The Gaslight and Coke Company v. Turner, 5 Bing. N. C. 666; and in *Ex. Ch. 6 Bing. N. C. 324*;
Lightfoot v. Tennant, 1 B. & P. 561;
Langton v. Hughes, 1 M. & S. 593;
Waymatt v. Reed, 5 T. R. 599.
 as to the eighth plea:
The Franklin, 5 Rob. Adm. Rep. 217;
Lothian v. Henderson, 3 B. & P. 499; 2 Smith's L. C. (5th ed.) 692.

Jan. 30.—ERLE, C. J. delivered the judgment of the court.—The declaration is on a policy of insurance on goods from Matamoras in the usual form, and alleges a loss in the course of that voyage by a peril insured against. The seventh plea alleges that the goods were contraband of war, and were shipped by the plt. for the purpose of being sent to, and imported into a port in a state engaged in hostilities with the United States, and were liable to be seized by the cruisers of the United States as contraband of war, and that the ship was carrying goods and papers which rendered her liable to be seized by such cruisers; and that the ship and goods were seized accordingly, which is the loss complained of: of all which the deft., at the time of subscribing the policy, was wholly ignorant. The demurrer to this plea raises the question, whether the facts alleged show a defence, and our answer is in the negative. The plea was probably intended to be a defence, on the ground of the concealment by the plt. of material facts, but we do not find sufficient averments to establish that defence, as we read the plea. We take it to be consistent therewith, that the goods of the plt. were sent from a neutral port to a neutral port in a neutral ship. The allegation in the declaration that the goods were sent from London to Matamoras is admitted by the plea, and although we cannot notice judicially the situation of Matamoras, so neither can the deft. rely on its proximity to the Confederate States, or make any unfavourable inference therefrom against the plt. If the goods were in the course of transport from a neutral port to a neutral port, the better opinion (see the authorities collected in Ortolan's *Diplomatie de la Mer*, vol. 2, p. 181) seems to be, that war does not give a belligerent any right to seize them on account of their quality. The allegation that the goods were shipped for the purpose of being sent to an enemy's port is an allegation of a mental process only. We are not to assume therefrom either that the plt. had made any contract or provided any means for the further transmission of the goods into the enemy's state, or that the shipment to Matamoras was an unreal pretence. If the goods were in a course of transmission, not to Matamoras, but to an enemy's port, the voyage would not be covered by the policy, and that defence is raised in direct terms by the third plea. Here the allegation does not deny the destination to the neutral port to which the insurance relates, but introduces a purpose existing in the mind of the assured, after the termination of the voyage insured for, as to the ulterior disposition of the cargo and ship. It is consistent with that purpose, as here alleged, that the plt. made the consignment for mercantile profit, as the end to be attained by him; in other words, that he knew of an effective demand for warlike stores at Matamoras, and was induced to send a supply by the expectation of a high price, and that he expected that the purchase would probably be made on behalf of the Confederate States, and in that sense had the purpose that the goods should pass into those States. In this sense, price was the ultimate end which he proposed to attain, and Federal and Confederate are alike indifferent as means, provided he attained at end; and in a neutral territory he might lawfully sell to either. The distinction between a mere mental purpose that an unlawful act should be done,

and a participation in the unlawful transaction itself, is made clear by referring to the cases of *Hobman v. Johnson*, Cowp. 341, and *Lightfoot v. Tennant*. In the first, the plt. in a foreign country sold goods to the deft., knowing that he purposed to smuggle them into England, and in one sense, the plt. there sold them with the purpose that they should be so smuggled; but as he did not participate in any way in the unlawful transaction, the mere mental purpose did not avoid the contract of sale. In the second case (*Lightfoot v. Tennant*), the plt. sold goods to the deft., to be delivered abroad, in order that they should be sent unlawfully to the East Indies. After a verdict for the deft., on a plea alleging this fact, on motion for judgment *non obstante veredicto*, the objection was raised that the mere mental purpose of the vendor did not avoid the contract of sale; but the objection was answered by suggestion of the fact that the plt.'s participation in the unlawful transaction went beyond the mere mental purpose, that he was taken to be a party to the whole project, and to be acting in the execution thereof in the sale which was the cause of action; and upon these facts the contract was held void. For these reasons we think the averment, "that the goods were shipped for the purpose of being sent to an enemy's port," construing these words as we have done, is insufficient to establish that they were liable to seizure for breach of neutrality. The effect of the other allegations in the plea depends much on that which we have last considered. If goods fit for immediate use in war, and therefore of the quality denoted by the term "contraband of war," are passing between neutrals, it seems that they are not liable to seizure by a belligerent. The right of capture, according to Sir Wm. Scott's opinion, expressed in the case of the *Imina*, 3 Rob. Adm. Rep. 168, attaches only where they are passing on the high sea to an enemy's port; they must be taken *in delicto*, that is, in the actual prosecution of a voyage to an enemy's port. The liability, therefore, of these goods to lawful seizure, although their quality was such as might make them contraband of war, depended on their destination, and they were not liable, unless it distinctly appeared that the voyage was to an enemy's port. The further allegation, that the ship was carrying goods and papers which made them liable to be seized, is immaterial as a ground of defence; for these goods are not alleged to be the plt.'s goods, and the plt. is not shown to be responsible for the ship's papers, nor for any other goods than his own; also, if the voyage was to a neutral port, and the law be as above stated, the facts alleged do not show that the ship and goods were liable to seizure. Furthermore, the allegation that the ship was carrying papers which made it liable to be seized, is not strictly accurate in reference to the law of nations. The papers alone are not a breach of neutrality, so as to work a forfeiture of the ship, they are only evidence from which a cause of forfeiture may be inferred; they may be evidence either of enemy's property or of destination to a blockaded port, or to an enemy's port with contraband, and so be evidence on which the judge may find a cause of forfeiture proved, but they are in themselves no cause of forfeiture. The language of Sir Wm. Scott, in the case of the *Franklin*, speaking of simulated papers, and saying that "this fraudulent conduct justly subjects the ship to confiscation," must be taken with reference to the question before him, whether the ship should be confiscated as well as the contraband cargo; and his decision is in the affirmative, and rightly, if the shipowner was knowingly conveying contraband to an enemy's port, of which knowledge papers indicating a false destination would raise a presumption. These being the premises alleged in the plea, the allegation that the

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deft. was ignorant of them is of no avail. If the defence is, that the plt. has concealed a fact which he was bound to disclose, the plea should have been framed accordingly. As it stands, it shows no wrongful act on the part of the plt. towards the insurer. If the proper construction of the premises in the plea be different from that which we have come to, still the allegation of the deft.'s ignorance of those premises would not make the plea a good defence on the ground of concealment. The insurance is against capture, lawful and unlawful, and the deft., in order to discharge himself, must show a concealment by the assured. Mr. Phillips, in his book on Insurance, vol. 1, s. 531, says: "Concealment is where one party suppresses or neglects to communicate a material fact." It is quite consistent with anything appearing on this record that a letter from the plt. may have miscarried, or that the deft. may have remained in ignorance without any default of the plt. The allegation, therefore, of the ignorance of the deft. is of itself immaterial, and has no effect in avoiding the policy; and the result is, that we consider the seventh plea to be bad. We proceed now to the eighth plea, which in substance alleges that the ship did not sail on the voyage covered by the policy. The third plea pleads the same ground of defence as a fact in direct terms. The eighth plea pleads it by way of estoppel, setting out a judgment, in which the fact is supposed to be stated as a matter whereon the court had adjudicated, and then relying on the judgment to estop the plt. from denying that fact. The same estoppel is the ground of two rejoinders to two replications, and the eighth plea and the two last rejoinders may be considered together. The deft., in support of these pleas, relied on the rule that sentences of foreign courts deciding questions of prize are to be conceived as conclusive evidence in actions on policies, on every subject immediately and properly within the jurisdiction of the court on which it has professed to decide judicially (see the opinion of the judges in *Henderson v. Lothian*, 3 Bos. & P. 499); and he contended that the judgment, as pleaded, showed that the voyage on which the ship was captured was not a voyage from London to Matamoras. The plt., in answer, contended, first, that the decision does not profess to decide the matter of fact on which the deft. relies; secondly, that if it had decided that matter of fact, still the decision could not be pleaded as an estoppel, and we are of opinion that the plt. is right. The rule making the decision of a court, which creates the *status* of a person or thing, conclusive upon all persons as to the existence of that *status*, has been regarded as salutary. Sentences of nullity of marriage in the Ecclesiastical Courts, of forfeiture in the Exchequer, of settlement of paupers by the quarter sessions, and of prize in Prize Courts, are examples. In *Hughes v. Cornelius*, 2 Show. 322, the rule was applied within salutary limits, where, in trover for a ship by the former owner, the sentence of a prize court was held conclusive to show that the property had been changed. See *Doe v. Oliver*, 2 Sm. Lead. Cas. 634, where the whole subject is fully considered with much learning and lucid arrangement. But the rule making the finding of a judge upon any matter of fact upon which he professed to form his judgment conclusive upon all the world has been supposed to be anomalous, and to produce pernicious results. See Lord Eldon's opinion in *Lothian v. Henderson*, 3 Bos. & P. 499, to that effect. Also in *Geyer v. Aguilar*, 7 T. Rep. 695, Lord Kenyon speaks of the rule as a source of the grossest injustice. So in *Donaldson v. Thompson*, 1 Camp. 429, Lord Ellenborough says, speaking of *this rule*, that the doctrine rests on a case in Shower, which does not fully support it, and the practice of reviewing these sentences often leads in its conse-

quences to the grossest injustice. We would further refer to the rule in *Dalglish v. Hodgson*, p. 504, where Tindall, C.J. says, "that the sentence of the prize court is not conclusive as to the ground of condemnation, if there be any ambiguity as to what the ground is. It must not be left in uncertainty whether the ship was condemned on one ground which would be justified by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country." Although these sentences must be received in evidence, still the precedents show that they have been carefully examined for the purpose of seeing whether the matter of fact, in proof of which they are adduced, was clearly and certainly found by the judge whose sentence is relied on. *Bernardi v. Motteux*, Doug. 575; and *Culbert v. Boul*, 7 Term. R. 523, are two amongst numerous cases which might be cited to this effect. We now proceed to examine the judgment set out in the eighth plea. The condemnation appears to us to have been for carrying contraband of war intended to be for the use of the enemy of the United States, and the sentence, so far from deciding that the ship with the said goods did not sail on the voyage from London to Matamoras, appears to us to express that she was on that voyage when she was taken. The first matter of fact found by the judge is, that the ship was knowingly on the voyage aforesaid, that is from London to Matamoras, laden with contraband. The second is, that the said ship with the said cargo was not truly destined to Matamoras, a nautical port, and for the purpose of trade and commerce within the authority and intendment of public law; but was destined for some other port or place, and in aid and for the use of the enemy and in violation of the law of nations, and that the ship papers were simulated and false. If the judge meant to find that the ship was not bound to Matamoras, but on the contrary to a port of the enemy, the finding would have been so expressed. But if he meant to find she was bound to Matamoras, not for the purpose of commerce with the inhabitants thereof, but for the purpose of such a sale or transfer there as that the Confederates should get the use of the cargo, all the words of the judgment have their usual meaning and effect. We have no jurisdiction to inquire into, nor are we at all considering the validity of the legal grounds of the judgment; our task is to ascertain what matter of fact the judge found to exist. He may have considered that trading with the Confederates was not within the authority and intendment of public law, and was a violation of the law of nations, and that a voyage to Matamoras, in order that the plt's goods and cargo should be transferred from there to some port or place for the use of the Confederates, was a destination of the cargo for such port or place, and made it liable to confiscation, and that the papers were simulated and false, because they represented Matamoras as the final destination, and concealed a purpose of ulterior destination. By this examination of the judgment set out in the plea, we are led to the conclusion that the learned judge did not intend to find as a matter of fact either that the ship had not sailed on a voyage to Matamoras, or that after having so sailed she had deviated from that voyage. But, on the contrary, he condemned her as a lawful prize, because she was in prosecution of that voyage, with an ulterior destination, either for the cargo or the ship, or both as above explained. The judgment, therefore, does not sustain the inferences of fact which the deft. seeks to establish thereby, nor does it sustain his claim of right to prevent the plt. from showing the truth in respect of this fact, and the plea is therefore bad. So far that is the judgment of myself and my brothers Byles and Keating. The other

that plea is the opinion of my brother and myself, and my brother Keating assent or dissent. We are further on that the eighth plea and the same as last mentioned are bad, because of a matter of fact in the course of adjudication of a prize court cannot be an estoppel in the cases where, if adduced, the judgment would be received as evidence of the fact so found. Although there are numerous in which the evidence has been adduced, still there is no precedent for the fact as an estoppel that we have been told. The principle on which the evidence is admissible is not clear. Lord Eldon, in *Lothian v. Wemyss*, says it was introduced at first against the owner to prove the loss, and was afterwards used by the owner for their defence. Lord Ellenborough, in *Ogle*, speaks of it as a matter of comity between the two courts. Such evidence does not in any legal description of matter of fact nor is it guarded by the safeguards against which restrict matters of estoppel in respect of matters of subject-matter. In *Burrs v. Jackson & Co.* 585 (cited in *Doe v. Oliver*, 2 Sm. 276), Knight Bruce, V.C. gives an elaborate opinion on estoppel, and lays down the principle (p. 595): "Generally neither the judgment of a court nor of an exclusive jurisdiction is evidence of any matter which came in question before it, though within the scope, or of any matter incidentally cognisable, of the matter to be inferred by argument from the judgment; and that a judgment is final only for its purpose and object. The admissibility of matters of prize courts upon matters of fact is confined within these limits; and although we have here to hold that they are admissible as they have been in decided cases have established their utility, yet beyond that limit we would not consider that the attempt to use them as an estoppel does transgress that limit, and is no precedent for it. In relying upon the fact of any precedent, we do not consider the objection is confined to a matter of form; it is in some degree the tendency of such to defeat real truth by technical proof, and they have the effect of preventing the foreign law from being misunderstood or misapplied. A judgment can only be adduced in evidence, and is not pleadable as an estoppel, the meaning of which is ascertained by adducing in evidence the proceedings and other matters referred to in the judgment. In *Bernardi v. Motteux*, Lord Stowell admitted a French *arrêt*, and expressed his opinion that the *procès verbal* on which the judgment was founded ought to have been given in evidence at the time by the plt., to show the meaning of the judgment—that is, to show whether the judgment was intended to find enemy's property, and so to reach of warranty of neutrality, or to condemn on an *arrêt* against throwing papers overboard. So in *Christie v. Secretan*, 8 T. R. 192, by the special case, had power to refer to the proceedings before the Tribunal de Commerce, to a printed copy of a treaty between the United States and America, to show the meaning of the treaty. So in *Pollard v. Bell*, the court referred to the purpose to the judgments in the Tribunal de Commerce at Bordeaux, in the Tribunal de Gironde, and in the Cour de Cassation. So in *Dalgleish v. Hodgson*, the circumstance which the ship entered the river was admitted in evidence to show the meaning of the judgment, that is to show whether she was intended for breaking blockade, or for disobedience to a municipal law of Brazil. These are considerations which induce us to adhere to

precedent and reject the plea of estoppel. If the judgment here in question should be hereafter adduced in evidence in support of the third plea, it may be that it would be found to refer to pleadings and doctrines of public law, and to various classes and items of proofs relating to acts and declarations of parties on board, and so forth, and if the judgment was given in evidence, these matters so referred to therein might be also adduced in evidence, and might show that the fact was not found by the judge as supposed by the deft. This inquiry would not tend to impeach the conclusive effect of the judgment upon the question of prize, but might prevent a mistaken assumption from prevailing over the truth. For these reasons we give our judgment on these demurrers for the plt. We consider the eighth plea open to the further objection that it does not plead the issuable fact in respect of the voyage, but the evidence which might prove that fact. It pleads the *probans* and not the *probandum*; but as this objection would not apply to the rejoinder to the replication to the third plea, we do not further advert to it.

Judgment for the plt.

Attorneys for the plt., *Reed and Phelps.*

Attorneys for the deft., *Waltons and Bubb.*

Feb. 9, 10 and 27, 1865.

FARNWORTH AND ANOTHER v. HYDE.

Marine insurance—Total loss—Notice of abandonment—Sale of cargo—Province of the jury.

In an action against underwriters on a policy of insurance on a cargo of timber, it was proved that the ship, on board of which the timber was, had run aground and been sold with its cargo by the master, under the advice of competent surveyors, and the jury found that the sale of the ship was justified, because the cost of the repairs of the ship would have exceeded its value when repaired, and that the sale of the timber was justified, because it was not practicable in a mercantile sense to convey it to its destination. No notice of abandonment of the cargo was given to the underwriters before the sale:

Held (per Erle, C.J., Keating and M. Smith, JJ.), that such a sale, supervening on the existing state of things, amounted to an actual total loss of the cargo, so as to render it unnecessary for the owner of the cargo to give notice of abandonment to the underwriters before the sale:

Held, further, that the question whether or not the sale was under the circumstances justifiable, was entirely a question for the jury:

Held (per Byles, J.), that the necessity of selling the timber must be strictly proved, and that if the timber could have been carried to its destination and there sold to greater advantage than if it had been sold with the ship, the master was not justified in selling it, and that the verdict of the jury was not conclusive, and that on the facts of the case, as set out in the judge's notes of the trial, the court were bound to review it.

This was an action brought by the plts., who were timber merchants, against an underwriter, upon a policy of insurance on timber on board the *Acorn*, from Quebec to Liverpool. The plts. claimed as for a total loss, and the deft. paid into court 23 per cent. on the valued amount as for a partial loss.

The vessel sailed from Quebec with the timber on board and got aground and was subsequently frozen up for the winter in the river St. Lawrence. She was surveyed repeatedly, and, in the opinion of some of the surveyors, it would have been prudent

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to sell the ship and cargo as they lay, but at the suggestion of Lloyd's agent at Quebec the sale was deferred till the spring, in the hope that they might be saved. Ultimately, however, they were sold; and the purchaser, taking advantage of an unusually high tide, got the ship off and sold her in Quebec. No notice of abandonment was given to the underwriters till after the sale.

The action was tried at Liverpool, before Pigott, B., and a verdict was found for the plts. for the full amount claimed, the jury finding that the sale was justifiable. The deft. had leave to move, and the judge's notes set out the value of the ship and cargo, and the amount which would have been required to repair the ship, and various facts relating to what would have been realised by the sale of the timber, supposing it to have taken place in Quebec or in England. It is unnecessary to set out here the details of the evidence, as the material facts are stated in the judgment of the majority of the court, and the separate judgment of Byles, J.

E. James, Q. C., for the plts., obtained a rule to enter a verdict for the deft. or a nonsuit, on the ground that there was no total loss, and that the sum paid into court covered the amount due on a partial loss.

Brett, Q. C., Mellish, Q. C. and *C. Russell* showed cause.

E. James, Q. C. and *T. Jones* supported the rule.

The following authorities were referred to:

- Rosetto v. Gurney*, 11 C. B. 176;
- Reimer v. Ringrove*, 6 Ex. 263;
- Roux v. Salvador*, 3 Bing. N. C. 266;
- Knight v. Faith*, 15 Q. B. 649;
- Idle v. The Royal Exchange Company*, 8 Taunt. 755;
- Cambridge v. Anderton*, 2 B. & C. 691;
- King v. Walker*, 33 L. J. 325, Ex.; 9 L. T. Rep. N. S. 259;
- Arnould's Marine Insurance*, sects. 95, 363, 1025;
- 2 Phillips' Marine Insurance*, sect. 1463;
- Stevens on Average*, 40;
- Fleming v. Smith*, 1 H. of L. 513;
- Stewart v. Steele*, 5 Scott's New Rep. 517.

Cur. adv. vult.

Feb. 27.—*M. SMITH, J.* delivered the judgment of Erle, C.J., Keating and M. Smith, JJ. —This action was on a policy on timber in the ship *Avon*, from Quebec to Liverpool. The *Avon* was frozen-up in the passage down the St. Lawrence, and, after survey, the ship and the cargo were sold by the master to one purchaser by separate sales. At the trial the jury found in effect—first, that the sale of the ship was justified, on the ground that the cost of the repairs would have been greater than the value of the ship when repaired; and secondly, that it was right to sell the cargo, because it was not practically possible, in a mercantile sense, to have carried it to its destination; that is to say, because the costs of bringing the cargo, added to the amount of depreciation, would not have left any appreciable margin of profit to the owners. Upon these findings the verdict was entered for the plt. for a total loss; and the rule nisi to alter the verdict, and enter it for a partial loss, on the ground that there was no evidence on which the finding of the total loss could be supported, is now to be disposed of. Upon the first question, relating to the ship, we have to say whether there was evidence to support the finding that the sale was justifiable; and our answer is in the affirmative. We do not propose to state the evidence at length; but, taking the report of the *surveyors on the 2nd May*, and the statement of *Julien, who purchased on the 7th May*, we think

there was evidence for the jury that the ship was in imminent danger of destruction, and that a sale appeared to afford the only reasonable hope of saving any part of her value. Then upon the second question, relating to the cargo, we have to say whether there was evidence to support the finding that it was right to sell it, because the cost of bringing the whole or any part of it to its destination would have exceeded the value thereof then and our answer is again in the affirmative. We are not called on to say on which side, in our opinion, the balance of evidence inclines. If there was reasonable evidence for the jury, the evidence stands; and we think there was. We have been embarrassed by the estimate appended in sequel to the judge's notes, by which it appears that a comparison of the supposed cost of carrying the timber to its destination, with the supposed value thereof, showed a possible profit of 209l. The estimate, taken alone, seems at first sight inconsistent with the finding in respect of the cargo; but as this estimate is followed by the note that the jury might say if anything was to be deducted for loss of quantity, we consider that there was evidence to the effect that in the process of saving the timber there would probably be a loss of 25 per cent. in quantity; and, although it might follow that in the case of a diminution of the quantity of timber a deduction should be made for some of the estimated expenses, such as freight, in the like proportion, yet some of the expenses might be a constant quantity, subject to no deduction, such as the expense of bringing labourers to make rafts. All this was for the jury; and we cannot say that there was not evidence to support the verdict. Then, upon the facts so found by the jury, is the plt. entitled to recover for a total loss? As the cost of carrying the cargo to its destination would have been greater than its value on arrival, it is not disputed that there would have been a constructive total loss, if notice of abandonment had been given: (*see Rosetto v. Gurney*, 11 C. B. 176; and *Reimer v. Ringrove*, 6 Ex. 263.) But no such notice was given, and we are therefore to say what is the legal effect of this sale so found by the jury to have been right and necessary. We answer, that such a sale supervening on the existing state of things was an actual total loss. A right sale passes the property; and when the property is passed from the assured by reason and in consequence of a peril insured against, the cargo is actually lost to him, as much as if it was destroyed. We are aware that the interest of the underwriter may at times be sacrificed by sale, where the ship or cargo might have been saved wholly or partially, if notice of abandonment had been given; but we are also aware that, if a right sale, such as was here proved, is not held to be an actual total loss, it would be for the interest of the assured, where a notice of abandonment would make a constructive total loss, to give a notice of abandonment, and leave the ship or cargo to perish unsold; and so the benefit of salvage from a sale would be lost by reason of the delay required for notice of abandonment. It must rest with the tribunal that has to deal with the questions of fact to guard against fraud and wrong; and the sale of the master ought not to be found right or valid unless it was the best that could be done for the interest of those concerned, with reference to the circumstances, including the time and manner of sale, and so, in a mercantile sense, necessary. The opposing considerations for and against requiring notice of abandonment where the proper insured exists in specie are stated in *Roux v. Salvador*, 3 Bing. N. C. 266; 4 Scott, 1; and *Knight v. Faith*, 15 Q. B. 649, 657. In *Roux v. Salvador* the policy was on hides from Valparaiso to Bordeaux. The ship was forced into Rio, and decomposition

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[C. P.]

he hides began by reason of a peril of the sea; and, because it was found not to be practicable to carry them to their destination, on account of the expected progress of decomposition, they were sold at Rio; and the loss was held to be total, although there was no notice of abandonment. The judgment is of a court of error—it is powerful in reasoning and in learning; and, although it relates to a cargo of perishable goods in the course of decomposition, yet it extends to all cases where the adventure is brought to an end by a peril, and the goods are taken out of the power of the assured in the course of their voyage, either by physical laws working decomposition, or by political laws working detention and sale by a court, or by circumstances of distress and danger creating what may be described as a mercantile necessity for a sale. The present case is an example of such circumstances, where a stranded ship was in danger of falling to pieces, and the expense and risk of rafting the timber, and reloading it on transhipment, and carrying it to its destination, was supposed to exceed the value of the cargo when there. Such a case seems expressly included in the part of the judgment in *Roux v. Salvador*, 3 Bing. N.C. 279, where it is said that if goods damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, in the case of perishable goods, in such a state that they cannot in safety be reshipped; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if, by any circumstances over which he has no control, they can never be brought to their original destination; in any of these cases the circumstance of their existing in specie at that forced termination of the risk is of no importance; the loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation, or other insuperable necessity. The judgment in *Knight v. Faith*, 15 Q. B. 657, accords with *Roux v. Salvador* in holding that there may be a total loss without abandonment, when there has been a right sale caused by urgent necessity, with full proof that everything was done *optima fide*, and for the real benefit of all concerned. There is an apparent difference of opinion in these two decisions as to the degree of imminent danger which should be held to be such urgent necessity as would justify a sale. But the sufficiency of the degree of danger is within the province of the jury, and it is useless to attempt to define a degree without a standard for measure, as Lord Campbell observes on the degree of fraud; but those observations are relevant to the caution required from the jury, not to the law of the case when the necessity for the sale has been properly formed. In *King v. Walker*, 9 L. T. Rep. 259, it was not necessary to decide that a valid sale from necessity was an actual total loss without any notice of abandonment; but the court clearly sanctioned the rational principles respecting the effect of a valid sale from necessity laid down in *Roux v. Salvador* saying, "It may not be easy to understand why notice of abandonment should be required in a case where the vessel cannot be made to sail except at an expense for repair which no reasonable man would incur, and is therefore properly and, in a sense, necessarily sold for the old materials." In these three cases all the authorities relating to abandonment are fully reviewed, and no useful object would be gained in repeating the review. We consider that we act on the principles laid down in *Roux v. Salvador* in holding that the jury, finding that the sale was right under the circumstances in evidence before them, found that there was an actual total loss with benefit of salvage, although the cargo existed in specie at the time of the sale, and there was no notice of abandonment. This is the judgment of my Lord, my brother Keating and myself.

My brother Byles has written a separate judgment, which he desires me to read. He agrees in the principle, but he takes a different view of the facts.

BYLES, J.—I agree with my Lord and the rest of the court, that if the cargo was sold by the captain of the vessel because the expense of forwarding it to its destination would have exceeded its value when so forwarded, it was rightly so sold; that a sale under such circumstances would have changed the property; and that there would have been, not merely a constructive, but an actual total loss, of the timber. I also agree that, in the case of such an actual total loss, no notice of abandonment is necessary. But in all cases of alleged constructive loss, where the captain takes upon himself to sell the ship, and still more so when he sells the cargo, the necessity of so doing ought to be strictly proved, and the jury are not at liberty to act on conjecture. It is plain, on the figures appended to the report of the learned judge, that the expenses of bringing the cargo to Liverpool would not have equalled the value of the cargo, when brought there in its integrity, by 209*l*. The jury have found that there would have been a diminution of the quantity of timber to this extent, and therefore that the expenses would have equalled the value of the diminished cargo, which alone could have been actually brought home. But I can find no evidence on the judge's notes to support this amount of deduction from the original quantity of the cargo. It may be that there would be some deduction; but it may also be that, if any, there would be a very much smaller deduction. Again, on the assumption that such a diminution of quantity were proved, the expenses of bringing home the cargo should be calculated on the larger quantity of timber contained in the whole original cargo. It is possible (but I see no evidence to prove it) that the expenses of landing and rafting would be the same whether any portion of the cargo were lost or not. This might depend on the period at which the loss of quantity took place, of which there is no evidence that I am aware of. But, assuming the landing and rafting to be constant quantities, yet the freight, both original and additional, is at so much per load, and is calculated by the assured on the quantity contained in the entire cargo. But the freight actually payable for sending a smaller quantity would be less. Therefore, in calculating the expense of sending the diminished cargo home, too much is charged for freight. But any deduction from the charge for freight makes the sale unlawful, and indeed destroys the claim for a constructive total loss; for it does not appear on the figures that, even if the freight could be charged on the original quantity, it would do more than bring the expenses of sending home the cargo up to the value of the cargo so sent home; no excess of charge beyond the value of the cargo is shown. I much regret that in this preliminary question I am unable to concur with the rest of the court; but though I fear I must be in error, I do not feel at liberty to yield my opinion; for, if it be correct, the plaintiff will still be entitled to hold his verdict to the extent of a partial loss, the amount of which loss is by agreement to be settled by competent parties. And on a careful consideration of the evidence, I feel strongly that this result would be more likely to advance the real justice of the case than the verdict as it now stands.

Rule discharged.

ADM.]

THE MARIE JOSEPH.

[ADM.]

ADMIRALTY COURT.

Reported by ROBERT A. PRITCHARD, D.C.L., Barrister-at-Law.

Aug. 1, 2, and Nov. 8, 1864.

THE MARIE JOSEPH.*Bill of lading—Stoppage in transitu—Fraud—Bond fide transferee for value.*

A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a bond fide transferee for valuable consideration, without regard to the title of the parties who make the transfer.

Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of the bill of lading without his authority, and if he have not authorised the transfer, a subsequent bond fide transferee for value cannot make title under it to the goods.

Indorsees of a bill of lading accepted a bill of exchange in payment, and, as further security, deposited the bill of lading with the shippers' agent; but, having afterwards fraudulently obtained possession of the bill of lading, indorsed it to a bond fide transferee for value:

Held, that the shippers had not thereby lost their right to stoppage in transitu.

This was a suit under the provisions of the Admiralty Court Act 1861, s. 6, for breach of duty and breach of contract by the master, in respect of goods shipped on board the above-named vessel.

On the 11th Feb. 1864, Walter Stericker, of Kingston-upon-Hull, as agent for Messrs. Maxwell and Dreossi, of Bordeaux, in France, agreed with Messrs. Scarborough and Tadman, of Kingston-upon-Hull, for the sale to them of sixty tons of linseed cake, they paying for the same by their acceptance at three months' date. The linseed cake was accordingly, on the 11th Feb., shipped at Bordeaux on board the *Marie Joseph*, owned and commanded by Jean Marie Gloahac. Messrs. Maxwell and Dreossi indorsed the bill of lading unto order or assigns, and drew a bill of exchange for the price of the linseed cake on Messrs. Scarborough and Tadman, and forwarded both the bill of lading and the bill of exchange to Stericker, their agent. On the 16th Feb. 1864, Stericker brought both the bill of lading and the bill of exchange, and also a policy of insurance upon the linseed cake, to the office of Scarborough and Tadman. Mr. Scarborough, one of the members of the firm, accepted the bill of exchange, and thereupon Stericker delivered to him the bill of lading duly indorsed by Maxwell and Dreossi, together with the policy of insurance. A conversation then took place, in which some mention was made by Stericker respecting the implication of the firm of Scarborough and Tadman in the affairs of one David Moor, which affairs, since the preceding Christmas, it had been rumoured were embarrassed. Thereupon Mr. Scarborough said, "Let him (Stericker) keep the bill of lading." Accordingly Scarborough handed back the bill of lading and the policy to Stericker, and Stericker signed and gave to Scarborough a receipt for the same in the following terms:

Hull, 16th Feb. 1864.

Memorandum, that I have received of Messrs. Scarborough and Tadman, of Hull, a bill of lading and policy of insurance for about sixty tons of linseed cake, shipped ex *Marie Joseph*, dated at Bordeaux the 11th Feb. 1864, and which I hold as security against their acceptance of Messrs. Maxwell and Dreossi's draft for 437l. 1s. 4d., due on the 14th May 1864, until the cakes are sold or the vessel arrives.

WALTER STERICKER.

On the 18th Feb. 1864, Mr. Walter Tadman, the other member of the firm of Scarborough and Tadman, called on Stericker, and stated to him that his

firm had sold the linseed cake to a Mr. Craydale who would accept a bill of exchange against the bill of lading, and Mr. Tadman asked for the bill of lading. Trusting to this representation, Stericker returned the bill of lading to Tadman; but the representation was untrue, as no such sale had taken place. On the same day, the 18th Feb., but shortly afterwards, Messrs. Pease and Co., the plts., who are bankers in Hull, sent a message to the office of Scarborough and Tadman, requesting one of the members of the firm to call upon them at the bank. It appeared that, on the 18th Jan. preceding, Messrs. Scarborough and Tadman owed the bank 1985l., and were liable on bills which the bank had discounted, and which were running, to the extent of 4847l., while the bank held security only for 850l. On the 18th Feb. the debt had been reduced to 1187l., but the discount liabilities still amounted to 4000l. or thereabouts. Upon receipt of the message Mr. Tadman went to the bank, and took with him the bill of lading, and also some warrants for some re grass. There he saw Mr. Arthur Pease, a member of the banking firm, who asked him to reduce the debt of the firm, but did not ask him for security. Tadman thereupon offered to him as a security the bill of lading, the policy of insurance, and the warrants, and this offer Mr. Pease accepted. Tadman then indorsed the bill of lading, and delivered it with the other documents, to Mr. Pease, and memorandum, in the usual form, was drawn up, to the effect that the documents were delivered as security for advances then made, or which might afterwards be made, giving authority to the bank to sell the goods and place the proceeds to the credit of the depositors. This memorandum was not signed by Mr. Tadman, in consequence, as it is sworn, of a mere oversight. Mr. Pease also deposed that at the date of this transaction he did not know the history of the bill of lading, but assumed the bill of lading to be as it purported, the lawful property of Scarborough and Tadman; that he had no suspicion that Scarborough and Tadman were insolvent or on the eve of insolvency, though he knew, through the banking account, that they were mixed up with the dealings of Mr. Moor. Mr. Moor did not become bankrupt till the 4th March.

On the 7th March Scarborough and Tadman also stopped payment. On the 5th March Messrs. Maxwell and Dreossi telegraphed to Stericker to stop the delivery of the linseed cakes, and announced that a bill of lading indorsed to Stericker would be sent by the same post. This was accordingly done, and on the 7th March Stericker received a bill of lading, being a duplicate of the one indorsed to Scarborough and Tadman, except that it was indorsed to him (Stericker). The vessel arrived in Hull on the 5th April. A water clerk came on board first, and told the captain that he thought two persons claimed the cargo, and advised him to be careful. He was shortly afterwards followed by Johnson, the clerk of the solicitors to the plts. Pease and Co., who presented the bill of lading held by the plts., and claimed the cargo. When it was first presented it was not indorsed by Messrs. Pease and Co., the plts.; in fact it was not indorsed till the 7th. On the same day, the 5th, but later, Stericker came on board and presented his bill of lading, and eventually obtained possession of the cargo, the captain receiving an indemnity from Maxwell and Dreossi. On the 9th April Messrs. Pease and Co. commenced this action against the *Marie Joseph* and her master, and on the 16th April an appearance was entered on behalf of the master.

The evidence was taken *videlicet* before the court itself.

Green's Advocate and Clarkson appeared for

, Q. C. and C. P. Butt for the defts.

WASHINGTON.—The case may at once be of any difficulty occasioned by the second lading indorsed to Stericker, as that bill was indorsed long subsequently to the indorsement of the first bill of lading by Tadman to the defts. If Messrs. Maxwell and Dreossi had a right *in transitu*, they did not, in order to exercise their right, indorse another bill of lading. The question is, whether Messrs. Maxwell and Dreossi had a right to stop *in transitu* as against Messrs. Pease and Co. the plts. If the first bill of lading, indorsed upon the delivery of it to Scarborough and Co., had been at once indorsed by them for valuable consideration to Pease and Co., the intermediate processes of the bill being indorsed by Scarborough to Stericker, and again indorsed by Stericker to Tadman, Messrs. Maxwell and Dreossi would have lost their right to stop *in transitu*, as against the bank. This is clear upon the authority of *Lickbarrow v. Mason*, 5 Term Rep. 111, 1 Smith L. Cas. 681, and other cases. It is, however, without disputing (which is impossible) the authority of that case, the applicability in the present instance. The question is, that the indorsement to Pease and Co. of the first bill of lading was not an indorsement for valuable consideration. But I cannot doubt that the consideration averred by Messrs. Pease to cover, the first bill of lading, was, in fact, the advance of money, and also the value of the goods, and I know, from undoubted authority, that it is customary for bills of lading to be indorsed to cover such banking accounts, and no objection exists as to the validity of such transactions. The cases cited have really no bearing on the present case. Reliance is placed on the case of *v. Thompson*, 5 Maule & Sel. 351, and upon the fact which holds good even under the late Acts, that a factor, known as a factor, who pledges goods entrusted to him as a factor, for past advances made to himself, is not a fiduciary character. In the present case, the bill of lading was undoubtedly delivered as a security for such past advances. But Scarborough and Co. were not factors, they were owners, and they dealt with as such by the bank. The case of *Patten v. Thompson*, and the cases of *7 v. Ruding*, 6 Beav. 376, and *Re Westzinthus*, 5 B. & A. 817, plainly show that the use of a bill of lading as a security to a bank for advances, if made by the owner, or by a factor authorized to make such pledge, takes precedence over the right of the vendor to stop *in transitu*. Another objection was, that this indorsement for valuable consideration, was nevertheless fraudulent, because fraudulent against creditors of Scarborough and Tadman. But, to use the words of the judgment in *Van Casteel and others v. Booker*, 91, "to defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent against the body of creditors, by proving that it was voluntary on the part of the bankrupt, and a violation of bankruptcy; and if it is made in consequence of the act of the creditor, it is not fraudulent." In the present case, it has not been shown that the indorsement of the bill of lading to Pease and Co. by Tadman in contemplation of bankruptcy. Mr. Pease swears he did not suspect the bankruptcy of Scarborough and Tadman to be insolvent; it is shown that it was made in consequence of the fraud of Mr. Pease, for Mr. Pease pressed for a discharge of the debt of the firm, and it was only

then that Tadman offered the bill of lading as a security. On these grounds, therefore, it seems to me clear that, if Scarborough and Tadman had, immediately on receiving the bill of lading, indorsed it to Pease and Co., the vendors would have lost their right to stop *in transitu* as against the lien of the bank. But there is another most important fact to be considered. The bill was returned to Stericker and obtained back from him by a fraudulent representation on the part of Mr. Tadman, and he, being so fraudulently possessed of it, transfers it to Messrs. Pease. In the case of *Gurney v. Behrend*, 3 Ell. & Bl. 638, Lord Campbell points out the distinction between a bill of lading and a bill of exchange. He says: "*Prima facie* the defts. had a right to stop the wheat on 2nd Feb., for it was still *in transitu*, and they were unpaid owners. The burden is upon the plts. to prove that they had become the owners, and that the right to stop *in transitu* was gone. For this purpose it is not enough that they had become *bond fide* holders of the indorsed bill of lading for valuable consideration. A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bond fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bond fide* transferee for value cannot make title under it as the shipper of the goods. The bill of lading only represents the goods, and in this instance the transfer of the symbol does not operate more than a transfer of what is represented." Applying this doctrine to the present case: the bill of lading was obtained back from Stericker by Tadman upon false representations—by fraud; it was then negotiated without Stericker's consent, or the consent of the vendor, and contrary to the understanding between Stericker and Tadman. This fraudulent conduct of Tadman, then, rendered invalid the indorsement to Pease and Co., and they, although quite innocent of any participation in it, must bear the consequences. I pronounce against the plts., of necessity, with costs.

Jan. 17 and Feb. 28, 1865.

THE MARY ANN.

Salvage—Appeal from magistrates—"Sum in dispute" The Merchant Shipping Act 1854, s. 464—Jurisdiction—Delay in taking objection.

Upon an application to magistrates for an award of salvage, the plts. claimed the sum of 200l., but afterwards made a formal demand of 40l.:

Held, that in such a case the High Court of Admiralty had no jurisdiction to entertain an appeal from the magistrates' decision.

An objection to the jurisdiction of the court may be taken at any time during the progress of the cause.

This was an appeal from a decision of two of Her Majesty's justices of the peace at Southampton, in a salvage claim brought by the owners and master and crew of the steam-tug *Phoenix*, against the above-named vessel, a brig of 213 tons. The value of the property saved was 1600l., and the salvors claimed a sum not exceeding 200l., and subsequently made a formal demand for 40l. The justices, after hearing the evidence adduced, adjudged that no salvage was due, and from their decision the present appeal was prosecuted.

Deane, Q.C. and V. Lushington appeared for the

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appe, the owners of the *Phoenix*, and argued that the appeal should not be allowed, as the sum in dispute was under 50*l*, and that therefore the case was within the provisions of the 464th section of the Merchant Shipping Act 1854. The following is the section referred to:

If any person is aggrieved by the award made by such justices . . . as aforesaid, he may in England appeal to the High Court of Admiralty of England . . . but no such appeal shall be allowed unless the sum in dispute exceeds fifty pounds.

The *Admiralty Advocate* and *E. C. Clarkson* for the resps., the owners of the *Mary Ann*, contra.

Dr. LUSHINGTON.—This is an appeal from the award of two justices of the peace at Southampton, in an alleged cause of salvage. The owners of the ship have denied the jurisdiction of the court, on the ground that the sum in dispute did not exceed 50*l*, it being enacted by the 464th section of the Merchant Shipping Act that no appeal shall be allowed unless the sum in dispute exceed 50*l*. The term "sum in dispute" is a somewhat vague expression, but would, in my opinion, have reference, in a case like the present, to any specific sum that has, in fact, been demanded and refused as a remuneration for the services rendered. I lay out of my consideration all loose expressions occurring in conversation between the master of the *Mary Ann* and the master of the *Phoenix*; but it appears that the Southampton Steam Towing Company, who are the plts. in this suit, made a formal demand for 40*l*. It is true that the plts. might not, by sending in this demand, absolutely debar themselves from suing for a larger sum; but they have not throughout the proceeding ever demanded a sum exceeding 50*l*. On the contrary, if when the parties went before the justices they demanded any specific sum, it was this sum of 40*l*. This, therefore, constitutes the sum in dispute, and, it being under 50*l*, no appeal can be entertained by this court. It has been contended that this objection is taken too late, but I apprehend that if at any time the court discovers, and the facts show, that the court has no jurisdiction, it cannot proceed further in the cause. The delay of one or both parties cannot confer jurisdiction. I must dismiss this appeal with costs.

Jan. 28 and 29, and March 3, 1865.

THE SPIRIT OF THE OCEAN.

Limited liability—Registered owners—Liability of part owners.

The owners of a ship who are entitled to the privilege of limited liability are not necessarily those whose names appear upon the ship's registry.

The master, also part owner of a ship, sold his shares, but before the transfer had been registered, the ship, through the master's default, came into collision with and damaged another vessel:

Held, that the master was not an owner so as to affect the privilege of limited liability.

Part owners are not partners, and therefore, semble, that the error or misconduct of one part owner would not forfeit the right of his co-owners to limited liability.

This was a suit for the purpose of limiting the liability of the owners of the British ship *Spirit of the Ocean*, 577 tons.

The *Spirit of the Ocean*, on the 22nd Nov., came into collision with the *Robin Hood*, whose owners and the owners of the cargo of the *Robin Hood*, having brought an action against the *Spirit of the Ocean*, the present action was brought for the purpose of asserting the right of the owners of the

Spirit of the Ocean to the privilege of limited liability.

E. C. Clarkson appeared for the plts.

F. LUSHINGTON for the defts.—The master, who was then also part owner, was on board the vessel at the time of the collision, and to blame for it. The 54th section of the Merchant Shipping Act Amendment Act 1862 shows that in such a case there can be no limited liability, at least as respects the master. The following is the section referred to:

The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say . . . Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat; be answerable in damages . . . to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage.

Dr. LUSHINGTON.—Upon the assumed state of facts in this case several questions of law were raised, and especially that the co-owners of the master were not entitled to limited liability. But it is first necessary to consider what is the real state of the facts, and whether the master was or was not a co-owner at the time within the meaning of the statute. The state of facts appears to be this, that Roulle Cary, the father of the master, owned several shares in this vessel, and that, early in the year 1864, in order to enable his son to become master, he transferred to him six shares. In the month of July his son, by bill of sale, re-transferred to his father the shares, which bill of sale was not registered at the time of the collision. Then the question is—assuming the son to be on board and to blame for the collision—whether he was a part owner, as the bill of sale was not registered? The solution of this question depends upon the meaning which the court must ascribe to the term "owners" in the 54th section of the Merchant Shipping Act Amendment Act 1862. If the court is bound by the terms of that section to hold that it means registered owners, whatsoever may be the circumstances of the case, then the court must hold, of course, that the master was an owner in respect of this collision. Very properly in the argument reference was made to many of the other sections of this Act, and, indeed, to prior Acts of Parliament; but I must confess that they throw but a very dim light upon the question I have to determine. Neither am I helped much by the fact that the former state of the law, which rigidly excluded all equitable interests, and held that nothing could be noticed which did not appear upon the registry, is now altered. The cases, too, which have been cited, though incidentally throwing some light upon the arguments raised, are not so pertinent to the present question as to afford me very material assistance as to deciding it. I bear in mind, however, though for very different purposes, that the present state of the law does allow cognisance of equitable interests. The object of the statute clearly was, to relieve from limited responsibility those who, as owners of the ship, had the government thereof, and were entitled to the advantages arising therefrom, and exposed to the risk consequent upon navigation, provided always that those owners had not incurred any blame as to the collision in question. Negligence or misconduct would forfeit this, which I may call a privilege. Supposing one part owner alone to blame, it appears to me contrary to the principle on which that enactment is founded, to hold that his error or misconduct would affect the innocent co-owners, for it is personal blame which is the ground of the forfeiture from limited liability. It must be recollected that co-owners of ships are not partners. I think that I am justified in giving to the word

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this latitude of construction, and that I voted in this opinion by the judgment in *Dickson*, 2 B. & Al., though that judgment did not in a case of collision and upon a differently worded. The terms of the c. 159, s. 1, are both singular and plural: person or persons who is or are owner or part owner or owners, of any vessel, shall answer for any damage arising by reason of the fault or privity of such owners." Those of the 54th section of the Merchant Shipping Act 1854 are singular: owner of any sea-going ship, or share in it, in cases where any of the following or without his actual fault or privity." Those of the 54th section of the Merchant Shipping Act Amendment Act 1862 are plural, viz.: "The owners of any ship, British or foreign, shall not, in cases of the following events occur without actual fault or privity." But although this is found in the phraseology, it seems impossible to infer therefrom that the Legislature intended to impose upon one owner a new liability for the faults of his co-owner. Whatever, therefore, the opinion might be with respect to Mr. Cary, I could not hold that his co-owners were liable by his fault or negligence. A contrary opinion, I think, be opposed to the spirit of the law and not reconcilable with justice. But as to Mr. Cary, jun., does the absence of a bill of sale compel me to consider him an owner? The meaning of the 54th section of the Merchant Shipping Act Amendment Act 1862? Is it that it is the duty of the vendee, and not the vendor, to register his title, as without registration the vendee would not be entitled to the benefits of ownership. But apart from registration, the execution of the bill of sale entirely transfers the title of the vendor. Such is the case by the law of nations, and I think, too, by the law of this country. Registration is but a record of a fact done—a record of the sale, not a condition of the sale; and though formerly, unless the bill of sale had been made, the law would not take cognizance of any interest in shipping, yet this was the result of statute only, and as the execution of a bill of sale then divested the interest in the ship where not prohibited by statute, such is the present state of the law, the statutory provisions having now been repealed. I cannot doubt the reasons upon which limited liability was introduced apply to Mr. Cary, sen. equally with owners, and I see nothing in the Act to prevent giving that construction to the 54th section. I pronounce for the limitation of liability, and the costs occasioned by opposing it.

Thursday, Jan. 26, 1865.

Before the Right Hon. Dr. LUSHINGTON.)

THE INDIA.

Bottomry—Obsolete statute—Repeal.

Non-user is not sufficient to repeal a statute, but the fact of non-user may be important in considering whether or no the statute has been repealed by implication.

1, c. 21, s. 2, which prohibits loans of money by vessels designed to trade in the East, since the other restrictions upon the East India Company have been removed, been repealed by impli-

as a cause as to the validity of a bottomry contract on a foreign vessel engaged in the India

In Jan. 1859 the *India*, a Monte Video vessel, left Monte Video bound for Calcutta with a cargo of horses; and in February following, the vessel being, in the course of the voyage, in Table Bay, the master borrowed some money on bottomry from a British subject there; and on his arrival at Calcutta he gave another bond, in favour also of British subjects, and payable at the Mauritius. In the answer put in by the owner of the *India* it was alleged that both bonds were void, by reason of the 7 Geo. 1, c. 21, s. 2.

The following is the section referred to:

... All contracts and agreements whatsoever ... made by any of His Majesty's subjects, or any person or persons in trust for them for or upon the loan of any moneys by way of bottomry on any ship or ships in the service of foreigners, and bound or designed to trade in the East Indies, or parts aforesaid ... shall be and are hereby declared to be void.

(See also 19 Geo. 2, c. 37, s. 5.)

Deane, Q. C. and *Clarkson*, for the bondholders, moved the court to reject the answer.

V. Lushington for the owner.

DR. LUSHINGTON.—Though a British Act of Parliament does not become inoperative by mere non-user, however long the time may have been since it was known to have been actually put in force, yet the fact of non-user may be extremely important when the question is, whether there has been a repeal by implication. What words will establish a repeal by implication, it is impossible to say. If, on the one hand, the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would have been declared in express terms, on the other hand it is clear that it is not necessary that any express reference be made to the statute which is to be repealed. A prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one; or, if the two statutes together would lead to wholly absurd consequences; or, if the entire subject-matter has been so dealt with in subsequent statutes that, according to all ordinary reasoning, the particular provisions in the prior statute could not have been intended to subsist. Before the passing of the statute 7 Geo. 1, c. 21, the whole of the East India trade was a strict monopoly in the hands of the East India Company. Not only had there been a series of parliamentary charters, but foreign ships were further excluded from trading to British possessions in India by virtue of the Navigation Act, 13 Car. 2, c. 18. The statute of 7 Geo. 1, c. 21, confirms the monopoly, the title being "An Act for the further preventing His Majesty's subjects from trading to the East Indies under foreign commissions, and for encouraging and further securing the lawful trade thereof." The 2nd section contains several provisions for preventing any foreign trade, and, amongst others, it prohibits all contracts of bottomry by British subjects on ships in the service of foreigners. It is manifest the sole object of this prohibition is the protection of the monopoly. The relaxation of this monopoly was a gradual process, both as to place and person. The monopoly continued longer as to China than as to the East Indies, and excluded foreigners longer than British subjects, other than the servants of the company. The abolition, so far as it concerns British subjects, was effected by the 2nd section of the 3 & 4 Will. 4, c. 93 (an Act to regulate the trade to China and India), which declares that notwithstanding any provisions made for the purpose of protecting the exclusive rights of the trade theretofore enjoyed by the company in any Act of Parliament contained, it should be lawful for any of His Majesty's subjects to carry on trade with any

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countries beyond the Cape of Good Hope to the Straits of Magellan. Then, with regard to foreigners, in 1797 the statute of Geo. 3, c. 117, was passed, reciting the Navigation Act, and empowered the directors of the East India Company to admit foreign ships to trade to the East Indies, notwithstanding the statute. The Court of Directors exercised this power by issuing a regulation which provides, "that foreign ships belonging to every state or country in Europe or in America, so long as such states or countries respectively remain in amity with Her Majesty, may freely enter the British seaports and harbours in the East Indies, whether they come directly from their own country or from any other place, and shall there be hospitably received, and shall have liberty to trade there in imports and exports conformably to the regulations established or to be established in such seaports," and then follows a proviso that they shall not engage in the coasting trade. Since that period various other measures have been adopted to put the foreign trade of India on the same footing as the trade carried on in British vessels and by British subjects. By an Act of the Government of India the duties on goods imported or exported in foreign or British vessels were equalised, and by another Act the coasting trade of India was thrown open to foreign vessels on the same terms as to British vessels. The trade therefore to India is now as open to foreign as to British vessels. If that be so, not only have all possible reasons for the prohibition contained in sect. 2 of 7 Geo. 1, c. 21, of bottomry upon foreign vessels engaged in the India trade, ceased to exist, but the continuance of that statute would be inconsistent with the state of trade as established by subsequent statutes. I therefore am of opinion that the statute 7 Geo. 1, c. 21, s. 2, is repealed by implication.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKBANK and JAMES B. DAVIDSON,
Esqrs., Barristers-at-Law.

Dec. 8 and 9, 1864.

(Before the LORD CHANCELLOR (Westbury.)

BARING v. HARRIS.

Sale of a ship—Injunction—Costs.

Defts., W. and Co., agreed, in consideration of the plts. accepting bills to a fixed amount (5000l.) drawn by them, to place the plts. in funds to meet the bills out of the proceeds of ships and deals coming to W. and Co. from their foreign consignor, who was a shipbuilder. W. and Co. having received from their consignor a certificate of sale of a ship then on its way to them, applied to the deft. Y. for an advance on the ship by way of mortgage. Y. objecting, on the ground that the certificate did not authorise a mortgage, W. and Co. entered into a collusive sale of the ship to the deft. L., to whom Y., in ignorance of the private arrangement between W. and Co. and L., then advanced the required sum by way of mortgage.

W. and Co., stopping payment shortly afterwards, plts. claimed a charge on the ship, and prayed to have a sale, or that they might be allowed to redeem, and that the amount of the bills might be paid out of the proceeds of sale; also, for an injunction against Y.:

Held, that the plts., though they might have a right of action as against W. and Co., had no right to a charge on this particular ship; also, that they had no right to challenge the sale to L. and the mortgage to Y., unless they established a case of fraudulent collusion against themselves:

Held, further, that as there was no proof that Y. had any knowledge of the plts.' equitable title, the charge

of fraudulent collusion with W. and Co., as against him, must fail, and injunction (which had been granted by Kindersley, V.C.) dissolved.

Where an app. succeeds on appeal in having an order made against him in the court below dismissed with costs, it is a salutary and desirable rule that he should have the costs of the appeal, and the old practice in this respect may be considered to be abolished.

This was an appeal from an order of Kindersley, V.C., whereby he granted an injunction at the suit of the plts., Messrs. Baring Brothers, restraining the defts. (except the deft. Mitchell) from mortgaging, selling, transferring, or otherwise dealing with a ship called the *Smyrna*, under the following circumstances.

The deft. Peter Mitchell, who lived at Miramichi, in New Brunswick, in 1864 applied to the plts. and asked them to open a credit in favour of Messrs. George Wright and Co., of Liverpool (the firm under which the defts. Harris and Van Wart carried on business), and proposed that any advances the plts. might make should be secured by the proceeds of ships and deals to be consigned by Mitchell to Wright and Co. The plts. agreed to open a credit in favour of Wright and Co., to the extent of 5000l., on receiving security on (as they alleged) all ships and deals to be consigned, as aforesaid, by Mitchell; and on the 3rd March Messrs. Wright and Co. wrote to the plts. as follows:

Herein we inclose letters from Hon. Peter Mitchell, of Miramichi, requesting you to open a credit to extent of 5000l. in our favour to be drawn for in bills at four months' date from time to time as we may require them. We hereby undertake to place you in funds to retire said bills at their maturity, out of proceeds of sales of ships and deals coming to us from said gentleman. Hoping to hear from you in confirmation of this credit,—We remain, yours respectfully,

GEORGE WRIGHT and Co."

The plts. upon this accepted four bills of exchange drawn upon them by Wright and Co., payable at four months each; two, dated 5th July 1864, for 1500l. each; a third, dated the same day, for 1000l.; and the fourth, dated 8th July 1863, for 1000l.

The *Smyrna* was a ship of which Peter Mitchell was the owner, and which, in Aug. 1864, had been sent by him to Wright and Co. for sale in this country.

In Sept. 1864, Wright and Co. applied to the deft. Yates, who was the secretary and manager of the company called the Maritime Credit Company (Limited), for an advance upon the ship, which had not yet arrived. Yates, finding that the certificate of sale which had been sent by Peter Mitchell to the deft. Harris did not authorise a mortgage, refused to make the advance; whereupon Wright and Co. entered into an arrangement with the deft. Lockwood, who was in the employ of Cunard and Co., by which they purported to execute a bill of sale, dated the 21st Sept., to him for 3500l.; and on the same day Lockwood mortgaged the ship to Yates for 2250l. The names of Lockwood as owner, and Yates as mortgagee of the ship, were now upon the register. It appeared that Yates departed somewhat from the usual course of business in these matters, by insisting that the bill of mortgage from Lockwood to him should be indorsed by Wright and Co.

In the early part of October Wright and Co. stopped payment.

The plts., alleging that they had a charge on "all ships and deals to be consigned for sale" by Peter Mitchell to Wright and Co., and that Peter Mitchell intended that the proceeds of the sale of the ship *Smyrna* should be applied in providing for the bills, claimed to be entitled to a charge on the ship, and accordingly filed this bill for an injunction in the terms above.

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The bill alleged, paragraph 12, that if in fact Yates advanced 2250*l.* on the security of the ship, the money was paid to Wright and Co. and not to Lockwood, and that Yates knew at the time that the ship had been sent over for sale, and that the left. Harris and his firm had received a certificate of sale from Peter Mitchell, and had no authority to mortgage the ship, also that Lockwood was not the owner of the ship, and that it had been transferred to him to hold as trustee for Wright and Co.

The bill prayed for a declaration that the plts. were entitled to a lien or charge on the ship; that it might be sold, or that they might redeem, and that the proceeds of the ship when sold might be applied in payment of the bills; also for an injunction.

Lockwood, in his evidence, admitted that the understanding between Wright and Co. and himself was that he was to resell the ship to Wright and Co. for the difference between the purchase-money and the mortgage, but said that this arrangement was carefully concealed from Yates.

The V.C. having on the 14th Nov. granted the injunction, the defts. now appealed.

Glasse, Q.C. and Kay were for the defts. Yates.—The V. C. relied upon the decision in *Orr v. Dickinson*, 1 Johns. 1; where Wood, V. C. held the registry not to be binding evidence of a sale, in a case where the sale was not in accordance with the power of sale contained in the certificate; and his Honour thought the same principle applied to this case, the sale to Lockwood being, in his opinion, not a *bona fide* transaction. But the plts. had no right to follow this particular ship; and in this instance no such fraud or collusion had been proved as to enable the court to go behind the registry and set aside the sale to Lockwood, still less to set aside the mortgage to Yates, who was proved to be without knowledge of the transaction.

Bailey, Q.C. and Cotton for the plts.—As against Yates, they said there was no authority to mortgage the ship at all; and as against Lockwood they supported the V. C.'s view, that the transaction was not a *bona fide* sale. Yates's suspicions ought to have been sufficiently aroused to have put him upon inquiry; and he must be held to have had constructive notice of the fact that Wright and Co. were the owners of the ship, of which indeed it appeared he had some knowledge, from the circumstance of his requiring their indorsement to Lockwood's certificate.

Glasse, Q.C. replied.

The LORD CHANCELLOR.—The plts., by their bill, seek to have it declared that they are entitled to a specific lien or charge upon a particular ship called the *Smyrna*, and they impeach the mortgage of one of the defts., or rather of the company represented by one of the defts., Yates, and, if that mortgage be held to be valid, they then seek to redeem the mortgage. Now, the first subject of inquiry is the nature of the plt.'s title. The title is rested on two documents. To render them intelligible, it is necessary to state that one of the defts., Mr. Mitchell, a large shipbuilder, and apparently a timber merchant at New Brunswick, was desirous of opening an account with the plts., and having credit with them to the extent of 5000*l.* They agreed to open that account with him, and to give him that credit upon the faith of the engagement entered into in two letters. By one of those letters, written by Mr. Mitchell to the plts., after requesting that he might have credit to the extent of 5000*l.*, he tells the plts. that he incloses them the under-

taking of his Liverpool agents, Messrs. Wright and Co., to appropriate sufficient to meet certain bills for 5000*l.*, which it was proposed that his agents should draw, when those bills arrived at maturity, out of the proceeds of ships, deals, &c., "sent to them by me." The undertaking of Messrs. Wright and Co., the agents, which was inclosed in that letter, is, in the material part of it, "We hereby undertake to place you in funds to retire the said bills" (which are previously described to be bills at four months for 5,000*l.*) "at their maturity out of proceeds of ships and deals coming to us from the said gentleman." No ships, no particular cargo, no specific property is mentioned. It is contended by the plts. that the words are sufficient to denote and to include all ships and all cargoes of deals that might be sent by Mr. Mitchell to Wright and Co., whilst any sum of money was due from Mitchell to the plts. I think it would be straining the language very much to give the words that interpretation, but I do not mean to let my decision rest upon that. I will suppose for the purpose of this motion, that the word "coming" shall be interpreted properly to include deals and ships that were not only coming, but might from time to time come, from Mr. Mitchell to Wright and Co. for the purposes of sale. Now, the only engagement and the only title which the plts. can rely upon are the engagements that I have read. It is one single transaction only; it is not that bills are to be drawn from time to time, but that one set of bills shall be paid out of the proceeds of consignments. Assuming, then, that the ship *Smyrna*, which is the property in question, had not been consigned to Wright and Co. at the time when these letters were written, which is the fact—for it appears by the bill itself that the ship was not despatched from New Brunswick until the month of Aug. 1864—assuming, I say, that the ship comes within the description of "ships and deals coming to Wright and Co.," within the language of this letter, the question is, whether the plts. have, by the subsequent transactions which are alleged and proved, made any case that will entitle them specifically to follow this particular ship? Now I can, undoubtedly, conceive a case of Wright and Co. having received ships and cargoes of deals applicable to the payment of the plt.'s debt, and wilfully refusing to deal with them for that purpose, and fraudulently applying them for their own use. In such a case as that which I have supposed, it might undoubtedly be possible for the plts. to maintain a bill of this sort, to prevent the property dedicated by Mitchell to the purpose of paying the plts.' debt being perverted by the consignees Wright and Co. to another and fraudulent purpose inconsistent with the directions of Mitchell. But is any case of the kind raised by this bill? The only case that is raised by this bill is simply in a few words this: that Wright and Co. received from Mitchell directions to sell this ship the *Smyrna*, and that being so directed, they thought it more desirable to mortgage the ship than to sell it, and that they were endeavouring to raise money by way of mortgage; but finding that was impossible, they devised a plan of a collusive sale in order that the purchaser might go into the market and mortgage the ship, they receiving the proceeds of the mortgage. Well, that case is a case in which it would have been competent for Mitchell to have had some relief against the mortgagee, against the pretended purchaser, and against his agents Wright and Co. But what title does that give to the plts. to have any relief, unless it be accompanied with allegations, and with proof of those allegations, which are not to be found in the case before me, that this proceeding was designed by Wright and Co. for the purpose of defrauding the plts., and-

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that the money received by Wright and Co. was money that they intended to apply in a manner inconsistent with the directions of Mitchell to pay the plts., and inconsistent with their duty to Mitchell and with the engagement that they had entered into with the plts.? There is no such case alleged upon the face of the bill. The only case made by the bill is, that the money having been received by Wright and Co., they refuse to apply that money in payment of the plts. What title does that give to the plts. to pursue the ship? It may give a title to the plts. to sue Wright and Co. on that engagement, but if the money received upon the mortgage has thus come into the hands of Wright and Co., the refusal of Wright and Co. to apply that money in payment of the plts. could not give the plts. any title whatever to pursue the ship, though it might give the plts. a title to bring an action upon their undertaking against Wright and Co. But that is not the point on which I think the case should be decided. The right of the plt., as against the ship itself, can only arise in a court of equity, provided he is in a condition to show that the defts., against whom he seeks relief, have been fraudulently colluding together to deprive him of his right to receive his money out of the proceeds of the ship. For that purpose it is not only necessary for the plt. to make out a case of such collusion between the defts., but it is necessary for him to prove that the defts. against whom he seeks relief had notice of his equitable title. That is attempted to be alleged by the bill in the twelfth paragraph, but there is not one particle of evidence in support of the allegation that Yates, the mortgagee, against whom the injunction has been directed, had any notice whatever of the title of the plt., or of the right of the plt. as against Wright and Co. But then, when we look at the transaction itself, I am obliged to come to the conclusion that the charge against Yates of having been guilty of fraudulently conspiring with Wright and Co. in a transaction which was either wrong as against the plt. or wrong as against Mitchell, is wholly unsupported. It is, in my opinion, a mere gratuitous, unfounded allegation. The transaction appears to have been of this nature. Wright and Co. applied to Yates, who was the managing officer of a particular commercial insurance company to borrow a sum of money upon this ship. They produced the certificate which had been sent by Mitchell to one of their firm, a gentleman of the name of Harris, containing directions or power to Harris to sell the ship. Yates immediately refused, after consulting his solicitor, to advance money by way of mortgage upon the ship. Some short time afterwards the application for a mortgage of the ship is renewed by Mr. Lockwood, and Mr. Lockwood represents to Yates that he had become the purchaser of the ship for the sum of 3500*l.*, which appears to have been her value, and that he was desirous of mortgaging the ship in order that he might get money to pay off what remained due in respect of that purchase. Now, there is no reason whatever, there is no circumstance whatever assigned or suggested, why Yates, who had refused the first application, should have assented to the second application, save this, that Yates tells us, and I entirely believe him, that he believed the transaction to be a *bona fide* transaction, and that Lockwood was really the *bona fide* purchaser of the ship. Now, there is a circumstance, undoubtedly, that proves to my mind that, as between Wright and Co. and Lockwood, it was a collusive transaction, and that circumstance is, that the engagement between them was, that Lockwood should resell the ship to Wright and Co. for the difference between the money borrowed,

namely, 2250*l.*, and the amount of his purchase-money, 3500*l.* But that circumstance is not brought home to the knowledge of Yates. There is no person who alleges any circumstances which render it in the smallest degree probable that this particular fact was known to Yates, or suspected by Yates at that time. I can find no reason why Yates, who had rejected the first application, should have assented to the second application, except that he thought the first application unwarranted, and that the second application was legal and warranted. Well then, the plts. insist upon the fact, that Lockwood was accompanied by Mr. Harris, the partner in the firm of Wright and Co., and that when the mortgage was completed, and the 2250*l.* handed over by Yates to Lockwood, Lockwood, in the presence of Yates, immediately transferred the money to the hands of Harris; and it is said that those circumstances were so suspicious that they should have put Yates upon inquiry. I cannot understand how that inquiry could have led Yates to any knowledge of the plt.'s title. If the circumstance was at all suspicious, it could have led Yates only to the conclusion that the authority and directions of Mitchell had not been properly observed and carried into effect by Wright and Co. But I deny that the circumstance which is relied on by the plts. was, under the facts of the case, at all a suspicious one, or a circumstance that should have led Mr. Yates to withhold the completion of the transaction, or to make any further inquiry. Lockwood had told him that he wanted to mortgage the ship to complete the purchase. It was a very natural thing that the vendor should attend in order to receive the mortgage-money, upon the completion of the mortgage. Yates swears that it was a *bona fide* transaction on the part of his company. There is nothing unusual, nothing extravagant, in the terms of the transaction to render it at all probable that it is one in any respect out of the ordinary character of these transactions. No undue advantage was gained by Yates's company. The terms of the loan, made by Yates to Lockwood, are terms in themselves reasonable, and not pretended to be otherwise than in accordance with the ordinary tenor of business transactions of this nature. I must hold, therefore, that there is not the smallest pretence for alleging or for suspecting, from the facts of this case, that there was anything improper in the transaction, or that Yates either knew or believed, or had any reason whatever that should induce him to know or believe, that there was any improper dealing between the parties before him, and that if he had investigated further into that improper dealing, he would have arrived at the conclusion that the plts. had any interest. Before the plts. can bring Yates into this court to answer their bill in respect of a fraudulent transaction, they must undoubtedly prove that Yates had notice of the plts.' title, and that Yates was aware that the transaction was one that was injurious to the rights of the plts. That entirely fails; the impeachment of the transaction itself entirely fails; and I am clearly of opinion that there was no warranty whatever for the granting of this injunction. It is said that the injunction has been continued by the V.C. with a view of having the matter more fully considered at the hearing. That is not a reason why an injunction of this kind should be continued, nor is it any reason why, on the ground of fraud, neither sufficiently alleged, and very far from being in any manner proved, the right of the defts., in respect of the mortgage of this ship, should be taken away. But, further, I am clearly of opinion that there is not in the case any ground for supposing it probable that any further evidence can be adduced for the purpose of elucidating the transaction, or in proving the right of the plt. at

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the hearing. Affidavits have been made by all the parties that can be brought forward, or that appear to have been implicated in the matter; the important persons have been cross-examined, and it is not suggested on the part of the plt. that there are any materials for further evidence or further explanation of the circumstances that he will be enabled to adduce at the hearing. Now, it is quite unnecessary for me to consider the point that might arise upon the Ships Registry Act, if I had been of opinion that there was anything that might give ground for the court interfering against Wright, and so as to put Wright to the necessity of insisting upon the title that Lockwood had in respect of the bill of sale. If it had been necessary to go into that matter I should have required very considerable argument upon it, and if that were the ground on which I thought it at all probable that the case would turn, why then I should have been of opinion that it might be desirable to keep matters *in statu quo* till the hearing. But I decide the case upon the ground that the allegation of any fraud or complicity in a fraudulent transaction by Wright and Co., as against Yates, is wholly unwarranted. There is nothing to justify or to make out the truth of the probability of any such allegation, and upon that ground I dissolve the injunction with costs.

Glasse, Q. C. asked his Lordship to include in the order the costs of the motion in the court below.

The LORD CHANCELLOR said he could not give the costs of the appeal, but he reversed the V. C.'s order, and substituted for it the order which he thought ought to have been made in the court below, namely, that the bill be dismissed with costs.

Glasse, Q. C. then asked his Lordship that the costs of the appeal might be costs in the cause.

The LORD CHANCELLOR was afraid he could not do that.

Glasse, Q. C. said that the inclination of the court of late years had been very much to consider that the rule of the Privy Council applied, that the wrong-doer should pay the whole of the costs of the litigation.

The LORD CHANCELLOR said he should be very glad if that were the rule of the court.

After some discussion, the case stood over for an interval, to allow of cases being cited.

Glasse, Q. C. then said, they were all agreed that it had been the practice of the Lords Justices in several cases to give the costs of the appeal, as well as the costs in the court below:

Lillie v. Legh, 8 De G. & J. 210;
Ralli v. The Universal Marine, &c. Company, 5 L. T. Rep. N. S. 390;
Collins v. Burton, 4 De G. & J. 618;
Beton on Decree, 1157;
Liedermann v. Schultz, 14 C. B. 52.

Malins, Q. C. (*amicus curie*) mentioned
Powell v. Lovegrove, Jur. (56), 791.

Baily, Q. C. said he quite admitted that the former rule, not to give the costs of the appeal when the appeal was successful, had been broken in upon, and the Lords Justices in many cases had so given the costs. They had not adopted the rule of the Privy Council, that the costs are to be given in all cases; but they had broken in upon the rule that costs were to be given in no case, and they exercised a discretion whether they should give the costs or not.

The LORD CHANCELLOR.—If that be so—and I am very glad to find it is—I think the alteration intro-

duced by the Lords Justices is a very wholesome alteration, and I have no hesitation in giving you the costs of the appeal.

Solicitors: for the plts., *Gregory, Rowcliffe and Gregory*, agents for *Duncan, Squarey, Blackmore, Pearson and Hill*, Liverpool; for the defts., *Marshall, and Lowndes*, agents for *Lace, Banner, Gill and Luce*, Liverpool.

Jan. 18 and April 22, 1865.

(Before the LORD CHANCELLOR (Westbury).)

Ex parte CHAVASSE, re GRAZEBROOK.

Contract between neutrals to convey munitions of war to a belligerent power—Rights of neutrals—Royal proclamation.

The rights which the laws of war give to a belligerent for his protection do not involve as a consequence that the act of the neutral in transporting munitions of war to the other belligerent is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint against either the neutral trader, or the Government of which he is a subject. All that international law does, is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined.

The object of a Royal proclamation is only to make known the existing law; it can neither make nor unmake the law. Hence, the Proclamation of the 13th May 1861, whereby the provisions of the Foreign Enlistment Act were enforced, and the subjects of the Crown were warned of the risks they incurred by sending contraband of war to either of the belligerent powers in America, had no effect upon the legality of an adventure for transporting munitions of war to the Confederate States.

This was an appeal from an order of Mr. Commissioner Perry, of the Liverpool district, dated the 29th Sept. 1864, whereby he dismissed with costs a petition of the present app., Thomas Chavasse, Isaac Jenks and William George Dixon (who were trustees of a trust-deed executed by the below-mentioned Horace Chavasse, of Birmingham, on the 19th Feb. 1864, in the bankruptcy under the following circumstances:

On the 17th June 1863, William Joshua Grazebrook, merchant and commission agent of Liverpool, was adjudicated a bankrupt.

In or about the year 1862, Horace Chavasse, who was a sword manufacturer, agreed with the bankrupt to purchase on a joint account arms and ammunition, and to consign them to Thomas Barrett Power, a friend of the bankrupt, then carrying on business as a merchant at Galveston, and afterwards at Wilmington and Charleston, in the Confederate States of America, to be by him sold in the said States for and on the joint benefit and account of Chavasse and the bankrupt. The arrangement was that Chavasse should purchase the arms and ammunition on the joint account, and that he should draw on the bankrupt, and that the bankrupt should accept bills for a portion of the price, such bills to be from time to time renewed until remittances arrived from Power. In pursuance of this agreement, H. Chavasse made purchases on the joint speculation, for which he drew bills of exchange, which were accepted by the bankrupt as an advance upon the invoice prices of the goods. These goods were consigned by Chavasse to Messrs. Lawrence and Co., the charterers from Messrs. Pearson and Co. of Hull, the owners of the steamer *Modern Greece*, then lying at that port, for shipment on board the vessel, bound for any port in the Confederate States which Power, who was the supercargo

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of the vessel, might think it safe to enter. The bills of lading were made out in the name and to the order of the bankrupt alone, but were distinguished from those of his own private consignment.

The goods, consisting principally of rifles and cartridges, were shipped on board the *Modern Greece*, and the vessel set sail on the 20th April 1862. In the course of her voyage she was wrecked off Wilmington, a considerable portion of the cargo was totally lost, and the rest much damaged. The portions of the property that were saved from the wreck were taken on shore by Power, and sold by him, realising 68,302 dols. 64c., in which sum the bankrupt and Chavasse were interested, in respect of their joint adventure, to the extent of 48,243 dols. 12c. Of the former amount, 26,616 dols. 66c., equal to 2000*l.* sterling, was remitted by Power in cash; and with the residue he bought 208,179*lb.* of cotton, which was now stored or warehoused in the Confederate States. In this amount of goods the bankrupt was interested to the extent of 77,937*lb.*, and Chavasse to the extent of 120,607*lb.*

The petition, after stating the above circumstances, proceeded to say that none of the bills accepted by the bankrupt had been honoured, and that no remittance had been received in respect of the cotton, and that the petitioners were desirous of having the cotton apportioned between the parties entitled thereto; and prayed the court to make an order enabling the petitioners to obtain possession of and to receive, as such trustees as aforesaid, the proportionate part or share of or to which they were so entitled as aforesaid, of and in the said cotton, or that the court would make such further order as it might think fit."

Since the bankruptcy, the cotton, which was still at Wilmington, had been taken possession of by the assignees.

Daniel, Q. C., De Ger and Thomas Jones (of the common law bar) supported the appeal.—In the first place, whatever unlawful intentions might be attributable to Grazebrook or Chavasse, no such intentions could be imputed to the assignees or trustees of either. But it was said that this petition could not be entertained, because it disclosed that this property was purchased with the produce of the sale of goods which were contraband of war, and which could have entered Wilmington only by the breaking of the blockade. But first, a state of war did not render illegal any dealings between neutrals as regarded contraband of war. Secondly, with reference to all questions that could be raised by belligerents, it could not be alleged on the part or in the interest of any belligerent power, that contracts to do things which were forbidden by the municipal laws of a foreign state were illegal, it could only be alleged that those contracts were illegal which were for doing things forbidden by English municipal law. Thirdly, with respect to international law, no doubt international law was part of the law of England, but only to this extent, that when a state of war arose, any of Her Majesty's subjects who thought proper to run the risk, were subject to the ordinary penal consequences. Every one who exported munitions of war to Wilmington knew that they were liable to lawful capture. But the only risk to which the consignor was exposed, was that of capture by the belligerent without any remedy being afforded by English law. Fourthly, as to the Queen's proclamation of the 13th May 1861, in the first place, that proclamation did not and could not make the law. But, moreover, its single object was to preserve the absolute neutrality of the Government of Great Britain. It was directed to two objects: first, to prevent any violation of the Foreign Enlistment Act; and secondly, to warn British subjects of the risk they ran of confiscation by carrying contraband

of war to either belligerent power. Fifthly, in order to render a contract illegal, it must be either *malum prohibitum* or *malum in se*. This was not a *malum prohibitum*. The prerogative only extended to dealing with the rights of the Queen's subjects within the limits of the law. It did not take away the right of the subject to deal in certain articles; it only imposed upon that dealing certain penalties: (*Holman v. Johnson*, Cowp. 341.) There was no illegality whatever in the contract; but if the court should be of opinion that the sale was an illegal transaction, it then remained to consider how far that illegal transaction, having come to an end, could taint with illegality the subsequent purchase; whether the *delictum* of selling ammunition could be followed into the cotton: (*Bird v. Appleton*, 8 Term Rep. 566.) Lastly, a mere proclamation was not sufficient *per se* to constitute a blockade; and in this instance it was notoriously incomplete:

The Betsy, 1 Rob. Adm. Rep. 95.

Aspinwall, Q. C. and Charles Russell, for the resp., the assignees of the bankrupt, supported the commissioner's judgment.—No species of property or interest at risk on a sea venture can be the subject of a valid contract if the course of trade, or the voyage in prosecution of which it is so exposed to risk, be in contravention either of the law of the land or the laws of nations: (*Arnould Mar. Ins.* 736.) Further, no court of justice can interpose to assist either of the parties to an illegal contract. A voyage to a blockaded port, after notification of the blockade, is an illegal voyage; and in this instance it was admitted that the intention of the master was to endeavour to break the blockade:

The Neptune, 2 Rob. Adm. Rep. 110;

Naylor v. Taylor, 9 B. & Cr. 722;

Medeiros v. Hill, 8 Bing. 234;

The Tutela, 6 Rob. Adm. Rep. 177.

It is one of the duties incumbent on the subjects of a neutral state to abstain from every act that tends directly to the assistance of either of the belligerents in the prosecution of a war: (*Duer on Mar. Ins.* 623, 728.) The law of nations, where any question arises which is properly the subject of its jurisdiction, is adopted as part of the common law; and where the individuals of any state violate this general law it is the duty of the Government under which they live to animadvert upon them with becoming severity: (4 Steph. Com. 296.) If a voyage be prohibited by law, it follows that any contract to perform that voyage is impliedly and by consequence prohibited; no claim can be supported through the medium of an illegal agreement:

Wilkinson v. Loudonsack, 3 M. & S. 126;

De Melton v. De Mello, 12 East, 236;

Thompson v. Thompson, 7 Ves. 478;

Armstrong v. Armstrong, 3 M. & K. 64.

As to the prerogative of the Crown to inhibit the exportation of certain goods by proclamation, see Bac. Abr. "Prerog." B. 405; and as to the statutory power of the Crown to prohibit the exportation of arms and ammunition, 16 & 17 Vict. c. 107, s. 150. The illegality of the present adventure was shown beyond all controversy by the terms of the Royal proclamation of the 13th May 1861. Upon these grounds, therefore, the petitioners had no *locus standi* in a court of justice in this country, and the appeal must be dismissed.

The LORD CHANCELLOR reserved judgment.

April 22.—The LORD CHANCELLOR, after reviewing the facts of the case, said:—In the view of international law, the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations, and they

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become belligerents, neither belligerent has a right to impose, or to require a neutral Government to impose, any restrictions on the commerce of its subjects. The belligerent power certainly acquires certain rights which are given to it by international law. One of these is the right to arrest and capture, when found on the sea, the high road of nations, any munitions of war which are destined and in the act of being transported in a neutral ship to its enemy. This right, which the laws of war give to a belligerent for his protection, does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the Government of which he is subject. The title of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral state of which he is a subject. In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful. Their conflicting rights are coexistent, and the right of the one party does not render the act of the other party wrongful or illegal. There is, however, much incorrectness of expression in some writers on the subject, who, in consequence of this right of the belligerent to seize *in transitu* munitions of war while being conveyed by a neutral to his enemy, speak of this act of transport by the neutral as unlawful and prohibited commerce. But this commerce, which was perfectly lawful for the neutral with either belligerent country before the war, is not made by the war unlawful or capable of being prohibited by both or either of the belligerents; and all that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined. That the act of the neutral merchant is in itself innocent is plain from the circumstance that the belligerent captor cannot visit it with any penal consequences beyond his judicial condemnation of the ship and cargo, nor can he make it the subject of complaint. This is well explained by Vattel in the following passage. Speaking as a belligerent power, he says: "Quand j'ai notifié aux puissances neutres une déclaration de guerre à tel ou tel peuple, si elles veulent s'exposer à lui porter des choses qui servent à la guerre, elles n'auront pas sujet de se plaindre au cas que leurs marchandises tombent dans mes mains, de même que je ne leur déclare pas la guerre pour avoir tenté de les porter. Elles souffrent, il est vrai, d'une guerre à laquelle elles n'ont point de part, mais c'est par accident. Je ne m'oppose point à leur droit—j'use seulement du mien, et si nos droits se croisent et se nuisent réciproquement, c'est par l'effet d'une nécessité inévitable. Ce conflit arrive toujours dans la guerre." Vattel must here be considered as speaking of the acts of the subjects of a neutral power, and not of the neutral Government itself, for the supplying of warlike stores to a belligerent by a neutral state would clearly be a breach of neutrality. The same doctrine as to the freedom of the commerce of the neutral subject is more explicitly stated by Mr. Chancellor Kent, in the first volume of his Commentaries, page 142, and was most distinctly affirmed in a celebrated decision of the Supreme Court of the United States: (*The Santissima Trinidad*, 7 Wheat. 283.) The language of Chancellor Kent is clear and compre-

hensive: "It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. It was contended on the part of the French nation in 1796, that neutral Governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown on the part of the United States that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act." The material passage of the judgment which affirms this, as given in 7 Wheaton's Rep. 340, is the following: "There is nothing in our laws or in the law of nations, that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." I take this passage to be a very correct representation of the present state of the law of England also. For if a British ship-builder builds a vessel of war in an English port, and arms or equips her for war *bonâ fide* on his own account, as an article of merchandise, and not under or by virtue of any agreement, understanding, or concert with a belligerent power, he may lawfully, if acting *bonâ fide*, send the ship, so armed and equipped, for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act. It is true that, under the provisions of the Act of the 16 & 17 Vict. c. 107, Her Majesty has power by proclamation or Order in Council to prohibit the exportation of certain goods, including arms, ammunition, gunpowder, naval and military stores, but no Order in Council or proclamation was made in the terms or under the special authority of this statute. Great reliance, however, was placed by the counsel for the resps. on the Queen's proclamation of the 13th May 1861. Although it was admitted that it could not be treated as made under the authority of the last-mentioned statute, I need not observe that it is the object of a proclamation to make known the existing law, and that it can neither make nor unmake law. But in truth the proclamation of 1861 is directed, and very properly, to two objects: first, to declare that the provisions of the Foreign Enlistment Act would be strictly enforced; and, secondly, not to prohibit the exportation of warlike stores, but to warn the subjects of the realm that if any subject carried contraband of war to either belligerent he would incur the penal consequences of the law of nations, and would receive no protection or relief from these consequences (that is, from capture and condemnation) at the hands of Her Majesty. The proclamation has no effect whatever on the legality of this adventure. I am of opinion, therefore, that this adventure between the bankrupt and the petitioner was a lawful contract, and that the ordinary rights of property result from it. Consequently, I am of opinion that the goods in which the proceeds of the adventure were invested belong to the petitioner and the bankrupt, according to their several interests in that adventure and their contributions to the same, and I shall remit the case to the commissioner with this declaration: Reverse the order of the commissioner; declare that there was a valid partnership between the bankrupt and the petitioner in the adventure described in the

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petition, and that the accounts of the partnership ought to be taken, the partnership property sold or otherwise disposed of, the proceeds applied in payment of the debts of the partnership, and the surplus divided according to the interests of the petitioner and the bankrupt respectively.

Solicitors: for the apps., A. D. Smith, agent for Southall and Nelson, Birmingham; for the resps., John H. Lyckull, agent for Timpron Martin, Liverpool.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Monday, April 24, 1865.

GLAHOLM v. BARKER.

Lord Campbell's Act (the 9 & 10 Vict. c. 93)—*The Merchant Shipping Act 1854* (the 17 & 18 Vict. c. 104), part *1c.*, s. 504—*The Merchant Shipping Repeal Act 1854* (the 17 & 18 Vict. c. 120)—*The Merchant Shipping Act Amendment Act 1862* (the 25 & 26 Vict. c. 63), s. 54—*The 13 Vict. c. 21*, s. 5—*Loss of life by negligence at sea—Liability of ship-owner.*

A brig called the *E. M.* wrongfully ran down a collier called the *T. B.* The collision resulted in the death of eight sailors on board the *T. B.* The personal representatives of the deceased sailors brought actions against the owners of the *E. M.* under *Lord Campbell's Act* (the 9 & 10 Vict. c. 93). The defts. at law then instituted a suit in this court to restrain the action, and to have their liability for the deaths ascertained in equity, on the grounds that, under the true construction of the above-mentioned Acts, either no action was maintainable, or their liability was 8*l.* per ton, and not (as the plts. at law contended) 15*l.* per ton of the vessel and freight of the *E. M.*:

Held, that the actions must be allowed to go on, and that the liability of the plts. in equity was 15*l.* per ton.

This suit was instituted by the owners of a vessel called the *Edith Murray*, to restrain certain actions at law against them. It appeared that in the month of Feb. 1864 the *Edith Murray* ran into a collier called the *Thomas Barker*. The result of that collision was, that eight seamen on board the *Thomas Barker* were drowned. Their personal representatives then brought actions under *Lord Campbell's Act*, the 9 & 10 Vict. c. 93, against the owners of the *Edith Murray*, to obtain compensation by way of damages for the deaths so caused. The plts. at law estimated the amount of their damages at the rate of 15*l.* per registered ton of the freight and vessel, the *Edith Murray*. That rate, the defts. at law contended, was an excessive one; that, in truth, there was either no right of action at all, or that the liability was limited to 8*l.* per ton, as aforesaid. Under these circumstances the bill in this suit was filed, praying an injunction to restrain the actions, and a direction that the proper amount of the liability might be ascertained in this court.

The question depended upon the construction of the following statutes:

The 9 & 10 Vict. c. 93, ss. 1 and 2;
The Merchant Shipping Act 1854 (the 17 & 18 Vict. c. 104), part 9, s. 504;
The Merchant Shipping Repeal Act 1854 (the 17 & 18 Vict. c. 120), s. 4;
The Merchant Shipping Act Amendment Act 1862 (the 25 & 26 Vict. c. 63), s. 54;
The 13 Vict. c. 21, s. 5.

Hobhouse, Q. C. and Druce appeared for the plts. in the suit.

Osborne, Q. C. and Hadden for the defts.

Hobhouse, Q. C. in reply.

The nature and effect of the arguments in the case, and the statutes cited in them, are fully stated in, and will sufficiently appear from, the judgment of the M. R., *supra*.

The MASTER of the ROLLS.—The question in this case relates to the construction of the Merchant Shipping Acts, with reference to the liability of the owners of a vessel which wrongfully ran down another, to make compensation for the loss of life thereby occasioned. In the month of Feb. 1864, the brig *Edith Murray* ran into a collier named the *Thomas Barker*, by which all the crew, with the exception of two, perished with the vessel which was run down. The number of persons so lost was eight, and the representatives of those eight persons brought actions at law against the owners of the *Edith Murray*, to recover compensation under the provisions of the Act commonly called *Lord Campbell's Act*, and of other Acts. The owners of the *Edith Murray* have instituted this suit to have the amount of their liability determined in this court. The history of the legislation on this subject is of considerable interest; showing, as it does, the progress of the legislation in adapting itself to the wants of society. Previous to the 9 & 10 Vict. c. 93—*Lord Campbell's Act*—no action was maintainable against any person who by his wrongful act had caused the death of another. Injury to the person only created a right of personal action in the party injured; and if the injury was fatal, the right of action perished with that party. In that state of things *Lord Campbell's Act* gave a right of action against the wrong-doer to the legal personal representatives of the person killed, for the benefit of the wife, husband, parent, or child of that person. The effect of that statute on cases of collision at sea became immediately one of great importance. Prior to that time it had been found necessary to limit the liability of the owners of vessels in respect of injury done by one vessel, which, through the fault of its master, had injured another. That was done by a statute of the time of Geo. 2, whereby the liability of the owners of the vessel which, metaphorically speaking, was the wrong-doer in respect of damage done to the cargo of, and to, the injured vessel, was limited to the value of the freight and of the ship doing the injury. But to personal injuries no limits were affixed by the statute, and the liability for them remained as before, measured only by the extent of the damage done. The reason why no limit was imposed was this, viz., that such actions were extremely rare, inasmuch as the injury done by collisions at sea were usually fatal. In 1847 *Lord Campbell's Act*, which I have mentioned, was passed. By that statute, after reciting that no action at law was then maintainable against a person who by his wrongful act, neglect, or default might have caused the death of another person, and it was oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injuries so caused by him; it was enacted that whenever the death of a person should be caused by wrongful act, neglect, or default, and the act, neglect, or default was such as would (if death had not ensued) have entitled the party injured to maintain an action and to recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued should be liable to an action for damages notwithstanding the death of the person injured; and although the death should have been caused under such circumstances as amounted in law to felony. By the 2nd section it was further enacted, that every such action should be for the benefit of the wife, husband, parent and child of the person whose death should have been so caused, and should be brought by and in the name

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of the executor or administrator of the person deceased; and in every such action the jury were empowered to give such damages as they might think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action should be brought. That Act imposed no limit as to the extent of damages to be recovered in actions brought by virtue of it; and accordingly, in cases of collision at sea, the liability of the owners of the vessel in the wrong was measured by and limited to the extent of the injury inflicted. The consequence of that was that by virtue of the Merchant Shipping Act 1854 (the 17 & 18 Vict. c. 104), part 9, s. 504, the liability of the owner for loss caused to goods or merchandise, or for loss of life or personal injury, was limited to the value of his ship and her freight. The words of the 504th section, so far as it is material to cite them, are these: "No owner of any sea-going ship or share therein shall, in cases where all or any of the following events occur without his actual fault or privity; that is to say (3) where any loss of life or personal injury is by reason of the improper navigation of such sea-going ship as aforesaid caused to any person carried in any other ship or boat; (4) where any loss or damage is by reason of any such improper navigation of such sea-going ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat, be answerable in damages to an extent beyond the value of his ship and the freight due or to grow due in respect of such ship during the voyage which at the time of the happening of any such events as aforesaid is in prosecution or contracted for, subject to the following proviso, that is to say, that in no case where any such liability as aforesaid is incurred in respect of loss of life or personal injury to any passenger shall the value of any such ship and the freight thereof be taken to be less than 15*l.* per registered ton." Subsequently to the passing of that statute, but in the same session of Parliament, another Act, viz., c. 120, was passed, by sect. 4 of which the several Acts and parts of Acts set forth in the first schedule thereto, to the extent to which such Acts or parts of Acts were therein expressed to be repealed, and all such provisions of any other Acts or of any charters, and all such laws, customs and rules as were inconsistent with the provisions of the Merchant Shipping Act 1854, were repealed. In 1862 the Merchant Shipping Act Amendment Act was passed (the 25 & 26 Vict. c. 63), by the 2nd section of which it was enacted that the Acts described in table A. in the schedule in that Act should be repealed as therein mentioned, except as to any liabilities incurred before such repeal. That schedule included the 504th section of the Merchant Shipping Act 1854. By the 54th section of the 25 & 26 Vict. c. 63, it was enacted as follows: "The owners of any ship, whether British or foreign, shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say: (I will read only those parts of the section which are material), (3) where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat; (4) where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board another ship or boat, be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding 15*l.* for each ton of their ship's tonnage; nor in respect of loss or damage to ship's goods,

merchandise, or other things, whether there be in addition loss of life or personal injury, or not to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without reduction on account of engine-room." The *plts.* in equity now contend that the right of the representatives of deceased seamen to bring such an action as is referred to in sect. 504 above mentioned, is either put an end to altogether, or else that their claim is limited to 8*l.* per ton against the vessel in the wrong. But I think that either the right of action is altogether gone, or the liability extends to 15*l.* per ton. The propositions enunciated by the *plts.* appear to me to be these: First, that by sect. 504 of the Merchant Shipping Act 1854 a right of action was given in case of the loss of a life, not being that of a passenger, extending to the value of the ship and the freight; secondly, that by sect. 4 of the Act 17 & 18 Vict. c. 120, of the same session, all acts inconsistent with any of the provisions of the Merchant Shipping Act 1854 were repealed; thirdly, that Lord Campbell's Act is inconsistent with sect. 504 of the Act of 1854, and consequently that it is repealed, so far as regards collisions at sea; and fourthly, that the Act of 1862, which repeals the sect. 504, does not therefore revive Lord Campbell's Act; because, by the 13 Vict. c. 21, it is enacted that where any Act repealing, in whole or in part, any former Act, is itself repealed, such last repeal shall not revive the Act or provision before repealed, unless words be added reviving such Act or provision. In addition to that, the Act of 17 & 18 Vict. c. 120, remains still in force. Those considerations, it is contended, show that no action in respect of any collisions at sea can be brought under Lord Campbell's Act. I must say that I dissent entirely from those views. I am of opinion that the 17 & 18 Vict. c. 120, s. 4, does not repeal Lord Campbell's Act. That section repealed the provisions of any Acts inconsistent with the provisions of the Merchant Shipping Act 1854; but in my opinion Lord Campbell's Act contains no provisions whatever inconsistent with the Merchant Shipping Act 1854. Lord Campbell's Act merely gave the right of action, saying nothing about the amount to be recovered. The Merchant Shipping Act 1854 limited the amount to be recovered to the value of the wrong-doer's ship and freight. But what inconsistency is there in that? I have carefully read Lord Campbell's Act, and I am unable to find a word in it which requires to be struck out, in order to give the Merchant Shipping Act 1854 full force and effect. On the contrary, sect. 504 seems to have been itself founded on the right given by Lord Campbell's Act. Had there been a clause in Lord Campbell's Act enacting that in every case the liability of the wrong-doer should go to the full extent of the injury done to the family of the person killed, then that clause, so far as it might have extended to collisions at sea, would have been repealed by the 17 & 18 Vict. c. 120, s. 4. If that meaning is properly attributable to Lord Campbell's Act as it stands, precisely as though a clause expressing such meaning in so many words were to be found therein, then to that extent and to that only would it be repealed. But I am clearly of opinion that the right of bringing actions under Lord Campbell's Act still remains unrepealed and in full force. That right was never touched by any of the subsequent statutes; and by the 54th section of the last Act (25 & 26 Vict. c. 63) the liability in respect of actions so brought for collisions at sea is limited and fixed at 15*l.* per ton of the vessel causing the injury, as the maximum. Moreover, I think that the *plts.* cannot escape from the dilemma suggested by the *defts.* counsel. Either this case

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falls within the provisions of the Act of 1862 or it does not. If it does, then sect. 54 is distinct in fixing the liability at 15*l.* per ton; if it does not fall within that Act, there is no liability at all. Sect. 504 of the last statute, under which the *plts.* are proceeding, was enacted in order to avoid multiplicity of suits, and has no application to this suit, the object of which is to ascertain their liability in this court. But the objection is one that can perfectly well be taken at law. The actions must, therefore, be allowed to proceed. I am indeed of opinion that, even if Lord Campbell's Act were wholly repealed, a right of action would still remain under the unrepealed sections of the Merchant Shipping Act 1854. Upon the whole case I am of opinion that the *plts.* in equity have failed in their contention; that their liabilities extend to and are measured by the sum of 15*l.* per ton; and that a declaration must be made to that effect.

COURT OF COMMON PLEAS.

Reported by W. MAYD AND LUNLEY SMITH, Esqrs.,
Barristers-at-Law.

Tuesday, April 25, 1865.

FOWLER AND ANOTHER v. THE ENGLISH AND SCOT-
TISH MARINE INSURANCE COMPANY (LIMITED).

*Marine insurance—Capture, seizure and detention—
Payment as for total loss—Embargo.*

By a valued policy of insurance the defts. undertook to insure a Prussian ship of the plts. against such risks as are excluded by the clause warranted "free from capture, seizure and detention," with a stipulation "to pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." An embargo was laid by the Danish Government upon the plts. ship, and all other Prussian ships in Danish ports, and the plts. gave notice of abandonment to the defts., which they declined to accept. Before the expiration of the thirty days after receipt of official news of the embargo, the Danish Government by a decree announced that all enemy's ships should be permitted to depart, under a proviso of reciprocity on the part of the Prussian Government. The Prussian Government did not assent to the decree till after the expiration of the thirty days, but they did ultimately assent to it, and the embargo was taken off before the plts. commenced their action:

Held, that at the expiration of the thirty days, a right of action vested in the plts. to recover as for a total loss, which was not divested by the subsequent removal of the embargo before the commencement of the action.

Declaration upon a policy of insurance, effected by the *plts.* with the defts., on the ship *Ernst Jacob*, from Riga to London, valued at 2500*l.*, the insurance being expressed to be "only against such risks as are excluded by the clause warranted free from capture, seizure and detention, or the consequences of any attempt thereof, to pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation."

Averments, that after the commencement of the risk, and during its continuance, and while the policy was in full force, the ship was seized and detained under an embargo by the King of Denmark, and that before action brought, thirty days after the receipt of official news of the seizure and detention had elapsed, and that the defts. had not paid the 2500*l.*

First plea to the alleged total loss:

The defts. deny that the said ship was detained under an embargo by the King of Denmark until after the lapse of thirty days after receipt of official news of the said seizure, and that the *plts.* thereby sustained loss within the meaning of the said

policy, and that before action brought thirty days after the receipt of official news of the said seizure and detention had elapsed within the true intent and meaning of the said policy.

Second plea:

So far as relates to the alleged detention of the said ship until after the lapse of thirty days after the receipt of official news of the said seizure, and so far as relates to the alleged total loss of the said ship and the causes of action in respect thereof, the defts. say that at the time of the alleged seizure and detention under the said embargo, the said ship was, in the course of the said voyage, lying in a Danish harbour, to wit, Elsinore, and was and still is a Prussian ship, and the property of certain persons, subjects of the King of Prussia, and that war had broken out and was then being carried on between the King of Denmark and certain other powers, to wit, among others with the King of Prussia, and that the said ship had been and was seized and detained under the said embargo by the King of Denmark as and being enemy's property, to wit, the property of the said subjects of the King of Prussia. And the defts. further say that after the alleged seizure and detention under the said embargo, and within the period of thirty days therefrom, and before thirty days after receipt of official news of the said seizure and detention had elapsed within the true intent and meaning of the said policy, and before action, to wit, within twelve days after the said seizure and detention, a decree was duly made in that behalf, and promulgated by the King of Denmark, to wit, on the 15th day of Feb. 1864, a correct translation of which decree is in the words and of the tenor and effect as follows, that is to say: "Decree respecting time to be allowed by the enemies' vessels now under embargo for quitting Danish harbours. On a representation being made to the King, His Majesty resolved under date of the 13th inst., that until the 1st April next the enemies' vessels now lying under embargo in Danish harbours and floods shall be permitted to depart unmolested in ballast, or laden with the cargo with which they arrived, and furnished with a letter of safe conduct to any harbour which they shall themselves designate, provided it be not blockaded, under proviso of reciprocity on the parts of the Governments interested.—Ministry of Marine, Feb. 10, 1864." And the defts. further say that afterwards and before thirty days after receipt of official news of the said seizure and detention had elapsed within the true intent and meaning of the said policy, and before suit, all the conditions of the said decree were and had been complied with on the part of the Government interested in the said decree and in the said ship, to wit, the Government of Prussia, and the said alleged embargo was by force of the said decree and such compliances with the conditions thereof as aforesaid taken off the said ship, and she was at liberty to prosecute the said voyage, and could and might have obtained, and would, on application, have been furnished with a letter of safe conduct for that purpose, of all which said premises the *plts.* always had notice, and the defts. further say that the said ship afterwards in fact sailed upon her said voyage, and arrived at London and completed her said voyage in safety.

Under a third plea the defts. paid 2*l.* into court to cover a partial loss.

The case was tried before Erle, C. J., in London, at the sittings after Michaelmas Term, and the following facts were proved: The ship, which was a Prussian ship belonging to the *plts.*, who carried on business at Memel and in London, sailed from Riga for London on the 16th Nov. 1862, and put into Elsinore, in Denmark, on the 4th Dec. 1862, for repairs. War between Denmark and Prussia was then imminent, and the policy of insurance declared on was effected on the 15th Dec. War was declared, and on the 3rd Feb. 1863 an embargo was laid by the Danish Government on all Prussian ships in Danish ports. The ship *Ernst Jacob* was then at Elsinore. News of the embargo was sent on the same day by telegraph to the *plts.*, and it was known at Lloyd's on the 4th Feb. On the 5th Feb. the *plts.* gave notice of abandonment to the defts., who refused to accept it. On the 15th Feb. the Danish Ministry of Marine published a decree of the King, allowing till the 1st April for enemies' ships then under embargo to depart, under proviso of reciprocity on the part of the Governments interested. On the 13th March the Prussian Government assented to the decree, and on the same day the embargo was taken off at Elsinore. The ship sailed eventually from Elsinore on the 17th April, and reached London in safety on the 29th April.

The thirty days from official notice of the embargo expired before the assent of the Prussian Government had been given. The action was

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commenced on the 21st March, after that assent had been given. The plts. claimed as for a total loss. The defts. maintained that the removal of the embargo operated as a restoration of the ship to the plts. before action brought, and that they were only liable to indemnify the plts. for a partial loss. The ship, on her arrival in London, was by arrangement sold, and realised 1381*l.* 9*s.* 6*d.* The plts. claimed in the action the difference between this sum and 2500*l.* Erle, C. J. directed the verdict to be entered for the plts. for the amount claimed, giving the defts. leave to move to enter it for them. A rule having been obtained accordingly,

Lush, Q. C. and *Sir G. Honyman* showed cause.

Mellish, Q. C. and *Archibald* supported the rule.

The argument turned on the question, whether or not at the expiration of the thirty days from the official news of the embargo a right of action to recover for a total loss vested in the plts., and whether that right was affected by the subsequent removal of the embargo before action brought.

The following authorities were referred to :

Arnould on Marine Insurance, p. 1071;
Kent's Commentaries, vol. 3, p. 403;
Smith v. Robinson, 2 Dow, 474;
Rotch v. Edie, 6 T. R. 413;
Forster v. Christie, 11 East, 205;
Hamilton v. Mendis, 2 Burr. 1198;
Brotherston v. Barber, 5 M. & S. 418.

ERLE, C.J.—I am of opinion that the plt. is entitled to recover for a total loss. There is no dispute as to how the law stood when the parties made the contract, upon the words of which the court has to put a construction. The risks being those excluded by the clause "warranted free from capture, seizure, or detention," the words giving rise to contention are those which follow the statement of the risks, namely, "to pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." There is some ambiguity about the words "without waiting for condemnation," and without them the stipulation would be clear, that at the expiration of the thirty days the assured should have a vested right to recover as for a total loss. I do not think that the addition of the words which are ambiguous can alter the meaning of the stipulation. The particular risk insured against seems to have been in the minds of the parties, and they must be taken to have been aware of the law on the subject. This was not a mere temporary embargo, but one laid on in time of war, and I think that the plts. are entitled to recover as for a total loss.

BYLES, J.—I am of the same opinion. The stipulation would have been perfectly clear but for the four last words, and seems to have been inserted for the benefit of the assured.

M. SMITH, J.—I am of the same opinion. The contract was to pay as for a total loss on the happening of an event which has happened. If the ship had been restored within the thirty days the plts. would not have been entitled to sue at all, but it was not.

Rule discharged.

Attorneys for the plts. *Thomas and Hollams*; for the defts. *Flux and Argles*.

Tuesday, May 2, 1865.

HEARD AND ANOTHER v. HOLMAN AND ANOTHER.

Ship and shipping—Policy of insurance—Collision clause—Measure of damages—Damages to ship—Damages for detention of ship.

The plts.' ship *W. H.* having been run into by the ship *G.*, the plts. arrested the latter ship, and prosecuted a suit against it in the Admiralty Court to recover compensation for the damage which they had sustained. The ship *G.* was insured by the defts. under a policy, one condition of which was, that the defts. should pay the amount of damage or loss by contact which the ship might do to others, provided it did not exceed the amount insured. It was thereupon agreed between the plts., the defts. and the owner of the *G.*, that the plts. should release the ship *G.* from arrest, the defts. undertaking to pay them "the amount of damage which the said ship *W. H.* had received from the said collision," and the costs of the proceedings in the Court of Admiralty:

Held, that the word "ship" must be construed to mean the "owners of the ship," and that the plts. were entitled to recover from the defts. under this agreement the same compensation which they would have received if they had prosecuted their suit in the Court of Admiralty, and therefore they were entitled to recover damages for the detention of their vessel, and the costs of the suit, in addition to damages for the injury done to the framework of their ship.

This action was tried before Erle, C. J., at the sittings in London after Michaelmas Term.

The plts. were the owners of the ship *Westward Ho*, which, in the month of Feb. 1863, was run into off Beachy Head, by the ship *Grenfells*, belonging to W. T. Mitcheson. The collision was caused by the improper management of the latter ship, and the plts. immediately caused it to be arrested by process from the Court of Admiralty in a cause of collision. The *Grenfells* was insured in the Western Marine Association for 2000*l.*, under a policy of insurance incorporating regulations, of which the 17th was the following:

In case of damage or loss by contact, which any ship in this association may do to others, this society shall be liable to contribute its proportion, but not beyond the sum insured, and also law costs given in any suit or action defended by the previous consent in writing of the managers upon this policy; but in no case shall this society pay for loss or damage to one or both ships more than the sum insured on policy.

The *Grenfells* was also insured in the Sunderland Insurance Clubs, of which Mitcheson was manager.

The committee of management of the Western Marine Insurance Association, finding that the damage done by the *Grenfells* to the *Westward Ho* would exceed 2000*l.*, the amount of insurance, collected that sum from the members of the association, and handed it to the defts. who acted as managers of the association under the direction of the committee. The defts. were requested by Mitcheson to try to effect a compromise with the plts., and after some negotiation the plts. agreed to release the *Grenfells* upon the execution of the following agreement:

An agreement made the 13th March 1863, between George Heard, of Bideford, in the county of Devon, shipowner, on behalf of himself and William Heard, his copartner (under the firm of Heard Brothers), of the first part; Charles Thomas Mitcheson, of Sunderland, in the county of Durham, shipowner, of the second part; John Holman and Sons, of Topsham, in the said county of Devon, merchants, on behalf of the Western Insurance Clubs of Topsham aforesaid, of the third part; and C. J. Mitcheson aforesaid, on behalf of the Sunderland Insurance Clubs, of the fourth part. Whereas the said Heard Brothers are the owners of the ship *Westward Ho*, and the said C. J. Mitcheson is the owner of the ship *Grenfells*; and the ship *Grenfells* having run into and injured the ship *Westward Ho*, the said ship *Grenfells* has been arrested and now continues under arrest. And whereas, on the application of the parties of the second, third and fourth parts, the said Heard

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Brothers have agreed to release the ship *Grenfell* on the terms and conditions hereinafter appearing. Now these presents witness and the parties to these presents mutually agree with each other as follows: The said Heard Brothers shall forthwith release the said ship *Grenfell* from the said arrest and in consideration thereof the said parties of the second, third and fourth parts, some or one of them, shall forthwith pay or cause to be paid to the said Heard Brothers the amount of damage which the said ship *Westward Ho* has received from the said collision. And that the whole of the said parties of the second, third and fourth parts shall be and are hereby declared to be in proportion to their respective interests liable to pay the said amount of damage and also the costs of the proceedings in the Court of Admiralty against the said ship; and it is further agreed between the said several parties hereto that if any dispute or difference shall arise between the said Heard Brothers and the said other parties hereto, or any or either of them, with respect to the amount of damages claimed by the said Heard Brothers by reason of the said collision, the said amount shall be referred to the award and determination of William Richards, Esq., of New City-chambers, Bishopsgate-street, London, whose decision shall be final and conclusive between the parties; and any party hereto may make these presents a rule of any one of Her Majesty's Courts at Westminster. As witness the hands of the parties,

(Signed)

GEO. HEARD,
J. HOLMAN and SOX,
C. J. MITCHESON.

Witness, &c.

After the execution of this agreement and the release of the *Grenfell*, the parties being unable to agree upon the amount of compensation to which the plts. were entitled, the defts. paid the plts. 1500*l.* on account, and Mr. Richards, the arbitrator mentioned in the agreement, was called on to fix the amount due to the plts. The arbitrator at first doubted whether he was empowered to award any compensation to the plts. for the loss which they had sustained by the forced detention of their ship; but eventually, on the 14th March 1864, he made an award reciting the agreement of the 13th March 1863, and finding the amount of the damage sustained by the ship to be 1337*l.* 13*s.* 6*d.*, and the further damage sustained by the plts. in consequence of the detention of the *Westward Ho* during the time necessary for repairs, and otherwise by reason of the collision to be 785*l.* 7*s.* 4*d.*

The defts. repudiated their liability under the agreement to pay any portion of this latter sum, and the plts. thereupon brought this action against them to recover 519*l.* 1*s.* 2*d.*, being 500*l.* the balance remaining in the defts.' hands of the 2000*l.* collected and paid over by the Western Marine Insurance Association, and 19*l.* 1*s.* 2*d.*, the defts.' proportion of the Admiralty costs.

The declaration set out in the first count the facts of the collision and arrest and the agreement of the 13th March 1863, and the sums awarded by Richards, and alleged that 519*l.* 1*s.* 2*d.* still remained due under the agreement. It also contained a count for money paid and money agreed to be paid.

The pleas traversed the material allegations in the declaration, and to the last count alleged payment.

At the trial a verdict was entered for the plts. for the amount claimed, the defts. having leave to move to enter a nonsuit or verdict for the defts. A rule having been obtained accordingly,

Lush, Q.C. and W. Williams showed cause.

Mellish, Q.C. and T. Jones supported the rule.

ERLE, C.J.—I am of opinion that the plts. are entitled to recover from the defts. under their agreement the same amount as they would have recovered in the Court of Admiralty, by which the ship *Grenfell* was detained, provided it does not exceed the sum insured; that is, they are entitled to recover the amount of the repairs necessary for the framework of the ship and compensation for the loss of the profit which would otherwise have been made by the employment of the ship. They would have had these amounts if the suit had continued in the Admiralty Court. By the agreement they give up

the suit and accept the agreement instead. There is no suggestion that the ship *Grenfell* was not a sufficient security for the amount which the plts. were entitled to recover in the Admiralty Court. Have the plts. then given up their right to recover for the loss of profits caused by the collision? It is said that they have done so, because the damage which, by the agreement, the defts. are to pay to the plts. is the damage to the framework of the ship only. I am of opinion, however, that the damage which the ship *Westward Ho* has sustained from the collision may be properly held to mean the amount of damage which the owner of the *Westward Ho* has sustained, i. e. the sum of money which will compensate the owner for the damage which he has sustained by reason of the collision. The agreement is capable of that meaning. The defts. were liable under the 17th of their regulations, as insurers of the *Grenfell*, to pay to the owner of the *Grenfell* the amount of the "damage or loss by contact" which that ship had done to the *Westward Ho*. Loss by contact includes loss of profits which the *Westward Ho* would have made. It was immaterial to the defts. whom they paid, and they made the agreement with the plts. in order to avoid circuity of action. I have endeavoured to explain the grounds of my judgment, in the hope that the defts. may be held harmless in any other court where the question may arise.

BYLES, J.—I am of the same opinion. The question is, what is meant by ship. It is said that, although the direct damage done to the ship and the costs of the suit in the Admiralty Court must be paid by the defts., yet, that the intervening damage proceeding from the detention of the ship is not to be paid. We must, however, carry out the real meaning of the agreement, and construe the word ship as meaning the owners of the ship. Mr. Jones says that to do so would be to give a rhetorical meaning to the word. But it is not a forced construction. The word "Cabinet" is ordinarily used to signify the members of the Cabinet. The gentlemen before and behind the bar are signified by the expression, "the Bar." So the "owners of the ship" may be meant by "the ship."

KEATING, J.—I am of the same opinion. We must look at the circumstances which existed when the agreement was entered into. The plts. had the security of the *Grenfell* in the Court of Admiralty, and they gave that up, as appears by the recital of the agreement, on the application of the other parties to the agreement. It is scarcely conceivable that the plts. should have intended to part with their security, if they were to give up any part of the compensation which they would have received by retaining it.

M. SMITH, J.—Looking at the words of the agreement alone, a question might have arisen as to whether or not the word "ship" meant the "owners of the ship;" but, reading it by the legitimate modes of construction, and looking at the circumstances, it is clear that the damage to the ship was meant to express the damage sustained by its owners.

Rule discharged.

Attorneys for the plts., Cotterills.

Attorney for the defts., J. Baker, jun.

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BARKER v. M'ANDREW.

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Tuesday, May 16, 1864.

BARKER v. M'ANDREW.

Ship and shipping—Charter-party—Commencement of voyage—Perils of seas—Guarantee for cargo.

A ship chartered to sail to some usual loading place, and after taking in cargo there to proceed to a named port of discharge, commences her voyage on starting to proceed to the loading place, and therefore the ordinary exception, "the act of God, the Queen's enemies, restraints of princes and rulers, fire and all and every other dangers and accidents of the seas, rivers and navigations, of whatever nature and kind soever, during the said voyage always excepted," contained in the charter-party, applies to the preliminary transit from the place where the ship was when the charter-party was made to the loading place.

The words "guaranteed for cargo in all this month," contained in the charter-party,

Held, not to prevent the exception from protecting the ship during the preliminary transit.

Action by charterers against shipowners for not receiving a cargo. The first count was on a charter-party, the second on an agreement.

Fourth plea:

The deft. says, that the charter-party in the first count mentioned was and is as follows:—"London, 3rd Oct. 1863.—Charter-party.—It is this day mutually agreed between Messrs. R. McAndrew and Co., of the good ship or vessel called the new steamer *Smyrna*, of the of tons, or thereabouts, now at Newcastle, and Messrs. J. Barker and Co., of London, merchants, that the said ship being tight, staunch and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to one usual loading place, guaranteed for cargo in all this month, or so near thereto as she may safely get, and there load from the factor of the said freighters in the customary manner a full and complete cargo of about 1500 tons of coal, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions and furniture, and being so loaded shall therewith proceed to Alexandria, Egypt, or so near thereto as she may safely get (cargo to and from alongside, and at merchant's risk and expense) and deliver the same on being paid freight as follows: thirty pounds per keel of twenty-one tons and one-fifth, with fifteen guineas gratuity in full of all port charges and pilotage (the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers and navigations, of whatever nature and kind soever, during the said voyage always excepted); the vessel to be addressed to the chartered agents, paying the one usual consignment commission of 2s., and to have a lien on cargo for all freight, dead freight and demurrage; captain to sign bills of lading at any rate of freight, without prejudice to this charter, freight to be paid on unloading and right delivery of the cargo, in cash, at current exchange, one hundred and twenty-five tons to be allowed the said merchant per weather-working day (if the ship is not sooner dispatched) for unloading; and all days on demurrage over and above the said lying days at thirty pounds per day; penalty for non-performance of this agreement estimated amount of freight.—Robert McAndrew, J. Barker and Co., agents. Witness to the signature of both parties, W. Nanca." And that the agreement in the second count mentioned was the same charter-party with an extension of time, mutually agreed on by the pta. and deft., for being ready for cargo until the early part of Nov. 1863. And the deft. says, that at the time of the making of the said charter-party and agreement, in the first and second counts respectively mentioned, the said steamer so being at Newcastle as in those counts mentioned, was at a place there far distant from the usual place there for loading, to which the said steamer was to sail and proceed; and the said steamer, before reaching such usual place, would necessarily be exposed to divers dangers of seas, rivers and navigation, all which the pta. and defts. at the said time well knew; and the said voyage in the said charter-party mentioned and referred to was a voyage from the place at Newcastle at which the said steamer was at the time of making the said charter-party and agreement, to the said usual place at Newcastle for loading, and from thence to Alexandria, and that the said steamer during the said voyage, that is to say, during such part of the said voyage as took place before the said steamer sailed or proceeded from the said usual place on her way to Alexandria, and after she had received on board part of the said cargo, and before any breach of the said charter-party or agreement, was hindered and prevented, by the danger of the seas, rivers and navigation then happening, from receiving and loading on board and from being ready to receive and load on board the residue of the said cargo, and was thereby greatly and neces-

sarily delayed therein, which are the supposed breaches of contract in the first and second counts respectively complained of.

Demurrer on the ground that, according to the true construction of the charter-party, the voyage had not commenced at the time when the steamer was hindered and prevented, as in the plea mentioned; and consequently, that the exception did not apply.

Horace Lloyd, for the pta., contended that the voyage did not commence till the vessel started from Newcastle with the cargo on board, and that the exception protecting the defts. from accidents resulting from the perils of the sea, did not apply to the preliminary transit to the loading place. He relied on

Crow v. Falk, 8 Q. B. 467;

Valents v. Gibbs, 6 C. B., N. S., 270; 28 L. J., 229, C. P.

Rew, for the defts., relied on

Bruce v. Nicolopulo, 11 Ex. 129.

WILLES, J.—I am of opinion that our judgment should be for the defts. The action is founded on a charter-party, by which it was provided that the defts.' vessel, being then at Newcastle, should proceed to some usual loading place, guaranteed for cargo in the month of October, and there take in a cargo and proceed therewith to Alexandria. The charter-party contained the usual exception of "the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas and rivers and navigations, of whatever nature and kind soever during the said voyage." I presume, from the state of facts disclosed by the pleadings, that the vessel broke ground to proceed to the usual place of loading. I will assume, also, that it is not clear whether she arrived at the usual place of loading or not, though she is said to have taken on board part of her cargo. It is unnecessary, however, so to construe the pleadings, as it is clear that she did break ground to proceed to the place of loading, and was prevented from fulfilling the terms of the charter-party by arriving there so as to take a cargo on board within the stipulated time, by dangers of the seas, rivers and navigations. Then the questions which arise are, first, whether the word voyage in the clause containing the exception includes the vessel's preliminary transit to the place of loading; and, secondly, whether, assuming that the word voyage would otherwise have included that preliminary transit, the parties, by using the words "guaranteed for cargo in all this month," have shown that they did not intend the exception to apply to the preliminary transit. The first is a general question; the second relates to the construction of this particular charter-party. The first is in effect whether, when a charter-party provides that a vessel shall proceed to a port without cargo, take a cargo on board there, and then proceed on a voyage to a port of discharge, the exception of the perils of the seas and so forth, applies only to the voyage with the cargo on board, or includes the preliminary transit. To determine this satisfactorily, it is necessary to consider the meaning of the exception. Shipowners carrying goods by sea are common carriers, and but for the exception, would be liable for all accidents but the acts of God and the Queen's enemies. This was well known to be the rule of the English law, but it was not the universal rule of maritime law. Therefore, to limit the liability of English shipowners under the English law, this exception was introduced large enough to include every case of accident arising without fault of the shipowner or the master employed by him. That being so, the reason for the exception, when we consider its object and origin,

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applies to the preliminary voyage as much as to the voyage with cargo. There is no reason for applying it to one part of the voyage more than to another. Is the preliminary voyage then a part of the voyage? That comes to be a question only of language. The voyage is nothing more than the passage of the vessel over the agreed journey. Mr. Llyod, for the plt., said that the contrary has been decided in two cases. But, I think that there is only one decision on the exact point, and that one is against him. *Crow v. Falk* was a case in which there was no preliminary transit. There was no voyage till the vessel broke ground, and for that reason the court held that the exception did not apply while the vessel was at the port of loading. *Valente v. Gibbs* was a peculiar case. It was an action brought to recover penalties for delay, and all that was decided was, that delay at the port whence the vessel was to start was not within a contract to pay penalties for delay on the voyage. It is true that the Lord Chief Justice and Crowder, J. expressed an inclination of opinion that the voyage did not begin till the vessel reached the port from whence cargo was to be taken; but this was on the construction of the particular instrument, and not on the ground that cargo was necessary to the voyage. Here the charter-party is in the ordinary form. Not only is there no authority against the plts., but *Bruce v. Nicolopulo* is an authority in favour of the defts. I do not concur with what is there said of *Crow v. Falk*, but it was held that the preliminary voyage was to be considered as part of the voyage within the clause relating to restraints of princes. That was a decision of importance, and in accordance with good sense. The guarantee for cargo "in all this month" merely means that the vessel will be ready for cargo within a month, provided it is not prevented by some accident, without fault on the part of the shipowners. Mr. Rew argued that the guarantee was merely introduced to enable the charterers to throw up the charter-party if the vessel were not ready by the end of the month. It is not necessary to decide if that was so or not, though his argument in support of that view was strong. The guarantee must be taken with the context, as subject to the condition that the guarantors were not prevented by the accidents contained in the exception. I think, therefore, that the plea is a good plea.

BYLES, J.—I am of the same opinion. The question is, what is meant by the exception? The word voyage, standing alone, is a very extensive word. It means a passing by water from one port or place to another. That explanation would assist us little, but the legitimate rule for the construction of instruments is to look at them with regard to the existing facts. The plea informs us that at the time of the making of the charter-party and agreement the steamer was at a distance from the place of loading, and would necessarily be exposed to perils in proceeding there, as the plts. and defts. well knew. The parties must be taken to have contemplated those facts when they made the charter-party, but in face of the distance and perils the ship engages with all convenient speed to sail and proceed to the loading place. There was a contract binding the ship to proceed on that preliminary part of the voyage and to face those dangers. The charter-party further provides that the ship, being tight, staunch and strong, and every way fitted for the voyage, shall sail to the loading place—not that she sail to the loading place, and thence, being tight, staunch and strong, sail on the voyage to the port of discharge. There are only two places in the charter-party where the word voyage occurs, and the first must necessarily include the previous part of the voyage. The word "sail" is a very strong

and almost technical word. It means "starting on the voyage." There is a distinct authority to that effect in the language of Willes, J., in *Valente v. Gibbs*, that when the vessel sails the voyage commences. I have no hesitation in saying that the plea is good. I say nothing more about the guarantee, which may be, as my brother Willes says, subject to the exception, or it may be the usual guarantee, and not intended to limit the exception.

M. SMITH, J.—I am of the same opinion. Under this charter-party, for some purposes the voyage commenced when the ship started from the place where she was when the charter-party was made. There was an obligation in the charter-party on the ship to start and sail to the loading place with all convenient speed and without deviation. The parties knew that she would have to sail over the intervening distance between her actual place and the loading place and face the dangers of that journey. Why should not the exception attach to what was not a preliminary voyage, but a preliminary part of the voyage? Each party contemplated that these perils would have to be encountered. As far as authority goes it is in favour of the defts. We must give effect to the intention of the parties to be collected from the whole charter-party, and I think that we shall be doing so in holding this to be a good plea. I agree with my brother Willes with respect to the guarantee, which is only an emphatic word signifying the intention of the parties.

Judgment for the defts.

Attorney for the plts., James Cooper.

ADMIRALTY COURT. IRELAND.

THE ROTHSAY CASTLE. (a)

Salvage—Signal of distress—Costs.

*In this case, where there was no personal risk or any danger, but which was an ordinary salvage service performed with skill, good conduct and complete success to a vessel in imminent peril of being totally lost, the Court awarded to the salvors a sum of 315*l.*, or "one-fourth" of the admitted value and costs.*

This was a suit instituted by the registered owners of the *Holyrood*, a screw steamer of 533 tons burthen and 100 horse power (Captain Fudge), the property of the London, Limerick and Liverpool Steamship Company, against the river steamer *Rothsay Castle*, of Glasgow, the property of the Oriental and Inland Steam Company (William C. Mahon), master, to recover compensation for salvage services alleged to have been rendered to the impugnant vessel a few miles off the Tuskar upon the south-east coast of Ireland. The impugnant vessel, including stores, &c., was admitted to be worth 1500*l.*, and one-half that amount was claimed for salvage. The salvaging vessel and cargo were stated to be worth 16,800*l.* The case was by consent heard *vis à voce*, and the facts appear fully in the judgment of the court.

Drs. Townsend and Chatterton, Q.C. for the salvors.—It was a case of merit, and deserved the marked approbation of the court, which should award at least one-half the value of the property saved. They cited

The Martin Luther, Swa. Rep.;
The Barklay, Swa. Rep.

Dr. Gibbon and Elrington for the *Rothsay Castle*.—No doubt services were rendered and should be

(a) From the Irish Jurist, by permission.

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THE ROTHSAY CASTLE.

[IRELAND.]

said for, but the amount claimed was most exorbitant.

KELLY, J.—This case has been spread out in the pleadings perfectly free from exaggeration, and spoken to on both sides so as to assist the court very materially. No question of law has arisen, and the single duty devolved upon the court is, to ascertain what amount of compensation should be awarded to the petitioners for the services proved by the evidence to have been rendered by them. That evidence is singularly corroborative, presenting one uniform narrative, without contradiction by witnesses at either side upon any material point. The *Rothsay Castle*, it appears, is a long river steamer, intended for inland navigation in India, and early in November last was stripped of her engines and machinery, and rigged as a three-masted schooner to proceed to Calcutta under canvas, the company who owned her having deemed that the most advisable course, her boiler and steam machinery having been shipped for the same destination in the *Earl of Lincoln*. For the purpose of avoiding the delays of the Channel navigation, the *Rothsay Castle* had been towed from Lamlash to Queenstown; and then, on the 13th Nov., from the latter harbour to the Old Head of Kinsale, for the purpose of giving her a good offing. Scarcely had she been cast off, and made a little to westward of Cape Clear, when the wind came on to blow heavily from S.W., and by W. to N.W., and she was brought round to run up Channel. The next day the step of the foremast gave, and the weather became so thick and dark, the master could not tell where he was. He was unable to take an observation, and his expression is, "He was puzzled to know where he was going, it was so dark and thick, and the vessel was drifting like a bladder on the water." At this most embarrassing juncture, the crew, refusing to work, came aft, and insisted on the master making for the nearest port. He asked them to give him one day's time to see if it would clear, and thus matters then stood. Through the course of that night an American vessel passing him, the master endeavoured to make sail after her, and threw out signals, but she passed on unheeding him. The next morning it cleared, when he found himself off the coast of Waterford, instead, according to his own calculation, of being to the west of Cork, having, to use his own words, made more way than he anticipated to leeward; in plain language, having drifted upwards of fifty miles to eastward of his then intended port. At this moment of time, viz., noon on Thursday, the *Holyrood* crew steamer, on her voyage from Liverpool to Limerick, with a valuable cargo, had passed the Tuskar, sighted the *Rothsay Castle*, then distant about seven miles, and seeing her ensign union downwards, at once shaped her course to come up with her to assist her. The position of the *Rothsay Castle* was then sufficiently perilous, the Saltees being under her lee, the strong current of the flood tide, which was then making, setting fast towards them; and the Hook, the entrance to the only harbour available, full eight miles to the north, the wind blowing nearly a gale from W.N.W., and a heavy sea rolling, the foremast of the vessel herself disabled, and her crew terrified and mutinous. The evidence of the master is, that he could not have cleared the Saltees; and the evidence of the other witnesses is, that he could not have fetched the Hook. The *Holyrood*, having hailed her, was asked to tow her to the nearest port, yet for that purpose the master of the *Rothsay* admitted he had not on board a rope sufficiently strong. That want was speedily supplied by the vigour of the master of the *Holyrood*, who, after two ineffectual attempts, one of them not without personal risk to himself, succeeded

in getting his own towline made fast to the *Rothsay Castle* and the vessel herself in tow. The *Holyrood* then, abandoning the further prosecution of her own voyage, turned back, towing the *Rothsay Castle* on towards the Hook, and then up the river to Passage, where, after a labour of about five hours, and a traverse of about nineteen miles, she left her at anchor in perfect safety. The master of the *Rothsay Castle*—the best witness on the point—made no secret of his sense of that providential rescue, having said to the master of the *Holyrood*, "that he thanked him for saving his life and his ship," and to the witness Phillips, that it was "a lucky thing he had met the *Holyrood*, or he did not know where he would be then." An occurrence which took place but a few hours later that same evening gives particular force to those last expressions. The wind had been blowing strong, nearly a gale, during the morning, but that night it increased to an entire gale. The words just referred to had, therefore, fearful and substantial import; as, had this disabled schooner not met with her salvors then and there, she must, under the circumstances, have been driven on the Saltees, for she had not sufficient ground tackle, even had she had the ground, to ride out that gale at anchor. From that great peril her rescue was complete; and here is the first element of salvage proper. It does not appear to the court that so great a merit is diminished because it has been accomplished without loss of life or limb to the salvors. At the same time it is not to be denied that it might be enhanced by such undesirable accompaniments, not in its intrinsic value to the owner of the rescued property, but in the amount of the reward then so justly to be increased by the salvors. The time occupied was short, but was effective, and all the more so when the change of weather that night is borne in mind. The court in all such cases will ever keep in view the fact that steam power—the cause and the forerunner of so many important and beneficial changes in all things connected with its influences—has, in regard to salvage, effected two great boons in favour of navigation and the world of commerce, namely, the saving of human life and property, with nearly entire immunity and with almost certain success. The petitioners in this case are the owners of a steamer of high value, and were the carriers at the time of a full cargo—all was risked in the service in question, and the voyage itself delayed. These in themselves are ingredients in their favour, and are to be weighed along with and against other circumstances. The admitted value of the *Rothsay Castle* and her stores is 1500*l.*, and, according to the law of salvage, a just proportion of that sum—just to owners equally as salvors—is now to be awarded. The Court, then, estimating the services of the salvors in this case but as ordinary services in respect of personal risk or daring, or of labour, and in regard of the object achieved, that it was achieved with skill, good conduct, and complete success; keeping also before it the policy of encouraging in such enterprises the aid and co-operation of great steam-packet companies, will award to the petitioners one-fourth of the value of this vessel and her stores, being a sum of 375*l.*, with the costs of suit.

Proctor for the petitioners, *Hamerton*, Q.P.

Proctor for the defts., *Lee*.

ADM.]

THE ANN CAROLINE.

[ADM.]

UNITED STATES DISTRICT COURT OF ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate in Admiralty.

THE ANN CAROLINE.

Collision in narrow channel—Vessel on privileged tack sometimes bound to give way.

Where two vessels were beating up a narrow channel, both close-hauled on the larboard tack, and the one which was to leeward suddenly came round on the starboard tack, and ran on till she struck the other vessel, which did not change its course:

Held, that the injured vessel, not being able to go about because of her nearness to a shoal, and being so far to windward and ahead of the other one in the channel that if she had ported her helm she would have been in imminent danger of colliding, the other one was not in fault for keeping her course, though on the larboard tack:

That the other vessel might have gone about or might have starboarded her helm and gone under the stern of the injured vessel, and was, therefore, under the circumstances, in fault for keeping her course, though on the privileged tack.

This was an appeal from a decree of the Circuit Court for the Southern District of New York. The libel was filed in the District Court by the owner of the schooner *John C. Wells*, to recover the damages occasioned by her being run into and sunk by the schooner *Ann Caroline*, in Delaware Bay, on Feb. 11, 1854, about 3 p.m.

The facts of the case were substantially as follows: There were, on the day in question, eight vessels beating up Delaware Bay. The channel runs about north, being about a mile wide, and having the Jersey shore on the east and Crow Shoal on the west. The wind was a full-sail breeze from the N.N.W., and the vessels were beating up, making their long tacks towards the Jersey shore. The *John C. Wells* was deeply laden, and the *Ann Caroline* was light. The *Wells* had tacked near Crow Shoal, so near as to stir up the mud with her centre-board, and, with six other vessels, was running on her larboard tack, the *Ann Caroline* being the furthest eastward of these; and the libellant alleged that, in this position of affairs, the *Ann Caroline* unexpectedly, without running out her tack, came round on the starboard tack, and running across the bows of three of the other vessels, struck the *Wells* about ten feet forward of her stern, sinking her instantly.

The District Court made a decree dismissing the libel. The libellants appealed to the Circuit, which reversed that decree, and gave a decree in favour of the libellant; and from this decree the claimants of the *Ann Caroline* appealed to the Supreme Court.

The appeal was argued by *E. C. Benedict* for the libellant, and by *C. Donohue* for the apps.

The opinion of the court was delivered by Mr. Justice CLIFFORD.—Having stated the case, he proceeded as follows:—The theory of the claimants is, that inasmuch as their vessel had come round on to the starboard tack, it was the duty of the vessel of the libellant to give way and pass to her right. The general rule of navigation undoubtedly is, that a vessel on the starboard tack, if close-hauled, has a right to keep her course, and that one on the larboard tack, although she is also close-hauled, must give way or be answerable for the consequences: (*St. John v. Paine*, 10 How. R. 581.) But it is insisted by the libellant that the rule has no application to the relative position of the two vessels, as shown by the evidence in the case. His

proposition in that behalf is, that his vessel was to the windward of the vessel of the claimants, and so far ahead of her in the channel that if those on board of his vessel had observed the general rule and ported her helm a collision would necessarily have followed. Granting that the position of the two vessels was such as is assumed by the libellant, then it is clear that the rule of navigation under consideration cannot apply, and that the views of the libellant are correct. The proximity of the libellant's vessel to the shoal was such that it rendered it unsafe for those in charge of her to attempt to go about, because the danger was, that if they should do so she would be wrecked on the shoal. She could not therefore starboard her helm and go about, and if, as assumed, she was ahead of the claimant's vessel, and to the windward, then it is clear that she could not be required to port her helm and attempt to go to the right, as in doing so she would have to cross the bows of the vessels astern, and must incur the imminent danger of collision with the vessel of the claimants. The principal question of fact therefore is, whether the theory assumed by the libellant is correct, because it is obvious that if the facts are so, the conclusion deduced from them must follow. Two controverted facts are assumed in the proposition of the libellant: first, that his vessel was to the windward; secondly, that she was ahead in the channel. Argument is not necessary to show that the libellant is right on the first point, as the whole current of the evidence when properly understood is that way, but there is much conflict in the testimony on the second point. Where the conflict of testimony in respect to a disputed point is between the witnesses on board the respective vessels, and no others are examined in the case, it is sometimes difficult to form any satisfactory conclusion. No such embarrassment, however, arises in this case, as there were four witnesses examined, who were on board the other vessels in the same company. Those witnesses concur in the statement, not only that the vessel of the libellants was to the windward of the claimants' vessel, but that she was above her in the channel, and in view of the whole case we adopt that conclusion as the correct one from the evidence. The vessel of the claimants was also in fault, because she had no look-out, and the evidence tends strongly to the conclusion that the disaster is mainly attributable to that cause. The testimony shows beyond controversy that she had no look-out at the time of the collision, and that the master, after the vessel was put about and filled away on the starboard tack, went below, and when he came on deck just before the disaster occurred, he inquired, with evident displeasure, if no one had seen the vessel of the libellant, and it is clear that he had abundant reason for dissatisfaction. Usual precautions were then too late, and in a very short time the vessel of the claimants struck that of the libellant, and the latter sank in the channel. Plainly, the vessel of the libellant could not avoid the collision; because, if she had attempted to go about, she would have gone on the shoal, and if she had ported her helm and attempted to go to the right, she would have collided with the vessel of the claimants. On the other hand, it is clear beyond doubt, that the vessel of the claimants might have avoided the disaster without any peril. She might have gone about, as she had ample room to do, or she might have starboarded her helm and gone under the stern of the other vessel. For these reasons we think the conclusion of the Circuit Court was right on the merits.

Decree affirmed.

COURT OF COMMON PLEAS.

acted by W. MAYD and LUMLEY SMITH, Esqrs.,
Barriers-at-Law.

Thursday, June 8, 1865.

TRAYES AND ANOTHER v. WORMS.

*Shipping—Marine insurance—Liability to
contribute to general average—Advance on freight—
Tort.*

The charter-party was as follows: "I, the charterer, do hereby charter a ship of the plt. for a voyage to and from the ports of call specified in the charter-party, by which it was stipulated that should be paid in advance, less a certain sum paid on delivery of the cargo, and also less the insurance to be effected by the charterers at expense. The deft. paid the stipulated portion of the freight in advance, and the ship in the course of the voyage was damaged and incurred expenses which were to be paid by the charterers in general average charges:

"The meaning of the charter-party was, that the charterers should retain the portion of the freight advanced, whether the ship arrived at her destination and therefore that it was at the deft.'s risk, consequently, that he was liable to contribute to general average in respect of the freight advanced, as in respect of the cargo.

The case stated after issue joined and before consent of the parties, and by order of

the court, contained *indebitatus* counts for general average, money paid, &c. The deft. pleaded a special plea, payment, the Statute of Limitations, a special plea setting up an American tort. The last plea was demurred to, and, on the 1st, held by the court to be bad: (see the 8 C. B., N. S., 149.) The amount claimed was £1007l. 13s. 11d., with interest at 4 per cent. from the 29th June 1854. The special case stated the following material

facts: On the 21st April 1853 Edward Oliver, the then owner of the ship *Hibernia*, effected a charter of the ship to the deft. for a voyage with coal from San Francisco to London. The cargo was to be loaded "on being paid freight at and after the rate of 10s. British sterling per ton of twenty cwt." And with respect to the freight it was stipulated, "the freight to be paid by the deft. on approved bills on London at six months' date of sailing, less costs of insurance, to be paid by the charterers at ship's expense, or under discount equal thereto at charterers' option in either case 800l. which is to be paid by the deft. of cargo, in cash at the current rate of exchange."

The ship, under the charter-party loaded on board 1246 tons of coal; and according to the charter-party he, in payment of the freight payable under the charter-party, less the 800l. mentioned therein payable on delivery of the cargo, gave two bills of exchange amounting to the sum of 4518l. 6s., being the balance of the freight less the insurance thereon, which was 288l. 14s. A receipt for 4807l., stated to be made up of these two sums of 4518l. 6s. and 288l. 14s., was indorsed on the bill of lading as paid on account of the within freight, to be paid from freight at San Francisco. Both the bills were paid at maturity. The owner of the ship, Oliver, on the 14th July 1853, transferred the benefit of the charter to the plt., and subsequently transferred their interest in the ship to the James. The special case set out the facts between these parties, but they are unnecessary for the purposes of this report.

The ship shortly after the shipment of the cargo

sailed on the voyage, and during the course of it sustained considerable damage, and was, for the safety of the general adventure, compelled to put into Valparaiso, where she arrived on the 7th Jan. 1854, and remained till the following March. Expenses were necessarily incurred there in the repair of the ship, the particulars of which appeared in the average statement set out in the case, and it was agreed between the parties that the portion put down to general average in the statement were general average charges. The master, not having funds at his command to defray the expenses, on the 10th March 1854, properly borrowed the requisite amount at Valparaiso, and executed a bottomry bond in the ordinary form, binding the ship, the cargo and the freight to be earned.

After the completion of the repairs the ship proceeded on her voyage to San Francisco, where she arrived in June 1854, and delivered the cargo. The plt., on hearing of the injury sustained by the *Hibernia*, transmitted to San Francisco the sum of 1000l. towards defraying the bottomry bond. On the ship's arrival at San Francisco an average statement was duly made out in accordance with the law, but this statement was not to preclude either party from raising the question who was to contribute in respect of freight. The deft. duly paid the 800l. balance of the freight, and also the sum of 912l. charged on the cargo in the average statement.

The deft., on the 21st and 25th July 1853, effected two policies of insurance in France for 130,000 francs on advances made on freight of the cargo. The policies were stated to provide for reimbursement of the advances in all cases of fortune of the seas which might have for consequence the deprival of the said advances from the person assured. No other policies were effected in respect of the advances.

The plt., or their transferee James, paid the amount advanced under the bottomry bond, and claimed from the deft. the sum charged by way of general average on the freight paid in advance in the average statement. The question for the opinion of the court was, whether or not the plt. were entitled to recover this sum? The court had power to draw inferences of fact.

Sir G. Honyman (*M'Leod* with him) for the plt. —In respect of the freight paid in advance, the deft. is the proper person to contribute. This is not a case of a sacrifice of any part of the ship, but of a money payment made for the benefit of all persons concerned in the ship, freight and cargo. By the terms of the charter-party the deft. was to insure the freight. Whether he did so, or whether he preferred to put the premiums, or a portion of them, into his own pocket, so as to become his own insurer, is nothing to the plt. The clause relating to the insurance puts the parties into the same position as if the words "ship lost or not lost" were in the charter-party. The freight so paid in advance was not under any circumstances liable to be returned by the shipowners. Therefore the deft. must contribute in respect of the value of his goods increased by that amount of freight. If he has insured the freight he will recover it from the underwriters, and if not, it is not the fault of the plt. He referred to

Ellis v. Lafone, 8 Ex. 546;

Arnould's *Marine Insurance* ss. 343, 344, 349;

Stevens and Benocke on *General Average*, by Phillips (edit. Boston, 1883), p. 215.

Mellish, Q.C. (*Milward*, Q.C. with him) for the deft. —The first question is, at whose risk the advanced freight was. By the terms of the charter-party freight is to be paid at the rate of 10s. per

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ton "delivered" *i. e.* at San Francisco. The subsequent clause about payment of a certain portion of the freight in advance is to be reconciled with this, by taking the payment in advance to be made simply on account of the freight which would be earned if the goods were delivered at San Francisco, and would be liable to be returned if they were not so delivered. [WILLES, J.—Has it not been decided that where the charterer is to insure, the freight paid in advance is not to be returned? *Honyman* referred to *Hicks v. Shield*, 7 E. & B. 633.] The next point is, that the freight paid in advance ought not to contribute at all. It was not in reality at risk at all, and therefore did not benefit by the amount expended:

Phillips on Insurance, 4th edit. p. 154, s. 1404;
Arnould's Marine Insurance, 1st edit. s. 848.

ERLE, C. J.—The general rule respecting contribution to general average is well understood. With respect to this advance of freight, it is clear from the language of the charter-party that it was not in any case to be returned; therefore, the 4800*l.* which was in the hands of the shipowner was no longer at his risk. It is clear that that portion of the freight is to contribute, but the question is, who is the party interested in it. I am of opinion that the charterer is the party interested, and that he had an interest in the ship's arriving at the port of destination to the extent of the value of the cargo increased by the advance which he had made on the freight. I need say nothing more than that, according to the general rules, the charterer is to contribute.

WILLES, J.—I am of the same opinion. With respect to the question whether the money advanced was to be returned, it is concluded by the terms of the charter-party. The charterers were to insure, and it is clear from that, that the advance was not to be returned if the ship did not arrive at her destination. The charterer must seek from the underwriters the indemnity which the charter-party contemplated that he would have. The second question is, whether a person who has advanced money on account of freight and shipped goods on board is liable to contribute to general average in respect of the sum advanced. I apprehend that he is. It is not a question between the charterer and the underwriters of the cargo and freight. The law lays it down that general average must be contributed to by persons interested in the freight and cargo. The debt. was interested in the freight advanced in the same sense as a shipowner who had fitted up a ship with goods would be interested in the carriage thereof, so as to enable him to insure his interest, though it would not strictly be freight. I think that this is a clear case of general average, and therefore that judgment must be for the plts.

BYLES, J.—I am of the same opinion. The charterer is really the purchaser of part of the freight, and his purchased freight has been saved. Another point of view from which it may be looked at is, that the debt's goods have been augmented in value by the payment made. It is not, however, necessary to put it on this ground.

M. SMITH, J.—I am of the same opinion. According to what seems the proper construction of the charter-party, the advance was not under any circumstances to be repaid. Both the advance, therefore, and the cargo were at the debt's risk, and he is liable to contribute in respect of both of them.

Judgment for the plts.

Attorneys for the plts., Cotterills.

Attorneys for the debt., Field and Roscoe.

CROWN CASES RESERVED.

Reported by J. THOMPSON, Esq., Barrister-at-Law.

Saturday, April 20, 1865.

REG. v. BJORNSEN.

Murder on the high seas—British ship—Register of ship—Prima facie proof—Alien owner—17 & 18 Vict. c. 104.

A murder was committed on board a ship on the high seas, sailing under the British flag, and the accused brought to England in custody, and put on his trial for the crime. To show jurisdiction in the courts of this country it was sought to establish that the ship was a British ship, and the register of the ship at the port of London was put in evidence, wherein the owner's name was stated to be C. A. Rehder, of 14, London-street, City of London, merchant. It was proved, however, that Rehder was alien born, and it did not appear that he was a denizen of this country or naturalised. It was further proved that the ship was foreign built, and that the officers and crew, including the accused, were foreigners:

Held, that although the register might be prima facie evidence of the facts stated therein, and that the ship was a British ship, yet the proof that the owner was alien born rebutted the inference from the register that he was a British subject, and he was therefore disqualified by the Merchant Shipping Act (17 & 18 Vict. c. 104), s. 18, from being the owner of a British ship:

Held also, that it would not be presumed that he was denizenised or naturalised.

Case reserved by Channell, B.

The prisoner Adolph Bjornsen was indicted before me at the last Winter Commission for the county of Southampton, for the wilful murder, on the high seas, of one Heinrich Leonard Paul Scherek.

The jury acquitted the prisoner of murder. They found him guilty of manslaughter.

This verdict is to be taken for the purposes of the present case to be correct, subject to the points of law hereinafter stated respecting the jurisdiction of the court to try the prisoner for the offence.

The offence was committed on board the barque *Gustav Adolph*, on the 21st June last, on the high seas, at a point about five days' sail from Pernambuco, and about 200 miles from the nearest land.

In opening the case to the jury the counsel for the prosecution stated that since the prosecution had been instituted doubts had arisen as to whether the *Gustav Adolph* was a British ship, so as to give jurisdiction to the Court to try the prisoner for an offence committed on board the barque on the high seas, and that he should place at the disposal of the prisoner's counsel, if desired by him, all the documents in the possession of the prosecution for clearing up those doubts.

The facts relating to the commission of the offence on board the ship having been proved, it was further proved that the ship in question was built at Kiel, in the duchy of Holstein, in the spring of the year 1864. That she sailed from Kiel to London, thence on the voyage in the course of which the offence was committed.

All the officers and crew were foreigners; the prisoner being second mate, and the deceased the master. The ship was sailing under the English flag on the 21st June 1864. The crew were told before sailing that Mr. Rehder was sole owner. He was not a born Englishman.

A certified copy of the register of the *Gustav Adolph*, under the 17 & 18 Vict. c. 104, was put in by the counsel for the prosecution.

It was objected that the qualification of Mr.

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an owner of a British ship according to the section of that Act ought to be

the certified copy as *prima facie* evidence that the ship *Gustav Adolph* was a British

ship. The opening statement of the prisoner, the prosecution, the prisoner's counsel, and the letters, which were then put in evidence, at the request of the prisoner. They were as follows:

Hamburg, 31st Dec. 1863.

I, Esq., London, verbally agreed upon, I hereby make over to you, a contract signed on the 29th May, A.C., by C. L. Bock, shipowner of Kiel, and myself, the delivery of the vessel therein contracted for the sole owner of the barque-ship called *Gustav Adolph*, having dimensions:—

	ft.	in.	
length	116	6	
breadth	131	0	
depth	27	0	British
all over	24	0	measurement
from below to the			
lank	12	4	

As stipulated for, say, Hamburg burnmarks, or agreed upon, I shall make the necessary C. L. Bock, and see to the true fulfilment of giving you all payments made in accounts regard to the vessel herself, I can in future act, and it will thus be necessary for you to of attorney at your earliest convenience.—I, your obedient servant, PAUL EHLERS, Registrar, Doctor of Laws of the Free Hanseatic City, Notary Public, &c., hereby certify and deliver herebefore written was duly signed by &c.

Jan. 1864.

(Signed)

LEHRMAN, DR.

London, 13th Jan. 1864.

I, Esq., of Hong Kong, p. t., Hamburg, reply to your letter of the 31st Dec. last. I am your responsibility in a contract signed the 29th May, A.C., by your good self and Mr. C. L. Bock, shipowner, relating to the barque-ship *Gustav Adolph*, construction at or near Kiel. As sole owner I am empowered to inclose power of attorney, and request enough to undertake the whole and entire above-named ship *Gustav Adolph*, declaring that I shall be satisfied with all and every thing do or cause to be done in or to her in and being intended for the China trade. I am sure time that you will be kind enough to attend, and in consideration of these services on that you charge no interest on any part of the above vessel for which you remain under promise, make over and transfer to you as between us, 6-7th, say six-sevenths parts arising out of this venture. On the other side between us that in case any losses should be sustained you share in them to the same extent say for six-sevenths (6-7ths). The result may be a favourable one, I remain, truly,

(Signed)

C. A. REHDER.

two names as witnesses to the signature—Behder, James L. Wulff, and T. C.

acted by the counsel for the prosecution, the prisoner was not a natural-born British subject. They had no evidence of his having been of denization or having been natu-

ralized on the part of the prisoner. The prisoner showed a partnership in the vessel with Paul Ehlers, and that it was shown in the 38th, the 103rd, and other sections of the Shipping Acts, that the owner of a British ship must be qualified as the owner of a legal interest; fitting the registration of the ship in the name of the proper officer to be *prima facie* evidence of the owner's qualification to be an owner of a British ship. It could be no evidence of Ehlers' and therefore the letters proving in the ship rebutted the *prima facie* evidence that she was a British ship. The 106th section of the Act was also referred to.

I respited sentence upon the prisoner, who is now in custody, till the next assizes, and reserved for the consideration of this court the following questions:

1. Whether I ought to have received the certified copy of the register of the ship as *prima facie* evidence that the ship was a British ship.

2. If it was rightly received as *prima facie* evidence, whether the letters of the 31st Dec. 1863, and of the 13th Jan. 1864, taken with the admission as to the status of Paul Ehlers, rebutted that *prima facie* evidence.

3. Whether, upon the evidence, there was sufficient proof that the *Gustav Adolph* was a British ship.

Harington for the prisoner.—It is submitted that the conviction was wrong. There was no sufficient evidence that this was a British ship. The register is only *prima facie* evidence of the matters contained or recited in the register or indorsed on it: (17 & 18 Vict. c. 104, s. 107.) The register describes Rehder as sole owner, and it was proved at the trial that he was alien born. He could not, therefore, be the owner of a British ship, because sect. 18 enacts that no ship shall be deemed a British ship unless she belongs wholly to owners of the following description, that is to say, first, natural-born subjects; second, persons made denizens by letters of denization or naturalised; third, bodies corporate established under, subject to the laws of, and having their principal place of business in the United Kingdom or some British possession. There was no proof that Rehder was denizenized or naturalised. The Merchant Shipping Amendment Act (24 & 25 Vict. c. 68), s. 3, shows the intention of the Legislature to exclude unqualified persons from the ownership of British ships and the privileges incident thereto. Accordingly, when a British ship is transferred to any person not qualified to be the owner of a British ship, that fact is to be notified to the registrar and the certificate of register is to be delivered up. Sect. 106, which enacts that unregistered ships shall be treated as British ships in respect of offences committed on board thereof, is limited to ships owned by persons qualified to be owners of British ships. It will be contended that as by sect. 38 no person shall be registered until he has made a declaration of ownership containing a statement of his qualification to be an owner of a British ship and other particulars, it must be presumed that Rehder has made that declaration. But sect. 97 enables the registrar for reasonable cause to dispense with such declaration. No such presumption can be made, therefore, in this case: (*Reg. v. Sewell*, 8 Q. B. 161.) A register is not a document required by the law of nations as expressive of a ship's character: (*Le Cheminant v. Pearson*, 4 Taun. 367.) As to what gives the character of a British ship independently of statute, there is no case to be found reported. The case stands thus, the *prima facie* evidence of the ship being a British ship is rebutted by the proof of Rehder being an alien born:

The Eagle, 1 W. Rob. 246;

The Fortuna, 1 Dods. Adm. 81, 86;

Pirie v. Anderson, 4 Taun. 652;

Liverpool Borough Bank v. Turner, 1 H. & J. 159;

2 De G. F. & G. 502.

A certificated ship and a British ship are not convertible terms.

Prideaux (M. Bere with him) for the prosecution.

—The conviction ought to be affirmed. There was evidence that this was a British ship. The question is not whether this was a British ship within the provisions of the Merchant Shipping Act, for a ship may be entitled to the protection of the British laws although it may not be within its provisions. The Admiralty Courts hold that the tests of a ship being a British ship are the residence of the owner

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in the British dominions and the ship sailing under the British flag. The case shows that Rehder, the registered owner, was resident in London, and that the ship sailed from a British colony and carried the British flag. From these facts the court will infer that this was a British ship. It will be inferred that the declaration of ownership required by sect. 38 of 17 & 18 Vict. c. 104 was made previous to the ship being registered. [BLACKBURN, J.—Why so? The fact was not proved, and sect. 97 enables the registrar to dispense with it on reasonable grounds.] Sect. 42 requires certain particulars to be entered in the register-book, and among them the several particulars as to the ship's origin stated in the declaration of ownership. And on the principle *omnia rite acta presumuntur* it must be presumed that as the Act directs a public officer not to register a ship until such declaration is made, it will be presumed that it has been duly made. Illegality is not to be presumed, nor anything that would subject the ship to forfeiture.

Taylor on Evid. 123, 4th edit.;

Juller v. Albion, 1 Stark. R. 222;

Van Omerson v. Dorrick, 2 Camp. 44;

Sissons v. Dixon, 5 B. & C. 758.

The court will further presume that the party who made the declaration of ownership was qualified according to his declaration. [BLACKBURN, J.—I own I have great difficulty in a criminal case against a third person in making any such presumptions. Sect. 107 carefully avoids saying that the register and declaration shall be proof of the contents, but says that they shall only be *prima facie* evidence of the matters therein.] It is not to be presumed that a party has committed the indictable offence of making a false declaration and unduly assuming a British character: (sect. 103). [BLACKBURN, J.—The truth of a statement is not to be presumed against a stranger on the ground that the party making the statement is not to be presumed to have committed a crime.] In *Rex v. Honekins*, 10 East, 211, it was held that the presumption of law being that every person has conformed to the law till something appear to rebut that presumption, it was to be taken that a person elected to a municipal office had duly taken the sacrament within a year as required by the 13 Car. 2, c. 12. [MELLON, J.—But in this case it is an admitted fact that Rehder was not born in England. CHANNELL, B.—Suppose that a declaration of ownership had actually been put in evidence, would there have been any presumption of the truth of its contents? In *Rodwell v. Lodge*, 1 C. & P. 220, a theatre was presumed to have been licensed from the fact of performances having taken place there; and in *Sichell v. Lambert*, 15 C. B., N. S. 781, a Roman Catholic chapel was presumed to have been licensed for the celebration of marriages from the fact of marriages taking place there. A somewhat similar presumption was made in *McMahon v. Ellis and others*, 14 Ir. C. L. Rep. 499. By sect. 97 the declaration of ownership can only be dispensed with where the registrar is satisfied that from any reasonable cause it cannot be made, and in that case the registrar, upon production of such other evidence, and subject to such terms as he may think fit, may dispense with the declaration. So that it is to be inferred either that the declaration of ownership was duly made, or that evidence equivalent thereto was produced before the registrar. [BLACKBURN, J.—Supposing there had been no statutory enactment affecting the question, what is the definition or character of a British ship at common law? There is no abstract definition to be found in the books:

The Indian Chief, 3 Rob. 13, 33;

The Matchless, 1 Hag. Adm. Rep. 103;

Tobbs v. Fendlebeck, 3 B. & P. 207;

The Vigilantia, 1 C. Rob. 12.

On the whole it is submitted that in this case this was a British ship for the purpose of giving jurisdiction to the Admiralty to prosecute for offences committed on board of her, and it would be dangerous to hold the contrary.

Hurmgton in reply.—It is not found as a fact that Rehder was an English merchant or resident in London. Carrying any particular flag is evidence against the owner, but not for him, and is not a circumstance from which jurisdiction can be presumed against a foreigner.

ERLE, C. J.—I am of opinion that this conviction cannot be sustained. The prisoner was convicted of manslaughter committed on the high seas, and the question is whether there was any jurisdiction to try the prisoner in England. The crime was committed on the ocean thousands of miles away from British territory, and the ground on which the prosecutor relies for jurisdiction to try in England is that the crime was committed on board a British ship, which carries with it British law, and that the case is therefore as if the crime had been committed on British land. The whole question is whether the ship was a British ship. I am clearly of opinion that there was *prima facie* evidence that she was a British ship. There was evidence of a certificate of registry in London, wherein Rehder was described as the owner at that time as resident in London, and the ship was sailing under the British flag. But Rehder was described therein as sole owner, and I take it to have been proved at the trial that he was alien born. That reduces the question to this, whether the *prima facie* evidence of its being a British ship was rebutted by the negative proof that Rehder was alien born. I am of opinion that it was. Then is the proof that he was alien born disposed of by the presumptions relied on by Mr. Prideaux in his argument, viz., letters of denizenship or naturalisation, and is the court to make such presumptions because Rehder, being alien born, would have become liable to be proceeded against for penalties under the Merchant Shipping Act, for registering the ship as belonging to a British owner? I am of opinion that there is no presumption to justify us in inferring that letters of denizenship or naturalisation were granted to Rehder. I limit my judgment to the question of evidence, the point reserved is merely a matter of evidence.

CHANNELL, B.—I also am of opinion that the conviction cannot be sustained. The offence was committed on board a ship of which the captain, mate and crew, including the prisoner, were foreigners. In one sense the ship may be taken to have been the property of Rehder, who, it was clear, was not a British-born subject. The question is, whether an English court has jurisdiction to try the foreigner for this offence. An English court can have no jurisdiction unless it is to be presumed that this was a British ship, and I can see no ground for inferring that this was a British ship. On the Merchant Shipping Act I cannot come to that conclusion, but on the evidence I agree that there was *prima facie* evidence that the ship was British; but the ordinary rule that *prima facie* evidence may be rebutted applies in this case. I must look at the case then as presenting this fact, that the owner was an alien born. If letters of denizenship or naturalisation had been produced they would have removed that difficulty, but they were not. I see no ground on which the court may draw the inference that one or the other may have been granted. It was then said that the ship might be a British ship independent of the provisions of the Merchant Shipping Act, but I can see no ground for any such inference. Some doubt might arise on sect. 106 as

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ht. That section, however, has no application supposes the capacity to register as a ship, but the privileges of a British ship to because some requisition has not been complied. It is therefore quite out of the ques-

KBURN, J.—I am of the same opinion. It is held that if a ship is a British ship, it carries the notion that it is part of the British territory and crimes committed on board thereof may be in England. I agree that the facts of the sailing under the British flag, and being registered as a British ship, and being registered in the register, were *prima facie* evidence that it was a British ship. The register was *prima facie* evidence that apparently Rehder was sole owner, and proved that he was alien born. There is no pretence for saying that this was a British ship, but from the circumstance of the register stating Rehder to be resident in this country at the time of the registry. That fact shows that he owed a temporary allegiance to this country, and in the case cited of the *Indian* that was the effect of the decision. For that appears, he might have left this country, and his allegiance here would have ceased. The Merchant Shipping Act requires an owner to be a British subject, and sect. 106 does not apply where the owner is a foreigner. I do not think, therefore, that this ship could be said to be a British ship as to make it part of British territory.

OR, J.—I am of the same opinion. I will add that Mr. Prideaux, while citing the cases brought before us, and which are unquestionably losing sight of the admitted fact in this case that the owner was alien born.

R, J.—I am of the same opinion. To prove that the register of the ship in London was evidence, but when it was proved that the owner was a foreigner, the *prima facie* effect of the register was rebutted. The declaration of ownership is prior to the register being drawn up, and if the effect of the evidence of the register is got rid of it can hardly be said that it was done prior to it is not also rebutted.

Conviction quashed.

BAIL COURT.

Reported by W. GRAHAM, Esq., Barrister-at-Law.

Thursday, June 15.

(Before CROMPTON, J.)

PEARSON v. NELL.

Owner—Liability for contracts of master—Evidence.

Action against the registered owner of a ship in which it was proved that the repairs were necessary, that they were ordered by the captain, and that the defendant's name was in the register as sole owner:

It was contended that there was no evidence to go to the jury.

It was an action against an executor for work done, and on account stated. The defendant was never indebted.

The trial at Leeds before the under-sheriff of the county, it appeared that the plaintiff was a ship-agent at Goole, and the testator, who resided in Lincolnshire, was the registered owner of the ship *Ocean*. In Dec. 1863 the *Ocean* arrived at Goole and discharged her cargo. The then captain called on the plaintiff and stated that he was the owner of the ship, and asked him to do

certain repairs. Nothing was said about credit at this time. The plaintiff did the repairs, and sent in his bill amounting to 16*l.* 19*s.* 1*d.* to the master, who thereupon asked him to give him credit till he got to London, when he would send him the money. This the plaintiff consented to, and nothing more was done till Nov. 1864, when the master wrote from Dundee saying that he could not send the money. The plaintiff then wrote to the master, inclosing a bill at one month, which the master refused to accept. On the 13th Jan. 1865 the plaintiff having heard that Nell, the testator, was the owner, wrote to him inclosing the account for the repairs and asking for payment. This letter was answered by the defendant's attorneys, who stated that Nell was dead, and his estate was not liable for debts contracted by the master, as he had never authorised him to pledge his credit. The plaintiff in cross-examination stated that he had headed the account in his books "To Capt. Chappel," the master.

The plaintiff and a witness who introduced the master to the plaintiff were the only witnesses called. The register was put in by which it appeared that Nell the testator was sole owner of the ship, and it was admitted that the charge was reasonable, that the repairs were necessary, and that the defendant was then in possession of the ship, but there was no evidence that the testator had appointed the master, or indeed any other evidence than that he was registered owner, and that the repairs were ordered by the captain. The jury found a verdict for the plaintiff for the full amount.

Pearce, on the 12th June, obtained a rule calling on the plaintiff to show cause why there should not be a new trial on the ground, first, that no evidence was adduced at the trial to show that the defendant's testator authorised Capt. Chappel to employ the plaintiff; secondly, misdirection of the learned assessor in not directing the jury, that on the evidence the said Capt. Chappel was the person liable to the plaintiff; and thirdly, on the ground that the verdict was against evidence.

Prentice now showed cause.—There was evidence to show that the repairs were ordered by the captain, and I submit the captain has authority to bind the owner for repairs. [CROMPTON, J.—It always used to be a question of contract, and now *Mitcheson v. Oliver*, 5 E. & B. 419; 25 L. T. Rep. 258, has brought it back to that.] These were necessary repairs, and the captain has implied authority to bind the owner in the absence of anything to the contrary. [MELLOR, J.—You must show more than that. You must show that the captain was appointed by the owner, and made the contract with his privity.] The captain says he is the principal owner: *Myers v. Willis*, 17 C. B. 77; in error, 18 C. B. 886.

Middleton, in support, was not called on.

CROMPTON, J.—I think that according to the case of *Mitcheson v. Oliver*, which all courts must be bound by, and which I think is grounded on sound principles of law, this claim is founded on contract and not on ownership; it may depend to a certain extent on the exigency of the occasion; but that point does not arise here. It would be absurd to say that if a ship was on fire a captain could not employ men to put it out. But I think we should leave that question open, as the court did in *Mitcheson v. Oliver*. There Parke, B. says the verdict was against evidence; and, further on in his judgment, he says that there was some evidence for the jury. There the facts were that there was some evidence that the defendant appointed the captain. Here we must see what is the effect of the whole evidence. There is no suggestion that the jury are not to believe the plaintiff's evidence, and on that we are to

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see if there is any case to go to the jury. It has long been settled that a nonsuit may proceed on the plt.'s and the def't.'s undisputed evidence, but here it is perfectly clear that there was no case for the jury; and when I say the def't.'s evidence, I mean that part of the plt.'s evidence which is favourable to the def't. If a master in an English port orders repairs, that is only general *prima facie* evidence. In *Mitcheson v. Oliver* the def't. had really appointed the captain, and it was said that there was some evidence. But here the case is conclusive; there was no evidence of a contract with the def't. At the time of the contract there was no mention of the def't., and the bill was sent in to the captain, and entered in the plt.'s books in the captain's name. Afterwards the plt. sees the captain, who applied for time, and afterwards he draws a bill giving him time; but he does not apply to the def't. till long afterwards. Therefore there is no doubt that the contract was with the captain, and for that reason I think there should be a rule for a new trial on the ground of there being no evidence, or, in other words, on the ground of misdirection. We cannot enter a nonsuit, as leave was not reserved. The case will go down for trial without payment of costs.

MELLOR, J.—I am of the same opinion. The only evidence by which it is sought to charge the def't. is proof that his name was on the register, and that Chappel acted as captain, but there is no proof that he acted as the def't.'s captain or with his knowledge. It appears to me that credit was entirely given to the captain, and all the circumstances show that the plt. treated the captain as the real person with whom he had contracted. There was no application to the def't. till after the delay, and, therefore, I think there was no evidence for the jury, and that the rule for a new trial should be made absolute. There will be a new trial without costs, as if leave had been reserved we should have entered a nonsuit.

Rule absolute.

Attorney for the plt., *H. Clarke.*

Attorneys for the def't., *Lewis and Watson.*

COURT OF ADMIRALTY.

Wednesday, April 26, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE ANNIE SHERWOOD.

Seamen's wages—American dollars—Sterling and currency payments.

Where in a seaman's articles it is covenanted to pay wages in dollars, sterling and not currency value is to be assumed as intended, and the wages are to be paid at the rate of 4s. 2d. per dollar.

Where it was alleged that there was a specific covenant in seamen's articles, duly read over and explained to the crew, that the wages when due should be "payable in United States currency or its equivalent."

Held, that the court would not enforce such a condition against the seamen, from the fact of its being contrary to equity and justice, and an imposition upon such a class of men as mariners.

Brett and Vernon Lushington appeared for the plt.s; Dr. Deane and Potter for the def'ts.

Dr. LUSHINGTON gave judgment in this case, which came before the court on a claim made by the late chief mate and steward of the barque *Annie Sherwood*, for their wages. From the plt.s' petition

it appeared that on the 15th March 1864 the *Annie Sherwood* was lying at the port of New York, chartered on a voyage from thence to Cuba, then to Liverpool and back to Cuba or the West Indies, and then to a final port of discharge in the United States; the time not to exceed eight months; that her master hired the plt. Drinkwater as chief mate, and the plt. Beckett as cook and steward. Drinkwater's wages to be forty-five dollars per month, and Beckett's forty dollars per month; that accordingly the plt.s. entered into the service of the ship in their respective capacities; that Drinkwater signed the ship's articles on board the ship, and subsequently signed another set of ship's articles at the British consul's office at New York; that Beckett signed the ship's articles at the shipping office of a Mr. Ferras; but that neither of the engagements were made, nor did either of the plt.s. sign the articles, in the presence of the British consul at New York, according to the provisions of the 160th section of the Merchant Shipping Act 1854. That on the 22nd March the ship, having taken in a cargo of coopersage, sailed with the plt.s. on board, and about the 20th April arrived at Cienfuegos, in Cuba, and discharged cargo there, and about the 16th May sailed from thence with a cargo of sugar for Liverpool, which port she made on the 3rd July with the plt.s. on board, and there docked and discharged her cargo; that Drinkwater continued on board the ship, performing his duty until the 17th Nov., when his period of eight months expired, and he then left and was discharged from the ship; that Beckett continued on board the ship performing his duty until the 21st Nov., when his time expired, and he left and was discharged; that the master did not deliver to the plt.s., or to either of them, or to the shipping master, an account of wages, as required by the 171st section of the Merchant Shipping Act, and the master had not paid them the respective wages due to them for the voyage, though often applied to and requested so to do. The petition then prayed the court to pronounce for 76l. 10s. as due to Drinkwater, and 67l. 9s. 11d. as due to Beckett, and to give them each ten days' double pay, under the provisions of the Merchant Shipping Act, and their costs. The answer for the def't., after admitting the sums at which the plt.s. were hired, pleaded that it was further agreed that any sums to become due for wages under the agreement should, when so due, be payable in United States currency or its equivalent; that the agreement provided for the service by the plt.s. on board the vessel on a voyage from New York to Cienfuegos (Cuba), thence to a port or ports in Europe, as the master might direct, with the privilege of returning to the United States *via* a port or ports in the West Indies, the final port of discharge to be a northern port in the United States; and the agreement was limited to eight calendar months; that it was untrue that Drinkwater signed two sets of articles; that both Drinkwater and Beckett signed articles on the 19th March 1864, in the presence of a consular officer of Her Majesty at New York, and at the time of such signature fully understood the terms of such articles, and that at such time the consent of the consular officer to the engagement of the plt.s. had been obtained, and all conditions required with respect to such engagements had been fulfilled; that the master delivered to the shipping agent accounts of the balance of wages due to both the plt.s., and that the def't. had always been ready and willing to pay to the plt.s. the balance appearing by such accounts to be due to each of them respectively, according to the terms of the said agreement, and was so ready and willing within the time fixed for such purpose under the provisions of the Merchant Shipping Act 1854, but that the plt.s. always

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refused to accept the same; that at the expiration of the eight months to which the said agreement was limited, the plts. claimed their discharge, although the master was perfectly willing to have taken them back to a northern port in the United States of America, and at that time the equivalent of a dollar of the United States currency at the then rate of exchange did not exceed the sum of 2s. 1d. of British money; that the debt. had brought into court the sums of 7l. 10s. 10d. and 7l. 16s. 7d., being the sums due to Drinkwater and Beckett respectively for balance of wages according to the terms of the said agreement. The court was then prayed to pronounce for the sums tendered, with costs. The reply for the plts. alleged, that if it appeared in the agreement that the wages should be payable in United States currency or its equivalent, such provision was fraudulently inserted, without the knowledge of either of them; that by custom, seamen engaged in the United States at dollar wages were, if paid off in the United Kingdom, paid off at the rate of 4s. 2d. sterling per dollar, and such custom was binding in the present case; that it was never intended by the owners, or by the master of the ship, that the final port of discharge of the ship should be a northern port in the United States, but it was intended by them that the ship should be discharged and the plts. paid off in the United Kingdom. The rejoinder for the debt., after denying the statements in the reply, concluded the pleadings. Upon this state of facts, the true question which the court was called upon to investigate and decide was, what was the contract made between the parties who are suing in this court for their wages, and those who had the authority to ship them? When an agreement of this description, which is the agreement for foreign-going ships selected by Board of Trade with reference to the statute, is certified by the vice-consul and the parties whose names are here mentioned, it is *prima facie* evidence that such was the contract which was really entered into between the parties; and if it stood unquestioned and undisturbed by the evidence in the case, the court would be inclined to give such construction as appeared consistent with equity and the terms of that agreement, presuming that when it was signed it was in the state it is now in. But there is this question, which is, whether or not the court can come to the conclusion that this agreement was, in all respects, precisely in the state in which it now is at the time when the plts. signed it, or when they are alleged to have been present at the time. In considering this question, it is not simply to take the word of the chief mate, who swears positively that he did not see these words at the time, though he read the paper through, and consequently he swears in substance that the words did not exist, but must have been inserted afterwards. The Court would be exceedingly cautious in taking the evidence of a person of this description, generally speaking, against the words to be found in a written instrument. But there remains behind another consideration—what is the nature of the stipulation, and how far it is consistent with probability, how far with justice and equity, for these words to have been inserted? Now let us see what is the purpose of these words, as contended for by the owners of the ship. It is that the mariners who entered into the contract should be subjected to receive payment only according to the currency which happened to exist at the time in the United States at any one period, whether they might happen to be paid off either in the United States or elsewhere. That the seamen should voluntarily and knowingly have entered into such an agreement is open to great doubt, more especially as it has been proved to the satisfaction of the court that the universal custom was that they should be paid, not after the rate of the currency value of

the dollar, but after the rate of 4s. 2d. per dollar; that it has also been proved by the shipping master, who stated that he had been concerned in no less than 500 cases, that such has been considered the justice and equity of the contract, and that, even where the articles have been in the shape and form in which these stand, there has been payment after the rate of 4s. 2d. In addition to this, there is the evidence of the deputy-consul of the United States in London, who says, in all contracts of seamen of this description 4s. 2d. was the rate after which they were paid. This being so, the court must first inquire whether this is not a special agreement of such a character and such a kind that it would require, in order to satisfy the court it was consistent with justice and equity, that there has been the fullest explanation given to the seamen (who were going to enter into the contract) of the nature of the contract, of the loss they would be subjected to, and that such a contract was a violation of the universal custom with respect to mariners in their condition. Now it is highly improbable that such clause was inserted after a full and complete and entire explanation. It is true that the vice-consul states he explained it; but that is merely the usual form and usual phrase adopted on these occasions, though perhaps the court is not altogether satisfied by the mere adoption of it; but it is the usual form and phrase that the thing said to be done was substantially carried into execution. That the court is not satisfied of; and unless it be assumed the chief mate was guilty of perjury, such a conclusion could not be arrived at. The result is, that the court is not compelled to decide the question whether or not the words were there at the time the articles were signed, but it bases its judgment upon the fact that it is not satisfied that the articles as contended for are consistent with justice and equity. It is the principle of this court, and there are many cases which show how rigidly this principle has been adhered to, that the mariner shall not be subjected to any hardship of this kind, of which previously he was not cognizant and aware of the consequences. Seamen are a peculiar class of people, who according to the doctrine of the Admiralty Court are entitled to protection. Their very ignorance, haste, total disregard of forms, and their being totally unaccustomed to matters of this description, induce the court to guard them against their own want of care and caution. Now the court is not satisfied that these articles were sufficiently explained to the men, and, even supposing that they were so explained, there is no sufficient reason why they should be enforced against them. Such a condition as here set up is in direct violation of a clearly established custom, acknowledged at least, as the evidence in this case proves, in two of the greatest ports in England, viz., London and Liverpool, and, for any evidence to the contrary, generally prevailing; and this court, therefore, will give such a condition no countenance or support, but will pronounce for wages after the rate of 4s. 2d. the dollar instead of 2s. 1d.

Friday, April 28, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE NORTHUMBERLAND v. THE ANDALUSIA.

Salvage—Service by steamship.

Where salvage services are rendered by steamships, the amount of salvage which the court will award is not necessarily affected by the fact of the services performed occupying only a short time; the Court now

Holding, that with respect to steamships it is better that the service should occupy a short space of time than

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the length of time it used to occupy from the delay which arose to enable sailing ships to make the manœuvres necessary to perform the service.

Brett and Clarkson appeared for the Northumberland.

The Queen's Advocate and Dr. Deane for the Andalusia.

Dr. LUSHINGTON gave judgment in this case, which was a suit instituted by the screw steamer *Northumberland* against the screw steamer *Andalusia*, for salvage services rendered to her off St. Goven's Head, on the coast of Pembroke-shire. From the evidence it appeared that the *Northumberland*, whilst on her way from Newport with coals for Liverpool, being at the time under charter to make five voyages between those ports as expeditiously as possible, after encountering heavy weather, during which part of her bulwarks were washed away, on the morning of the 14th Sept., the weather having become clearer, though the sea was still heavy, fell in with the *Andalusia* (from Cardiff, with coals for Liverpool) in a state of distress, and with a signal of distress hoisted, her pumps choked, and her engine fires extinguished, and having shipped a great deal of water. After several attempts by the *Northumberland* to take the *Andalusia* in tow, during one of which the ship came into collision, and upon another occasion, owing to the *Andalusia* steering heavily, the second mate had a narrow escape of being drowned (being suspended by the hawser, to which he clung until some of the crew extricated him), the *Northumberland* at last succeeded in taking the *Andalusia* in tow, and ultimately conducted her to Milford Haven, where the tow ropes were cast off. The value of the *Northumberland*, her cargo and freight was stated at 8650*l.*, and that of the *Andalusia* at 5750*l.* A tender was made of 350*l.* by the owners of the *Andalusia*, which the owners of the *Northumberland* refused to accept; and it was contended for the owners of the *Andalusia* that 350*l.* was a sufficient sum for the aid their ship had received, the service occupying only eight hours. The most important question for the court to consider was, what was the degree of danger, if any, to which the *Andalusia* was subject at the time when the assistance was rendered to her by the *Northumberland*? According to the protest, it would appear that at 10.40 a.m., which was the period when the assistance was commenced to be rendered, it was blowing an increasing gale. In the pleadings it was stated that the danger was not very severe, or not very likely to be destructive, inasmuch as the crew of the *Andalusia* might have drained the vessel of the water and lighted the fires, and, of course, proceeded again to steam; but, if that was the state of things, it is singular they resorted to the means they did in order to obtain salvage assistance, viz., hoisted a signal for assistance, and representing, as they did represent, that they must be taken in tow in order to save them from risk of loss of life. The Court was of opinion that the *Andalusia* was in very considerable danger. In the evidence it was stated that the *Andalusia* was very low in the water, which would probably be one of the reasons why the danger was greater than otherwise would have taken place. The *Andalusia* did not appear to have made any particular leak, or anything of that kind, but seems to have made water to an extent which undoubtedly created danger, because she was a steam-vessel, and at the time the fires were extinguished and the water came in it was clear a considerable amount of danger was likely to occur; and it was also clear that somehow or other, though not perhaps by a leak, the vessel was making water: for it is averred in the protest, that "on sounding the pumps found the vessel making

water, which obliged them to get assistance from shore to bale her out," so that, after the *Andalusia* had been brought to anchor in Milford Haven, she was in that condition that it was necessary to get assistance from the shore to bale the water out of her. Taking all the facts and circumstances into consideration, the court came to the conclusion that the *Andalusia* was in considerable danger, and that looking at the state of the weather, there must have been considerable difficulty in towing her to Milford Haven. It was admitted on all hands that no blame was to be attributed to the salvors for want of skill or any improper conduct. No doubt the representation was substantially true, that there was considerable difficulty in getting the hawser attached; for, first an attempt was made with one hawser, and then with two, and there was much difficulty in performing the service. Respecting the duration of the service, it was short, and did not exceed eight hours; but that is a question, where steam-vessels are employed, which the court does not consider operates against the claim for remuneration, because the court has held that it is better the service should occupy a short space of time than the length of time it used to occupy from the delay which arose to make the manœuvres requisite to perform the service. As to the question of detention, the *Northumberland*, it is admitted, was not detained long. She went to Liverpool, but she lost her turn. Looking at all the circumstances, the Court is of opinion that 360*l.* is an inadequate reward, and will give 510*l.*, allotting to the owners 300*l.*, because it was their vessel that performed the service, and that she was compelled to deviate from the course she was pursuing, and they have incurred some inconvenience, and probably some loss, from the detention and loss of time which has been mentioned. The Court would also give a considerable sum to the master, because of the responsibility he undertook, viz., 100*l.*; and will award 100*l.* to the crew, to be distributed according to their ratings.

Tuesday, May 2, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE SPLENDID, THE THOMAS BAILEY AND THE QUEEN OF THE EAST v. THE MARTIN LUTHER.

Salvage awards as to derelicts.

Former practice of the court to allow one-half of the value of the derelict property in salvage awards no longer observed, the present practice being for the court to be guided by the degree of merit of each particular case as it arises.

Dr. Deane and E. C. Clarkson appeared for the salvors; the Queen's Advocate and V. Lushington for the owners.

Dr. LUSHINGTON gave judgment in this case, of which the facts as adduced in evidence were as follow:—On the 9th Nov. 1864, about nine o'clock in the morning, the fishing-smack *Thomas Bailey*, whilst engaged in fishing in the North Sea about 120 miles E.N.E. of the Spurn, the wind blowing E.N.E. with a heavy rolling swell, fell in with the barque *Martin Luther*, dismasted, abandoned by her crew, waterlogged, and only kept from sinking by being timber-laden. Part of her mizen-mast was standing; she had no boats or ropes on board; her jibboom was partly chopped as if an attempt had been made to cut it away; her wheel had been carried away, and she was otherwise in a deplorable condition. The *Thomas Bailey* then began to tow the barque for the Humber, and, as the water was level with the barque's deck and there was a heavy swell, she was a great drag upon the smack and her trowl-warp, and they made very slow progress. In the afternoon of the

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same day the fishing-smacks *Splendid* and *Queen of the East* came up, and an arrangement was made between the master of the *Thomas Bailey* and the masters of the *Splendid* and *Queen of the East*, that they should assist in the salvage to get the barque into port as soon as possible. The smacks then commenced towing ahead of each other, the *Thomas Bailey* being next the barque, and a man from each smack having been sent on board her to assist in her management. On the morning of the 10th the strain upon the *Thomas Bailey* and her hawser being very great, the *Queen of the East* was cast off and her trowl-warp also attached to the barque, and they again towed ahead; but that did not succeed, for the wind having suddenly dropped, the jibboom of the barque passed through and tore the mainsail of the *Queen of the East*. The *Splendid* and *Queen of the East* were then cast off, and the *Thomas Bailey* alone towed the barque until the 11th, when the *Queen of the East* took her place next the barque, with a rope from either bow. The *Splendid* was placed ahead of her, and the *Thomas Bailey* ahead of the *Splendid*. They so towed the vessel till about 4 a.m. of the 13th, when the wind blew so strong from the S.S.E. that the tow-rope of the *Queen of the East* broke, and the three smacks parted from the barque and she was in danger of getting ashore. The *Splendid*, however, got hold of her again and towed her for an hour and a half alone, whereby her bridles, valued at 5*l.*, were so damaged that they were condemned. The *Thomas Bailey* and *Splendid* then continued to tow her, and the *Queen of the East* was sent to Grimsby for a steam-tug, and having returned with a tug an agreement was made with that vessel to assist the barque into Grimsby for 30*l.*, and the tug and the smacks *Splendid* and *Thomas Bailey* then towed ahead, the *Queen of the East* lying by. Meanwhile the owner of the *Splendid* and *Queen of the East*, residing at Hull, engaged the tugs *Superb*, *Lady Londesborough* and *Sir William Scott* to proceed from Hull to the assistance of the barque under certain agreements. Two of the tugs took hold of the barque, together with the tug before mentioned; the smacks were cast off and the barque was safely towed into Grimsby dock about 5 p.m. on that day, and on the following day (Monday) the barque was hauled into the middle of the dock and placed in charge of the receiver of wreck. For these services the fishing-smacks now prayed to be compensated, as also for the loss and damage arising from the performance of the services. The claims of the tugs had been previously settled. The *Martin Luther* was a derelict, and it was the habit of the court in former days to give a moiety, but of late it has given a reward proportionate to the service rendered. The Court considered the service rendered in the present case was a most meritorious one, lasting a great length of time, and depriving the smacksmen of their occupation of fishing; and the Court would, therefore, give the sum of 600*l.*, directing it to be distributed according to the tonnage and number of the crew on board the smacks, giving the *Thomas Bailey* 7 per cent. in addition to the others, and allowing costs.

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Thursday, May 4, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE INDIAN v. THE JESSIE.

Collision—Foul berth.

A clipper-built ship has no right to place herself in such a berth as would make it inevitable that she must take the ground on an ebb tide, to the probable risk of other vessels moored in the vicinity.

A clipper-built ship not being able to get up to her discharging berth at a wharf, owing to the number of

ships before her, moored herself in an anchorage ground outside, in a berth where there was not sufficient draught of water for her to lie afloat at low tide, in consequence of which she listed over on a vessel anchored alongside:

Held, that the clipper ship so mooring herself was answerable in damages for the injuries sustained by the vessel anchored alongside of her and berthed previously to the time of the clipper ship taking up her moorings where she did.

Brett and Dr. Pritchard appeared for the *Indian*; Dr. Deane and E. C. Clarkson for the *Jessie*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the barge *Indian* against the schooner *Jessie*, to recover for loss arising from a collision between them in Battlebridge tier (which is on the south side of the river Thames, below London-bridge), about nine p.m. on the 25th Nov. 1863. It was agreed that the wind was from the westward and the weather fine. The case for the *Indian* set forth that she was laden with about thirty tons of stone, but had an ample free board, and that while so laden she was properly moored at the Pickle Herring upper tier, her starboard side being alongside a vessel called the *Wool Packet*, and shortly afterwards the *Jessie* arrived at the tier, and was brought up and moored alongside the port side of the barge; that the *Jessie* at such time drew about thirteen feet of water; that it was high water at the tier about two p.m. of the day in question, and at low water there was about eight feet of water only at the inner side of the tier where the *Jessie* was moored; that as the tide ebbed the *Jessie* listed over upon the barge, and in consequence thereof the barge sank and the *Jessie* subsequently settled down upon and utterly destroyed her. The defence of the *Jessie* represented that on her arrival in London with a cargo of figs from Smyrna, she proceeded to Fresh-wharf, which is on the north side of the river Thames, to discharge her cargo; that it being found impossible for her to do so, owing to the number of vessels there, she went to Battlebridge tier, where she was moored in the usual manner with her head down the river, and in the second berth from the shore; that at such time another schooner, called the *Charlotte*, was moored in the same tier, inside and on the starboard side of the *Jessie*, and in the first berth from the shore; that at the time when the *Jessie* was so moored it was about high water; that in the fourth berth in the tier from the shore the *Wool Packet* was moored, and the *Indian* was, contrary to the rules and by-laws duly made and promulgated by the Conservators of the River Thames, and then lawfully in force, fastened alongside the *Wool Packet* and between the *Wool Packet* and the *Jessie*, and receiving broken granite from the *Wool Packet*; that the *Indian* being loaded on the port side only, her gunwale on that side was close to the water, whilst her starboard side was considerably elevated and rested against the *Wool Packet*; that after the *Jessie* had been moored a further quantity of stone was discharged from the *Wool Packet* into the *Indian*, and placed on her starboard side, but no proper precautions were taken, whilst the ebb tide made, to keep the *Wool Packet* off from the *Indian*, and enable the latter to right herself; that the *Indian* remained in this position (with no person on board her) between the *Wool Packet* and the *Jessie*, and although she could and ought to have been taken out from between the *Wool Packet* and *Jessie* (her lading having been completed) at slack water, she was suffered to remain between them, and when the flood tide made it flowed into the *Indian*, and although, when this was discovered by those on board the *Jessie*, they and also the persons on board the *Wool Packet* endeavoured to get

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her out from between the two vessels, they were unable to do, and at about 9 p.m. the *Indian* sunk under the quarter of the *Wool Packet*. The real question for the consideration of the court was, what was the immediate cause of the barque sinking? was it occasioned by the *Jessie* or some other cause? One of the witnesses on behalf of the *Jessie*, when he was pressed, stated that even if the *Jessie* had been out of the way this barge might have sunk in consequence of her cargo being so entirely out of the level. According to the evidence of the *Indian*, pains had been taken to bring her more to the level, and they continued at work later than usual to effect that end. The evidence for the *Jessie* is, that the *Indian* was so much out of the level that that really was the occasion of her sinking. Probably, and in the opinion of the court the fact is, it is not that she was exactly, on the level, but that she was not so much out of the level as stated by the other parties. The medium probably was the fact, and it is said that nothing but that or the *Wool Packet* could have caused her to sink. It is stated in the petition that the *Jessie* drew thirteen feet of water, and it is not contradicted in the answer. The mate of the *Jessie* states it was about twelve feet she drew, and I think the extreme depth of the water stated by any of the witnesses at low water at the place where she was is eleven feet, one foot less than was sufficient for her to float according to the estimate of the mate. The defence of the *Jessie* is, that "after the *Jessie* had been moored, a further quantity of stone was discharged from the *Wool Packet* into the *Indian*, and placed on her starboard side, but no proper precautions were taken whilst the ebb tide made to keep the *Wool Packet* off from the *Indian*, and enable the latter to right herself; that the *Indian* remained in this position, with no person on board her, between the *Wool Packet* and the *Jessie*, after she could and ought to have been taken out from between the *Wool Packet* and *Jessie*, her loading having been completed at slack water." Now, if it be true that the loading was completed at slack water, and if it could be shown it was the duty of those on board the *Indian* her to remove her from the position she was in then, between the *Jessie* and the *Wool Packet*, that might have been an excellent defence; but that seems to fail altogether, for nothing can be clearer from the evidence than that the lading was not completed, for she had only thirty tons of granite, and was capable of carrying forty-five tons; therefore that defence must be put out of consideration, and the defence argued here must be reverted to. It is said that the *Jessie* was perfectly justified in taking up her position where she did; but if she did take up her position there, knowingly or unknowingly, was it not her duty to take care that she did not do damage to a vessel which had precedence of her, and was lying there to take up cargo. It did not appear that anything whatever was done on board the *Jessie* for the purpose of taking precautions against the danger that might possibly arise from her taking the ground. It seems clear from the evidence she did take the ground upon two occasions, both on that night and the next morning; and if she did take the ground, then the question is whether that was not the necessary cause, or the moving cause, of the destruction of the *Indian*. As to the bye-laws, there is a specific penalty of 5*l.*; and if the barge fell within the 29th bye-law, and that penalty was incurred, it does not necessarily follow that she must be considered as a wrong-doer in this collision. It does not appear that there was anything in the conduct of those on board the barge for which blame can be imputed to them. They began to load in the usual and accustomed manner, first on one side, then turned round and loaded on the other, for the purpose of putting the cargo as

conveniently as they could do to keep the barge on the level, and saving the trouble of putting the cargo all on board at once, as there might be mischief, and, independently of that, there might be trouble in levelling it; and therefore they attempted to do it, as far as they could, in a convenient manner. The two questions, therefore, which the court submitted to the Elder Brethren were, first, whether the *Jessie* was not the cause of the loss of the *Indian*; and, secondly, whether she was not to blame for such loss? Having conferred with the Elder Brethren (represented on this occasion by Captain Bax and Captain Nesbitt), the Court stated that those gentlemen were of opinion that the *Jessie* was solely to blame, she being too sharp a vessel and drawing too much water to take up such a position for an ebb tide.

MARITIME LAW REPORTS.

NORTHERN CIRCUIT, LIVERPOOL.

Tuesday, April 10, 1865.

(Before MELLOR, J. and Jury.)

UZIELLI v. THE COMMERCIAL UNION INSURANCE COMPANY.

Marine insurance—Imperfect disclosure of known facts. —Policy of marine insurance based on assumption that all material facts known to the owner in respect to his ship are disclosed at the time of insurance.

Subsequently to an application to underwriters to insure a ship on her voyage from a port in Ireland to the port of Nassau, and previously to the terms of insurance being agreed on, the owner of the ship received information that the ship had put into an intermediate port to repair, and the owner omitted to advise the underwriters of the same:

Held, that the owner of the ship was bound to communicate to the underwriters all material facts known to the owner at the time of insurance, and during the progress of the negotiations between him and the underwriters; that the withholding of such facts deprived the underwriters of a fair opportunity of judging of the condition of the ship, and of calculating the risks run by them in insuring; and that the non-disclosure of such facts, even where there was no fraudulent concealment, voided the policy.

This was an action brought to recover the sum of 1475*l.* upon a policy of insurance on the steamship *Red Jacket*, on her voyage from Queenstown, Ireland, to Nassau, and Tampico in Mexico. The insurance company pleaded that they had been induced to issue the policy on the fraudulent representations of the plts. and the parties interested in the risk, and the fraudulent and improper concealment of certain material information known to the plts. and the parties interested, but unknown to the company, and which ought to have been communicated to them.

The pleadings having been formally opened by Quain on the part of the plts.,

Edward James, Q.C. stated the case for the defendants as follows.—The ship in question had been built in the year 1842, but had changed her names on various occasions, having, since the American war commenced, been engaged in running the blockade. She left Liverpool in May 1862 with a cargo for Nassau; but, in consequence of considerable damage sustained at sea in the early part of her voyage, she put into the port of Cork, from whence she sailed in the latter end of July. It was a well-known fact that for voyages such as that on which the *Red Jacket* was bound, viz., to Nassau and Mexico, the season between the beginning of August, and the

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January following was the most dangerous; so much so that it was often stipulated in policies of marine insurance that the ship insured should not sail during that period. The *Red Jacket* belonged to a Mr. Dronke, who was the real plt. in the case, Mr. Uzielli being merely a nominal plt. The ship having sailed from Cork in July, Mr. Dronke wrote from Liverpool to Messrs. Uzielli and Co., of London, to insure the ship from Queenstown in ballast, the ship having discharged her cargo in the port of Cork and sailed thence for Nassau in ballast. Mr. Uzielli, on receiving this information from Mr. Dronke, called in the beginning of August at the office of the Commercial Union Insurance Company, where he saw the underwriter of that company, who referred to *Lloyd's List*, and finding no ship of the name of the *Red Jacket* inserted there, required to have further information, and remarked on the lateness of the season for such a voyage. Mr. Uzielli upon this wrote to Mr. Dronke on the 5th Aug. for the required information, and on the following day Mr. Dronke wrote back to the effect that the *Red Jacket* had been built in 1842; that her tonnage was 159 tons; that she was a paddle steamer of 100 (nominal) horse power, in thorough repair and in splendid condition. The premium which Mr. Dronke had empowered Mr. Uzielli to pay was five guineas; but on the 7th Aug., when Mr. Uzielli called on the defts., and showed the letter he had then just received, the defts.' underwriter stated that, considering the lateness of the season, the age of the steamer, and the risk that would have to be run, the sum named was not enough, and should, in fact, be doubled. Mr. Uzielli, upon this, wrote and informed Mr. Dronke of the increased premium required, and that gentleman wrote back declining to give ten guineas, but authorising Mr. Uzielli to offer six. In this letter Mr. Dronke again stated that the ship was in first-rate order; urged that the season was still a favourable one; and asserted that he expected that the ship would arrive at Nassau (r Tampico before the end of the month, or not much later. Some further correspondence then took place, Mr. Dronke offering seven guineas; but eventually agreeing to give eight guineas, at which premium the insurance was effected. It now appeared that on the 6th Aug. Mr. Dronke had received a telegram from the captain of the *Red Jacket*, stating that the ship had put into Ferrol, in Spain, in consequence of having broken her crank, and that he expected the repairs would be completed in a few weeks. This circumstance Mr. Dronke never communicated to the underwriters, though it would be shown that it would have had a material effect on their mind in regard to the terms of insurance. With regard to policies of insurance there was no law more clearly laid down than this; viz., that if from any cause whatever, whether from ignorance, mistake, or fraud, any material information which it was within the power of the owner to give, and which the underwriters were entitled to, was withheld, the underwriters were not bound by the insurance; and for the simple reason, that the underwriters expected, and were entitled, to have all material information in order that they might consider, first, whether they would take the risk; and secondly; if they did take it, upon what terms they would do so. And if anything material be withheld, even though it be through ignorance on the part of the owner, the underwriters were not bound by the contract. Now it appeared that the *Red Jacket*, whilst on her voyage, in the month of October, struck upon a sunken reef and became a total loss. It then turned out that she had sailed from Liverpool under the name of the *Dundroon Castle*, and had followed the usual practice of blockade runners in changing her name with the

view of escaping detection and capture. After sailing from Queenstown she put into the port of Corunna, in Spain, to coal; and then into the port of Ferrol, in consequence of having broken the crank of her engine; and was, in point of fact, detained there for six weeks, so that she resumed her voyage at the very worst part of the season. The telegram, therefore, which Mr. Dronke had received on the 6th Aug. (the very day he had written to Mr. Uzielli stating he expected she would arrive at Nassau by the end of the month), announcing the fact that the ship had put into Ferrol with a broken crank, was a very material piece of information for the underwriters; and Mr. Dronke by withholding this information had rendered the contract of insurance null and void. Mr. Dronke might, and would, say that he did not think it was material; but Mr. Dronke's opinion or belief in this respect would not affect the real question for the jury, which was, whether the information was actually material for the underwriters to be put into possession of.

Mr. Saunders, the underwriter to the defts., stated that the information with regard to the breaking of the crank and the consequent putting into Ferrol was most material; and that, in fact, if he had known it, he would not have advised the insurance of the ship by his office. Other underwriters gave opinions to the same effect, and in support of Mr. Saunders' views.

Capt. Hepburn, who had sailed from Liverpool in command of the *Red Jacket*, stated that the registered name of that ship was the *Dundroon Castle*, and that the name of *Sea King* was painted on her paddle-box, although she had sailed from Liverpool under the name of the *Red Jacket*. After leaving Liverpool in May she sprang a leak, and put back to Holyhead. She was there repaired, and some fifteen or twenty tons of her cargo being taken out she sailed from Holyhead, but, in consequence of bad weather, put into Cork. She remained at Cork for two or three days, and again sailed; but was obliged to put into Crookhaven, where she remained for three or four days until the weather permitted her continuing her voyage. On resuming her voyage the weather again became very bad, the sea breaking over the ship, the cargo becoming wet, and combustion taking place amongst it, so that the ship was compelled to put back to Cork. At this period he (Capt. Hepburn) ceased to have command of the ship.

Mellish, Q.C. on behalf of the plt., contended, in the interest of the owners of the ship, that the breakage of the crank, and the delay which such a casualty entailed, had nothing to do with the subsequent loss of the ship, inasmuch as she was wrecked in calm weather in consequence of accidentally having struck on a sunken reef, which was not laid down in any chart. He called Mr. Dronke as a witness for the plt., who stated that he did not think that the information in the telegram was at all material to be communicated to the underwriters.

MELLOR, J. left the question to the jury as to whether the telegram of the 6th Aug. and the information therein contained were material to be communicated to the underwriters, who were about to insure the ship, so that they might have an opportunity of calculating for themselves the risks which the ship would run? A contract of insurance was one which required the utmost good faith. He did not say that there had not been good faith in the case; but, even if Mr. Dronke himself believed *bonâ fide* that this information was of no importance, he was not the less bound to communicate it, in order that the underwriters might be enabled to calculate the risk that the ship

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would run. In calculating the risk incurred, the underwriters took into consideration all the circumstances attendant on the voyage. The person insuring was not bound to mention to the underwriters those general matters which the latter might be presumed to know themselves; but, if the owner of the ship (or the person insuring on his behalf) had any special knowledge with regard to the state of the ship at the time of the insurance, he was bound to communicate it. The real question for the jury was, whether the information contained in the telegram of the 6th Aug. was material or not.

Mellish, Q. C. and Quain appeared for the plt.

Edward James, Q. C., Peter Williams and R. G. Williams for the defts.

The jury found their verdict for the defts. on the ground that such information was material and ought to have been communicated to the underwriters; the jury at the same time expressing a unanimous opinion that there was no fraudulent intention on the part of Mr. Dronke in withholding such information, and that he did so under the impression that it was not material as affecting the insurance.

DUBLIN, Thursday, April 27, 1865.

(Before KELLY, J.)

THE ROSALIND, OF LIVERPOOL, AND CARGO.

Salvage services—Deficiency of salvage tender—Ship coming up when all danger over, but with the intention to assist, though not entitled to salvage, entitled to costs.

A ship, driven from her anchors, was drifting on shore. The muster sent up ensigns for assistance. Two whaling boats went to the ship's assistance and managed to keep her off the shore by means of warps, until more efficient aid came up, when the ship was got into deep water and moored in safety:

Held, that the service of the whalers was highly meritorious, and that they were entitled to material salvage reward, upon the principle laid down by the Privy Council in the case of the Atlas, "that where a salvage is finally effected, those who contributed to that result are entitled to a share in the reward, although the part they took, standing by itself, would not in fact have produced it."

Dr. Todd and Dr. Townsend (with Mr. Richardson as Proctor) appeared for the petitioners.

Dr. Elrington and Dr. Boyd (with the Queen's Proctor) for the defts.

KELLY, J., in delivering judgment, said:—The facts as proved in this case are as follows: The barque *Rosalind*, 456 tons, with seventeen hands, from Havana for Queenstown, with a cargo of sugar, when off the south coast of Ireland, having encountered stormy easterly winds, had on Saturday the 21st Jan. last borne up for Crookhaven, a harbour usually resorted to by homeward-bound ships as a safe refuge under such circumstances, and had there come to anchor opposite the Coastguard-station on the north shore. On the following Saturday, preparing to get ready for sea, her port-anchor had been hove up, but the wind increasing from the southward towards the evening, it was again let go, but according to the evidence of the coastguard, with about ten fathom of cable, the starboard anchor being hove to twenty-five fathoms, and so she was trimmed to lay for the night. On that evening the weather, which had been boisterous and squally, blew a gale from S.S.W., being

right on shore, and continued so during the whole of the night and following morning of Sunday, the sea running with violence outside the harbour, and, at its entrance breaking along the coast and even within the harbour, the gale causing a very heavy roll of the sea. About four o'clock that morning the chief mate reported to the master that he thought the barque was getting too near the shore. This apprehension soon became a certainty, the coastguard on board soon after perceiving that the ship was dragging her anchor and drifting gradually towards the rocks on the north shore of the harbour. These rocks, as described by the witnesses, were slaty, jagged and broken rocks, with upright pieces projecting from them, and of such a nature that the primest built ship in such a gale and so heavy a sea as then prevailed must inevitably have broken up shortly after striking upon them. Now the value of the ship and cargo, then gradually drifting towards these rocks, is admitted to be 8700*l.*, and the evidence of one of the coastguards is, that when he boarded the ship at that time he sounded and found but twelve feet of water astern; that the ship drew twelve feet, and that he consequently concluded that she was about touching. The master's evidence is that the ship was then but twenty fathoms from the shore. The master, at last alive to the threatening danger, at the first break of day ran up the ensign for assistance from the shore. The crew of the *Lord Clinton* and the *American Union*, two whale boats, and the prominent salvors in the cause, conjecturing that some casualty might have occurred during the gale, had been, as it appears, on the beach before daybreak, and at once perceiving that the barque had been drifting from where she had lain the night before, launched their boats and proceeded towards her. The crew of the *American Union* reached her first, and put their best hands on board, but finding, according to their affidavit, that she was within thirty or forty feet of the rocks, and her anchors, as they were down, perfectly useless for the purpose of heaving her from her perilous position, they determined to request the assistance of a steam-tug then in the harbour, leaving it to their consort boat, the *Lord Clinton*, then coming up, to render help until their return. The steam-tug, it appears, refused to comply with the request for assistance, but these men, undeterred by the refusal, at once pulled on shore, and landing one of themselves, sent him to the house of the agent of the steam-tug to give information of the imminent danger of the barque, and to request that the steam-tug might be ordered to go to her assistance. Failing to obtain a compliance from the agent of the steam-tug, they pulled back to the barque, the master of which had during their absence despatched the coastguard to both steam-tug and agent for the tug's assistance, but with no better success. It having, therefore, become necessary to adopt other measures to save the barque, at the suggestion and with the aid of the crews of the two whale boats, two warps were got out from the barque, and being carried (one coiled up in each of the boats) across the harbour to the south or weaker shore, one end of the heavier warp was made fast round a solid perpendicular rock, and some hands being left to watch it, the boats then returned, and half-way back they joined the other end of that warp to an end of the second one, so as that the two stretching across the harbour should reach the barque in their united length. The end of the warps thus joined they placed round the capstan of the barque. Two other warps were then procured and bent in a similar way along the entire warps, so as to double their power of resistance to the stream. The capstan and windlass then being manned by the united crew of both whale boats, assisted in this by the barque's crew, they hove on the warps, and the barque was

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got about thirty fathoms from the north shore and over her anchors, which were then hove up, and by dint of the continuing strain was settling more over into the deep water toward the south shore, when the rock to which the shore end of the hawsers had been made fast gave way, shooting out of its bed, and the hawsers became useless for their purpose. The anchors were at once let go, but the barque again began to drive. It was now ten o'clock; the ensign was again run up for assistance, and not in vain on this occasion, as in about half an hour before the rock gave way, and whilst the barque was still gaining ground towards the south shore, the third boat claiming as a salvor, and called the *Little Meteor*, with her owner Mr. Notter, had arrived; and he at once, seeing the necessity of the steam-tug's assistance at so critical a juncture, went in his boat to her, and, having got the agent on board, at last, by his influence with that official, got the steam-tug under weigh to give the barque her long withheld assistance. A line being got from the starboard bow of the barque and taken by the *Little Meteor* to the tug, was bent upon her hawser, which was then forwarded to the barque and made fast, the weight of it having been carried by the *Little Meteor*. The barque, thus at last taken in tow by the steam-tug, was, in less than one hour, anchored in perfect safety. Immediately before the towing by the steam-tug began, the fourth boat (the *Kate*) claiming to be a salvor came up and put five hands on board the barque. Five hands of the *Little Meteor* were also there, two being on board the steam-tug, which was short-handed. It is to be observed that, as the case of these four boats is alone before this court, the court is not called upon to pronounce any opinion on the conduct or service of the steam-tug, whose case is before another tribunal. Still, as it cannot but be observed that the salvage of this vessel and her cargo was finally effected by that steam-tug, it is right to state that no difficulty is cast upon the court, either by the depts. themselves, or by the law as it stands declared in the recent case of the *Atlas*, referred to in the arguments of both sides, in dealing with the petitioners before the court as actual salvors. The proposition of the law laid down in that case—a case in appeal, too, before the Judicial Committee of the Privy Council, was, "that, where a salvage is finally effected, those who contributed to that result are entitled to a share in the reward, although the part they took, standing by itself, would not, in fact, have produced it." But the main fact of the present case is a stronger one than that of the *Atlas*, as in the latter case the first schooner was a stranger, and acting without the authority or acquiescence of the earlier salvors; but, in the case before the court, the final salvor, the steam-tug, was solicited and invited, and at last proceeded to give the necessary aid through the influence of the earlier salvors, and some hands were even lent to make up a sufficient complement for the steam-tug. This distinction is so substantial that it influences the mind of the court to mingle the acts of the earlier and the final salvors to a certain extent, and at all events to consider such invitation or influence as an additional ingredient in the merits of those earlier salvors who employed it. There is no reason, arising from the evidence of the depts., to preclude the court from these conclusions, that of the second mate being merely hearsay, and that of the master passing by the circumstances most loosely, almost evasively. For the service, admittedly rendered to the depts. by the *Lord Clinton* and the *American Union*, a tender of 50*l.* to each boat has been made. The depts. deny altogether the services of the *Little Meteor* and the *Kate*. But, when the court considers the services of the two former—their promptitude, always to be considered an important ingredient in determining a salvage

award—their ready resources, their skilful management, their exposure to some hazard, and the great value of the barque and her cargo, which they saved, at all events, from certain destruction at the time, when being so close on the rocks: and that in twelve feet of water they warped her off more than thirty fathoms; and then the exertions made by one of them, the *American Union*, in the morning, to procure the aid of the steam-tug—the court cannot consider these tenders as sufficient. Still, the court is fully aware that the time occupied was short, and still more, that the whalers were not the final salvors. Under all views of the case, the court will award to each of the whale boats the sum of 20*l.*, in addition to the 50*l.* tendered, and 10*l.* extra to the *American Union* for her efforts to procure the aid of the steam-tug. To the *Little Meteor* the court will award the sum of 50*l.*, 30*l.* of which is to be paid to Mr. Notter, personally, for his special services. To the *Kate* the court can award nothing, inasmuch as she arrived when all danger was over; still, the circumstance of her hands going on board and pulling a chance-rope, although it constitutes no salvage service—the crew of the barque and the three other boats being quite sufficient for all the ship's purpose—yet, it shows that her intention was to render useful service if she could, and the court will so far recognise the meritoriousness of such intention as to give the *Kate* her costs. The *Lord Clinton*, the *American Union*, and the *Little Meteor* must also have their costs.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,
Barrister-at-Law.

Wednesday, March 8, 1865.

(Present—The Right Hon. LORD CHELMSFORD,
KNIGHT BRUCE and TURNER, L.JJ.)

THE FLYING FISH.

*Ship—Collision—Damage—Subsequent negligence of
injured ship—Amount of damages.*

The F. gunboat at midnight ran into the W. vessel making a hole in her stern six feet above water line, whereupon the master of the W. stood in for land. The coastguard about two hours afterwards visited the W. on her reaching land, and told the master of her position, and that the vessel could be got off, giving good reasons for their advice. The master refused repeated offers of the same kind, and the vessel broke up next morning:

Held (reversing the order of the Court of Admiralty), that there being strong grounds for believing that if the master of the W. had accepted the offers of assistance they would have been successful, the F. was responsible only for the damage directly occasioned by the collision, and not for what happened after the refusal of assistance by the master of the W.

This was an appeal from an order of the High Court of Admiralty.

On the night of the 30th Nov. 1861, Her Majesty's gunboat *Flying Fish* ran into the Dutch vessel *Willem Eduard*, and in consequence of the damage the *Willem Eduard* ran ashore about five miles west of Rye Harbour, where she broke up soon afterwards. The value of the ship in its original state was 10,910*l.* 11*s.* 8*d.* and the wreck sold for 2623*l.* 13*s.* 2*d.* The *Willem Eduard* sued the *Flying Fish* in the Admiralty Court, and the depts. set up a case that the master of the *Willem Eduard* might have got off his vessel if he had accepted the assistance offered to him by the coastguard service, and therefore

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that a great part of the damage was due not to the injury caused by the *Flying Fish*, but to the master's subsequent negligence and want of skill.

The judge of the Admiralty Court made the following observations as to the bearing of the law on the facts of the case.

Dr. LUSHINGTON.—This case comes before the court upon an objection to the report of the registrar and merchants. The objection is preferred on behalf of the owners of the *Willem Eduard*, a Dutch vessel, who had prosecuted to a successful issue a cause of damage against the *Flying Fish*. The damage in question having occurred almost immediately after the collision, the presumption of law is that it arose from the collision itself, and upon the pts. making out a sufficient *prima facie* case, the onus of disproving it would fall on the defts., who are in the eye of the law wrong-doers. The defts., however, allege, and the registrar and merchants have found, that a very large part of the damage was not to be attributed to the collision, but was solely occasioned by the master's refusal to accept assistance. To substantiate this defence, it must be shown not only that the master did refuse assistance as a matter of fact, but that such refusal arose from gross want of nautical knowledge or *crassa negligentia*. It must be shown, not only that the acceptance of the particular offer of assistance, which in this case was laying out an anchor and chain, was probably the best mode of proceeding, but that there was no reasonable ground for doubt as to what ought to have been done. The master had a discretion, and to impose blame in a matter of such discretion the court must be convinced that the course pursued by him was so manifestly wrong that no person in his position could have adopted such course, save from culpable ignorance or gross negligence. Before addressing myself to the particular circumstances of the case, it is proper to state that I must consider all the evidence which has been produced, both that before the registrar and merchants, and also that which has been subsequently produced before the court itself. I am well aware that much may be said as to the inconvenience of producing evidence after the report, but that practice was sanctioned by Lord Stowell after consideration: it has always prevailed in this court, and certainly I cannot depart from it in any particular instance; at the same time I may add, that were it necessary to discuss the question there are strong reasons for the practice, as well as strong reasons against it. The collision occurred a few miles off Hastings; the vessel was run on shore three or four miles to the west of Rye, Nov. 30th, 1861. The next day the ship went to pieces, but a portion of the wreck and cargo were recovered and landed. The value of the ship and cargo, as claimed, was 10,910*l.* 11*s.* 8*d.*, and the net proceeds of the sale of the wreck and cargo amounted to the sum of 2623*l.* 13*s.* 2*d.*, leaving a clear loss of 8286*l.* 18*s.* 6*d.* The registrar and merchants, in their report, have disallowed the whole of this sum 8286*l.* 18*s.* 6*d.*; and they have allowed a sum of 610*l.* (upon the principle that the ship might have been saved), as the probable cost of the repairs, and the expenses of discharging and reloading the cargo, demurrage and port charges; and they have also allowed a sum of 500*l.*, which the registrar supposed might have become due by way of salvage, if proper assistance had been accepted. Now, what is the result of that evidence? The witnesses are, the harbour-master, who must have been thoroughly conversant with the locality; the master of the tugs usually lying in the port of Rye, and, of course, occupied along this part of the coast; and an experienced shipbuilder, and I think that no possible imputation of corrupt intention, or desire to mislead, can be imputed to them. Their evidence most strongly expresses the

exceeding danger in their opinion of the experiment proposed by the coastguard, and as I think that that danger arose more particularly from the state of the locality, I deem them to be most worthy of belief. They say that the ship, if held by the anchor, would have been beaten on the hard sand and her bottom would have been broken out, and then they say that the experiment suggested by the coastguard would have ended in the destruction of the ship and cargo. With this evidence before me is it possible for me to come to the conclusion that the master was guilty of gross nautical ignorance, or of gross negligence? It may well be that men of nautical knowledge might reasonably say that the measures suggested by the coastguard were fit to be adopted. But such opinion would not decide the question at issue, for it is not, I must repeat, whether the measures proposed were right, but whether they were so clearly right that the master was guilty of gross ignorance or negligence in refusing to allow them to be carried into execution. I am of opinion that, as against a wrong-doer, which, in legal estimation, the *Flying Fish* must be taken to have been in this case, it cannot be maintained that there was no reasonable doubt as to the course to be pursued. The master entertained exactly that opinion which the harbour-master himself entertained, and which the master of the tug has expressed in such strong language, and if this be so the claim of the owners to be indemnified cannot be prejudiced by the judgment of the master in circumstances of such great difficulty. I must therefore send back the report to the registrar to allow the amount which shall be found to be fairly due for the loss sustained by the owners; but as the case on the part of the owners, I know not why, was left derelict before the registrar and merchants, and as the report of the registrar and merchants might be well founded upon the evidence before them, I shall, with regard to costs, make this decree: that the pts. shall pay all the costs of the reference, and that there shall be no costs of the present appeal.

The deft. (the *Flying Fish*) thereupon appealed to Her Majesty in Council.

The *Queen's Advocate* (Phillimore), Dr. Twiss, Q.C. and Phinn, Q.C. for the app.

Dr. Deane, Q.C. and Brett, Q.C. for the resp.

Lord CHELMSFORD.—In this appeal no question has been raised as to the app.'s liability for damages arising from the collision, which was the subject of the action, but he objects to the decree of the judge of the Court of Admiralty so far as it renders him liable to a portion of the damages which he contended was the result, not of the collision itself but of the absence of nautical skill on the part of the captain of the resp.'s vessel in making no effort to rescue her from the peril in which she was placed by the immediate consequence of the collision, and of his want of prudence and judgment in refusing assistance which was offered to him, and which if it had been accepted would probably have prevented all the damage which afterwards ensued. The collision happened about twenty minutes past nine p.m., 30th Nov. 1861, in the English Channel, off Hastings, by Her Majesty's gunboat *Flying Fish*, of which the app. was commander, running with her stem and port bow into the port quarter of the resp.'s vessel the *Willem Eduard*. It is admitted that the blame of this collision must be attributed solely to the app. The effect of the blow received by the *Willem Eduard* was that a hole was made in her stern about five or six feet above the water line, and the steering gear was disabled. The master

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believing that the vessel was making water, and was in danger of sinking, rigged a temporary steering apparatus, and stood in for the land, which he reached at about midnight of the same day, and ran her ashore three miles from Rye Harbour. The tide was then about half-ebb. The night was dark, the wind being W.S.W., and the weather cloudy and squally. The coastguard, who were on duty at a station near Rye, being desirous of rendering assistance, and the surf on the beach being heavy, carried their boat and launched it abreast of the vessel, and got aboard of her about two o'clock in the morning. Attersoll, the chief boatman, in the presence of Tremble, a commissioned boatman of the coastguard, told the captain of the *Willem Eduard*, that he was three miles from Rye Harbour, that where his vessel was lying was sand and no rocks, and that if he would give him charge of her he had no doubt that he could get her safe into Rye Harbour. But the captain refused this offer, stating "It would be of no use trying." Attersoll then asked to be allowed to get out an anchor, but the captain said "No." He then inquired what he intended to do; the captain replied, "It is no use, the wind will be from the south-west, and the ship will go to pieces." Attersoll, after waiting some time longer to see if the captain would allow him to do his best to get the vessel into a place of safety, at about three o'clock got over the side of the vessel, and walked ashore, the tide having ebbed and left her high and dry. After Attersoll quitted the vessel, Tremble, who stayed behind, pointed out to the captain that the wind was two points off the land, and that they could get the vessel off, she being three miles to windward of the harbour but he still refused to let them try. Attersoll returned to the vessel at four o'clock, when he and Tremble procured a light and walked round the vessel, which was still dry, and all the damage they could discover was on her stern and quarter about five or six feet above the water line, and they asked the captain to give them some canvas and nails for the purpose of nailing the canvas over the damaged part, which he refused to do. When Attersoll got on board again, he asked the captain what he intended doing, and he answered, "The vessel will go to pieces." And upon Tremble proposing to get her port anchor out, he replied, angrily, "No anchor—no good." At five o'clock the tide began to flow, when Mr. Groom, the receiver of wreck for the port of Rye, and Mr. Buck, the chief officer of the coastguard station, went alongside the vessel, and repeatedly urged the captain to accept the services of the coastguard men, but he still refused all offers of assistance. At five o'clock the captain and the crew left the vessel, the men carrying their clothes and chests with them, and the captain taking away his chronometer. As the tide rose the vessel floated, and a little before seven o'clock, the port wing of the foresail and gaff of the fore trysail not being properly bailed up, the wind caught these sails, and carried the vessel on to the beach. As she was driving in to the beach the mainmast went overboard. At seven o'clock, after the vessel was on the beach, there having been no one on board from five to seven o'clock, and nothing having been done during that time, the captain said the coastguard might try their best, and he gave charge of the vessel to them; but it was then too late for any effectual services to be rendered. When the vessel was seen about half past nine, she was lying broadside on to land, full of water, and the sea breaking over her. She afterwards went to pieces on the beach, and the greater part of her cargo was destroyed. The total value of the ship and cargo was 10,910*l.* 11*s.* 8*d.* The net proceeds of the sale of the wreck and cargo was 2623*l.* 13*s.* 2*d.* Upon the hearing of the cause, the learned judge,

assisted by two of the Elder Brethren of the Trinity-house, pronounced for the damage sued for, and referred the question of amount to the registrar, assisted by merchants, to report upon. The resps., before the registrar and merchants, claimed compensation for a total loss, amounting to 8286*l.* 18*s.* 6*d.*, after giving credit for the net proceeds of the sale of the wreck and of the cargo recovered. The apps. denied their liability for the damage consequent upon the refusal of the master to accept the services of the coastguard. No affidavits were used by the resps., nor were any witnesses produced by them before the registrar and merchants, but they relied entirely upon the written evidence filed in the cause. On the part of the app. six witnesses were examined, all of whom had been present when the services of the coastguard were tendered and refused, and they were cross-examined on behalf of the resps. The registrar reported that he was of opinion, for the reasons which he set forth in an exhibit to his report, that there was due to the resp. in respect of the damage proceeded for the sum of 1110*l.*, together with interest thereon at 4 per cent. The reasons for this opinion were stated to be that the master showed a great want of ordinary nautical skill in not taking any measures to save the vessel before the tide rose, and gross neglect of duty in not accepting the services of the coastguard men; that, therefore, the damages to which, in the opinion of the registrar and merchants, the resps. were entitled were, first, the cost of the repairs to the vessel at the port to which she might have been taken, including the discharge and reloading of the cargo, and the demurrage and port charges, which they estimated at the sum of 610*l.*; and, secondly, a reasonable sum for the services of the coastguard, and of the steam-tug in rescuing her from the shore, and taking her to a port of safety; and as the whole value of the ship and cargo was estimated by the owners at 10,910*l.*, they thought that 500*l.* would have been a proper remuneration to the salvors for their services. This report was objected to on the part of the resps., and they filed a petition praying the judge to refer it back to the registrar for amendment, and the app. filed an answer praying the judge to confirm the report. At the hearing of this petition the resps. proposed to produce witnesses who had not been examined before the registrar and merchants. This was objected to on the part of the app., but the learned judge overruled the objection, and five new witnesses were produced by the resps. One witness who had been examined before the registrar and merchants was produced and examined by the app. The judge, by order, referred back the report to the registrar, assisted by merchants, for amendment, condemned the resps. in the costs incurred at the reference before the registrar and merchants, but made no order as to the costs incurred by the objection to the report. The learned judge was of opinion "that the app. had not substantiated his allegation, that a large part of the damage was not to be attributed to the collision but was solely occasioned by the master's refusal to accept assistance. That to establish that defence, it ought to have been shown not only that the master did refuse assistance as a matter of fact, but that such refusal arose from gross want of nautical knowledge or *crassa negligentia*. That the true issue in the case was not whether the assistance of the coastguard or others, and the laying out of the anchor, might have been successful, but it was whether there was such reasonable doubt on the part of the master, who refused the adoption of such measure, that he was justified in declining to run the risk; or, put it in other words, whether, looking to the condition of the ship, the cargo, the weather, and the locality, he was guilty of gross nautical ignorance or gross negligence." The learned judge stated, that "had the case come before

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the court solely upon the evidence produced before the registrar and merchants, he thought it most probable—indeed, he entertained little doubt—that the court would have come to the same conclusions, as to matters of fact, as they did." But after adverting to the evidence of the witnesses produced by the resps. on the hearing of their petition, he added, "with this evidence before me, is it possible for me to come to the conclusion that the master was guilty of gross nautical ignorance, or of gross negligence?" and he concluded by expressing his opinion that, as "against a wrong-doer, which in legal estimation the *Flying Fish* must be taken to have been, it could not be maintained that there was no reasonable doubt as to the course to be pursued." Upon the hearing of the appeal from this judgment, two points were insisted upon by the counsel for the app.: first, that the learned judge ought not to have received fresh evidence upon the objection to the registrar's report; and, secondly, that such evidence was not sufficient to lead to a decision contrary to such report. As to the admission of additional evidence, the counsel for the app. did not attempt to maintain that the learned judge had no power to admit such evidence, but they contended that he thereby exercised his judicial discretion improperly. And they referred to former expressions of opinion of the same learned judge strongly condemnatory of the course of withholding evidence at the reference, and making a new case before the court, particularly in the cases of the *Sir George Seymour*, 1 Spinks Admiralty Reports, 67; and the *Glenmanna*, 1 Lushington's Reports, 122. They also insisted that the new rules made in pursuance of the Acts of the 3 & 4 Vict. chaps. 65 and 66, and 17 & 18 Vict. c. 78, which came into operation on the 1st Jan. 1860, had introduced a new practice with respect to references before the registrar, had armed him with more authority in conducting the inquiry, and had enabled the judge to know the oral evidence taken before the registrar, by a transcript of the shorthand writer's notes, and therefore had considerably limited the discretion previously exercised as to admitting additional witnesses. Their Lordships do not think that these rules have at all the effect of restraining the power of the judge, or of fettering his discretion as to the admissibility of fresh witnesses upon these occasions—a discretion which, it is unnecessary to say, must always be exercised with great caution, and with a careful regard to the peculiar circumstances of each case. With respect to the value of the evidence produced before the learned judge upon the hearing of the objection to the registrar's report, it must be observed that not one of the five witnesses who were called saw the *Willem Eduard* until she was on the beach, and at that time when it was admitted by all the resps.' witnesses that it was too late to do anything to save her. Although, therefore, they are witnesses of perfect respectability and of competent experience, and although they express themselves with great confidence as to the impracticability of saving the vessel in the place where she first grounded, yet it is impossible to give as much weight to their conjectures (for they amount to nothing more) as to the evidence of the app.'s witnesses, persons also of skill and experience, who saw the vessel where she was first lying, and who formed their judgment of the measures to be adopted upon the spot, and with the best opportunity of judging whether they were likely to be successful. Taking, however, the whole of the evidence on both sides into consideration, can it be said that the conduct of the captain of the *Willem Eduard*, after he had run his vessel on shore in consequence of the collision, did not exhibit a want of nautical skill and gross neglect of duty? The learned judge thought that, in order to exonerate the app. from liability to the subsequent damage to the vessel, it was necessary

to show that the master was guilty of "gross nautical ignorance, or of gross negligence." It appears to their Lordships that the principle upon which the owners of a vessel are to be exempted from liability for the acts or omissions of their master is not here laid down with perfect accuracy. The blame imputed to the master of the resps.' vessel in this case is, that he made no effort to save her, and that he refused all offers of assistance which were made to him; and the proper question seems to be, whether in so acting he did, in the words of Parke, B., in *Tindal v. Bell*, 11 M. & W. 232, "what a reasonable man would do under similar circumstances, where he had no other judgment but his own to resort to;" or, in the words of the learned judge of the Court of Admiralty himself, in the case of the *Linda*, 1 Swab. 306, upon a question of abandonment, "whether the master had wilfully abandoned the vessel when he might have saved her, or had abandoned her through a want of ordinary nautical skill and resolution." It is to be observed that this was not the case of a sudden emergency, leaving no time for deliberation, when great allowances should be made for any error in judgment which may occur. In this case there was no danger to life, nor any immediate apprehension of the loss of the vessel, and the captain had some hours to decide what course was best to be adopted. The learned judge was of opinion that "as against a wrong-doer, which," he says, "in legal estimation the *Flying Fish* must be taken to have been, it cannot be maintained that there was no reasonable doubt as to the course to be pursued." But treating the *Flying Fish* as a wrong-doer is really begging the whole question. For the collision, and for all the consequences of that collision, the app. is responsible. But if the subsequent damage resulted from the acts or omissions of the captain of the *Willem Eduard*, for that portion of the damage the app. is not only not a wrong-doer, but he is not even to be regarded as the doer of the act which occasioned it. It is quite true, as the learned judge has said, that "if there was a reasonable doubt on the part of the master whether the measure proposed, or any other measure, would be successful, he was justified in declining to run the risk, and would not be guilty of nautical ignorance or gross negligence." But the master appears to have exercised no judgment at all in the matter, but at once to have abandoned himself to despair, and to have regarded all efforts to save the vessel as hopeless. He seems, from the first, to have formed an erroneous notion of the extent of the injury she had sustained from collision. He says that he ran her aground because after she had been struck by the *Flying Fish* he found she was making water very fast, and was in danger of foundering. And yet Attersoll, the coastguardman, says that when he was on board, two hours after she was aground, he asked the master "if she made any water," and he answered, "No." And Tremble, another of the coastguard men, says that the master told him she was not leaking. To reconcile these different statements the counsel for the resps. allege that though the vessel made water while they were running to the shore after the collision, yet when the vessel was high and dry on the sand, the water ran out of her. But this explanation can hardly be accepted, because, if she was so much shaken by the collision as the suggestion assumes, the vessel would have made water again while she was drifting to the beach; and yet, after she arrived at the beach, the well was sounded, and there was no water in her, and the lee bilge (that is, the bilge on the side that was lying over) was examined, and no water was found there. The vessel, therefore, was clearly not in a state in which all attempts to save her were hopeless; and this must be taken into account in considering whether the master really exercised his judgment

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all in the matter. Offers of assistance were made him as early as two in the morning; he said it was no use, "the wind will be from the south-west, and the vessel will go to pieces." He was asked at five o'clock for a piece of canvas to nail over the deck above the water-line; he refused to give it. At six o'clock offers of assistance were repeatedly made him, which he as repeatedly refused. All this time he appears not to have been doing, or attempting, or suggesting anything to save the vessel; and at five o'clock he and the crew abandoned her without leaving a soul on board, and some of the sails not properly brailed up, and thus, when the vessel floated, the wind catching these sails carried her in 300 or 400 yards, and she again grounded on the beach. These circumstances furnish a strong ground for believing that, if the offered assistance had been accepted, it might have been successful. There were two modes suggested by which attempts to save the vessel, or, at all events, the cargo, might have been made: one, by carrying out anchors and holding the vessel till she floated, and then, with the assistance of a tug, carrying her into Rye Harbour; the other, as suggested by one of the witnesses for the respondents, to have forced her further on the shore. Whether either of these modes would have been successful, it is impossible to do more than conjecture, though the witnesses for the appellants speak very confidently of their expectation of success in their proposed experiment. But, however this may be, the master of the *Willem Eduard* never seems to have considered even for a moment any plan suggested to him, nor to have turned his own mind to the thought of how the vessel might be saved, but once, resigning himself to his fate, he abandoned her to the mercy of the wind and waves, by which she was helplessly carried to her destruction. Under these circumstances it is impossible for their Lordships to arrive at the conclusion that the master exercised any judgment at all upon the possibility of saving his vessel. It appears that he attempted nothing, because he had persuaded himself that nothing could be done, and that he rejected all offers of assistance, not after weighing the measures proposed, but because he had hastily determined that the state of his vessel would make every effort to save her unavailing. Their Lordships, therefore, agree in the conclusion to which the registrar and merchants arrived, as to the master having shown want of ordinary nautical skill and neglect of duty, and they think that the witnesses produced before the judge by the respondents did not alter the case, and that the learned judge ought to have confirmed the report so far as it limited the damages to the immediate consequences of the collision; but they agree with the learned judge in his objection to the conjectural estimate of the measure of damages made by the registrar and merchants. They ought not to have formed any judgment as to the reduced damages except upon the evidence of witnesses. By which of the parties these witnesses should have been produced was made a question in the course of the argument. It seems clear that the respondents could have been expected to be prepared with proof of the description upon the reference. They claimed the entire value of the vessel and cargo, minus the amount of the proceeds of what had been sold, and they could not know that the registrar and merchants would reject that claim before their report was made. On the other hand, the appellants contended that the respondents were not entitled to damages beyond those which would be attributed solely to the collision, and the proof of the amount of those limited damages would seem more properly to have been a part of their case. But no evidence at all having been given, their Lordships think that the registrar should have reported to the judge his opinion that the appellants were responsible only for the damages

directly occasioned by the collision, and not for any which happened after the refusal of the master of the respondents' vessel to accept the assistance which was offered to him, and that as to the amount of those limited damages no evidence had been given. If the judge had adopted the view of the registrar, he would have confirmed the report, but referred the matter back to the registrar to ascertain the damages upon that footing, and then the onus of proving the amount to which the respondents would be entitled upon this restricted view of their claim would have fallen upon them. Their Lordships, upon the whole of the case, will humbly advise Her Majesty that the decree appealed from should be reversed, except so far as it condemned the respondents in the costs incurred on the reference before the registrar and merchants; that the cause be retained, and that it be referred back to the registrar, assisted by merchants, to ascertain the amount of damages to which the respondents are entitled down to the time when the master of the *Willem Eduard* first refused the assistance which was offered to him, and that there should be no costs of the appeal on either side.

Order partly reversed.

App.'s proctor, *W. Townsend.*

Resps.' proctor, *H. H. Deacon.*

Monday, Jan. 23, 1865.

(Present—The Right Hon. KNIGHT BRUCE and TURNER, L. J.J., and Dr. LUSHINGTON.)

THE LAURA.

Ship—Flag—Nationality—Register.

The register, flag and pass of a ship carry with them a presumption that they are true and correct, and the owner is estopped from averring against them.

This was an appeal from a decree of the Vice-Admiralty Court of Antigua condemning the ship *Laura* and her cargo as forfeited to the Crown for breach of the statutes for suppression of the slave trade.

Deane, Q. C. and Lushington for the app.

The Queen's Advocate (Phillimore) and Swabey for the Crown.

Dr. LUSHINGTON.—A preliminary objection has been taken by the counsel for the appellants. They contend that the court below had no jurisdiction to try the question which it has decided. The case may be reduced into the shortest possible compass. The *Laura* originally belonged to New Orleans. She was sent on a voyage to Cuba, and while there at Havana was sold to Nicholas Dionissis the present claimant. Dionissis, it would appear, was anxious to obliterate all traces of the nationality of the vessel which he had purchased. Having been at one time a native of Cerigo, one of the Ionian Islands, the best course seemed to him to be to apply to the British Consul for the purpose of obtaining a British register. Mr. Crawford, Her Majesty's Consul General at Cuba, refused at first to comply with the claimant's request, and there is some doubt as to the precise grounds of his refusal. It is, however, quite clear that the claimant did eventually receive from him a provisional register. Now it appears to their Lordships that in the giving of this register, and in the receipt of it by the claimant, there is no reason to suspect fraud on either side. It was necessity alone which induced Dionissis to make his application. The question remains, what is the effect of this register? It was contended by the appellants that it was wholly void, and that therefore the court had

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no jurisdiction. But the operation of such a register may be very different under different circumstances. It may be that in a civil court this vessel would not be entitled to the privileges or advantages usually enjoyed by British ships. But it is a very different question whether she can escape all the consequences which follow upon the adoption of the flag under which she sailed. We apprehend that it is a proposition which has never been disputed, that the register, flag, and pass of a ship carry with them a presumption that they are true and correct, and that the owner is not at liberty to aver against them. We should therefore upon this general principle hold that the argument of the app. is not well founded. But even assuming such an argument to be well founded, and that the register was a nullity, and nothing but waste paper, the vessel would not appear to be justly entitled to claim the protection of any flag or nation. Now by 2 & 3 Vict. c. 73, s. 1, power is given to the Courts of Admiralty to adjudicate upon such vessels when captured by British cruisers. Their Lordships are therefore of opinion that this objection to the jurisdiction cannot be supported.

Judgment for the Crown.

App.'s proctor *Rothery*.

Crown's proctor *Dyke*.

HOUSE OF LORDS.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,
Barrister-at-Law.

Thursday, March 16, 1865.

ROBERTS v. BRETT.

*Contract—Condition precedent—Mutual covenants—
Damages—Action.*

*R. agreed forthwith, at his own expense, to procure a ship to go to M. and to take up and carry a cable, R. to fit the ship for such service, the ship to be ready on 15th July, fuelling which R. to pay 200*l.* per week as liquidated damages. B., on the other hand, covenanted to pay to R. 1000*l.* seven days after the ship arrived at M., and 4000*l.* at later dates. And, for the true performance of the covenants by R., he was to give to B. a bond, with sureties for 5000*l.*, within ten days after agreement executed, and deft. to do the like, but the bonds were not to prejudice other rights of the parties under the agreement:*

Held (affirming the judgment of the Ex. Ch.), that the true construction of the agreement was, that the giving of the bond on either side was a condition precedent to the party suing for a breach, and that the default of one party to give a bond did not excuse the other from giving his, and that it was not inconsistent with the hypothesis of the bond being a condition precedent, that part of the contract may have been performed, and a breach have occurred before the ten days.

This was a suggestion of error on a judgment of the Ex. Ch.

The action was brought by the plt. in error, Julius Roberts, a Captain in the Royal Marine Artillery, against the deft. the gerant in this country of a joint-stock company, established in France, called the Mediterranean Submarine Electric Telegraph Company, to recover damages for breach of an agreement under seal, entered into between the plt. and deft. on 15th May 1855, as to the laying down by the plt. of 150 miles of submarine telegraph cable called the African and Sardinian Cable, and which cable the plt. undertook to lay down between Cape Tabaque on the northern coast of Africa and Cape Spartivento, in the island of Sardinia.

By the agreement the plt. was bound forthwith at his own expense to procure a frigate called the

Cornwall, or some other suitable ship or vessel, and to stow the cable on board, and which cable was in the agreement expressly stated to be then lying at Morden's Wharf, East Greenwich: the plt. was also bound, at his own expense, to rig, complete, fit out, provide and provision the said ship with all things necessary, as set forth in the agreement, and to pay 600*l.* towards insuring the cable for 60,000*l.* The agreement then stated that the plt. was to have the ship ready for sea at the Nore on the 15th July then next, and in the event of the plt. failing to have the ship fully equipped at the Nore on or before that day, the deft. was to be at liberty to retain out of any moneys payable to the plt. under the agreement 200*l.* a-week as liquidated damages for every week, and so in proportion for less than a week of such default. The deft. covenanted to pay to the plt. the sum of 5000*l.*, as follows:—1000*l.* on or before the expiration of seven days after the arrival of the ship at Morden's Wharf, the sum of 2000*l.* further part thereof on or before the expiration of twenty-one days after the ship should have arrived alongside Morden's Wharf, and the sum of 2000*l.*, the remainder of the said sum of 5000*l.*, as soon as the said ship should have proceeded to sea from the Nore; and besides these money payments the plt. was to have five hundred 10*l.* paid-up shares in the said company delivered to him. By the agreement it was also agreed and declared that for the true performance of the covenants by the plt., and for securing any penalties which he might incur, the plt. and two responsible sureties should, within ten days after the execution of the agreement, give and execute to the deft. a bond in the penal sum of 5000*l.*; and that for the due performance of the covenants on the part of the deft., the deft. and two sureties should within ten days from the execution of the agreement give and execute to the plt. a bond in the penal sum of 5000*l.*; and that the said bonds so to be given should not in any manner prejudice or affect the respective rights or liabilities of the plt. or of the deft. under or by virtue of the agreement.

The plt. in his declaration, after setting out the agreement and averring performance of all conditions precedent, alleged as breaches of the agreement, that before the time arrived for the plt. to bring his ship alongside Morden's Wharf for the purpose of taking the cable on board, the deft. refused to perform his contract and dispensed with the said ship being brought alongside the said wharf, and would not stow the cable on board the ship, but caused the same to be stowed on board another ship, and thereby prevented the plt. from completing the said contract on his part. There was also a further breach assigned, that the deft. did not, in pursuance of the covenant on his behalf in the said agreement contained, give a bond with sureties to the plt. in the penal sum of 5000*l.*

The deft. pleaded—1. That the plt. did not procure a suitable ship. 2. That the plt. did not rig, complete, fit out, and provision her. 3. That the plt. was not ready and willing to provide and pay officers, and crew, and workmen. 4. That the plt. did not give a bond with two sureties to the deft. in the penal sum of 5000*l.* 5. And finally, in answer to the breach respecting the deft. not giving his bond to the plt., the deft. paid into the court the sum of 1*l.*

Upon the three first and fifth pleas issues in fact were raised, and to the fourth there was a demurrer.

The demurrer having been argued, the Court of C. P. gave judgment for the deft.

The issues in fact came on for trial before Cockburn, C.J., when the jury found that the plt. did procure a suitable ship, properly equipped according to the contract, and was ready to provide the officers and crew, and found all the issues in fact in favour

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of the plt., and they assessed the damages at 2300*l*. The plt. brought error on the judgment of the Court of C. P. on the demurrer, when the Ex. Ch. affirmed the judgment of the C. P.

Bovill, Q.C., M. Dawson and Beasley, for the plt. a error, contended that the giving of the bond by the plt. was not the consideration for the plt.'s agreement, and was not a condition precedent to the plt.'s right of action for breach; that a day was appointed for payment of the first instalment of the 1000*l*., which event was contemplated by the parties as likely to happen before the ten days allowed to execute the mutual bonds had expired. That the agreement as to giving mutual bonds was distinct and independent of the covenants entered into by the deft. for the performance of the contract on his part, and formed a part only of the consideration or his covenants, the breach of which might be compensated by a cross-action:

Pordage v. Cole, 1 Wms. Saund. 320, c. 3;

Staers v. Curling, 8 Bing. N. C. 355;

Boone v. Eyre, 1 H. Bl. 273, n.

The question whether there was a condition precedent depended on the nature of the contract, and how far the non-observance of the alleged condition tended to make the contract nugatory:

Tarrabochia v. Hickey, 1 H. & N. 183;

Kingdon v. Coz, 2 C. B. 661;

Clipskam v. l'ertue, 5 Q. B. 265;

Mattock v. Kinglake, 10 A. & E. 50;

Cumplell v. Jones, 6 T. R. 570;

Dicker v. Jackson, 6 C. B. 108.

The declaration showed that the deft. dispensed with the plt.'s performance of any condition. The interchange of the bonds were to be concurrent acts, and therefore, before the deft. could claim the plt.'s bond, he ought to have averred his readiness to give his own bond.

Mellish, Q.C. and H. Lloyd, for the deft. in error, offered to

Hochster v. Lavour, 2 E. & B. 678;

Acery v. Bowden, 5 E. & B. 714.

Cur. adv. vult.

THE LORD CHANCELLOR.—My Lords, the question in this appeal is, whether having regard to the true construction and intent of the agreement of the 5th May 1855, the stipulation that the app. should within ten days after the date and execution of the agreement give a bond with sureties for the due performance of the covenants on his part, be a condition the previous fulfilment of which, unless waived or released, was necessary to enable the app. to maintain any action upon the agreement. The case has been learnedly argued at the bar, and many decisions were cited, but the question depends on simple principles. First, having regard to the subject-matter of the agreement between the app. and the resp., who was the representative of a company, it is reasonable to suppose that the company who were about to entrust the app. with the laying down of a very valuable telegraphic cable should require from the app. security for the due fulfilment of his contract, and the requisition that the bond should be given within ten days is sufficient to show that it was intended to precede any material action under the agreement. The app. indeed contends that if he had brought the *Cornwall* frigate or some other suitable vessel alongside Morden's Wharf on the day of the date of the agreement, or the next day, the sum of 1000*l*. would have been payable to him by the resp. within a week afterwards, and thus he insists that a material part of the contract might have been performed before the expiration of the ten days allowed for the bond, and that therefore the giving of the bond is not a condition precedent. I cannot think that any such great expedition, if it was possible, was contemplated by the parties, or that

the app. was bound to act with any such rapidity. This engagement is that he will forthwith, at his own expense, procure the *Cornwall* frigate, or some other suitable ship or vessel, for the purpose required; the word "forthwith" does not necessarily imply that this was to be done by the app. before he had received the bond of the resp. and his sureties, that is, before the expiration of the ten days. But if the app. had brought a suitable vessel alongside the wharf so expeditiously as to have entitled himself to the sum of 1000*l*., and had received that sum (which must be the hypothesis) within ten days, and before the time for giving his bond expired, I should not have thought that it affected his liability to give the bond within the appointed time. It is urged that in the state of things supposed, the 1000*l*. might not have been paid as stipulated, and so a breach of covenant by the resp. might have occurred within the ten days. If it did, I should still be of opinion that the app. was bound to give or tender his bond to the resp. within the prescribed time. The right to have the security of two responsible sureties for the performance of the app.'s covenant was a very material thing to the resp.'s company, and of the essence of the contract, and I do not think it could be affected by anything voluntarily done by the app. within the ten days. It was also contended by the app. that the covenants to give the bonds by the app. and resp. respectively were mutual covenants dependent one on the other, and that there was no default by the app. until that instant of time at which there was a like default by the resp., and that the resp., being in a like default, could not defend himself by pleading the default of the app. But I fear that this is not the true meaning and effect of the contract. The engagements to give the bond are not entered into in consideration one of the other; but the fulfilment of his own engagement by each of the parties is a necessary preliminary to his right to recover on the agreement. It is the true intent and object of the agreement that each party should find security within the time prescribed. If this be not done by either party, both may be in effect released from the contract, which may fall to the ground; but neither party can recover for breach of the contracts in the agreement unless he has performed this precedent obligation. I therefore move your Lordships that the judgment of the court below be affirmed.

LORD CRANWORTH.—My Lords, I think that the judgment of the House ought to be for the deft. in error. I agree with the opinions of the learned judges that the giving of the bond must have been intended to be a condition precedent to any right of action for breach of any of the covenants contained in the indenture. On any other hypothesis the bond would be useless. No doubt, as there was a covenant by each party with the other to give a bond with sureties within ten days if default was made in giving a bond, a right of action would accrue for breach of that covenant, but such an action could produce no fruit to the party recovering in it. If brought before breach of any of the other covenants, it could only result in nominal damages. If brought after a breach, no damages could be recovered, except such as would have been recoverable in an action founded on the breach itself. It would give no right against any sureties, the obtaining of which right was the sole object of the bond. It was argued that the circumstance that the bonds were to be given, not immediately, but within ten days, was inconsistent with the hypothesis of a condition precedent. A breach, it was suggested, might occur within the ten days, and so a right of action might accrue before any bond need have been given. This does not appear to me inconsistent with the hypothesis.

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of a condition precedent. Probably the parties knew that practically no breach could occur within the ten days. But even if that is not so, the party injured by a breach of covenant within ten days might, by giving his bond, put himself in a condition to sue for the breach, for it would certainly be no answer on the part of the deft. sued for the breach to say that he had not given his bond. Suppose, for instance, the plt. had on the day of the date of the indenture moored a proper ship alongside Morden's Wharf, but that after the expiration of seven days the deft. refused to pay him the 1000*l.*, the plt., if he had given a proper bond with sureties to the deft., would then have been in a condition to maintain an action for breach of covenant against the deft., whether he had or had not given a proper bond to the plt. But it was argued that, even assuming the giving of the bonds to be conditions precedent, still they must be treated as mutual and dependent conditions, and that the deft. who had given no bond to the plt. could not insist on the want of such a bond from him. I do not feel the force of this argument. There is nothing in the indenture making it obligatory on either party to apply to the other for his bond. By giving the required bond the party giving it puts himself in a condition of enforcing, if he thought fit, the performance of the covenants. If neither party, as was the case here, gave any bond, neither party could sue for any breach of covenant. This was the opinion of the courts below, and in that view of the case I concur.

LORD CHELMSFORD.—My Lords, I agree with the decision in the Court of Ex. Ch. affirming the judgment of the Court of C. P. The question is, whether the fourth plea is an answer to the action, or in other words, whether the giving of the bond by the plt. was a condition precedent to his right to recover damages from the deft. for his non-fulfilment of his part of the agreement. The only parts of the deeds necessary to be noticed are, first, the covenants of the plt. that he would forthwith, at his own expense, procure the *Cornwall* frigate, or some other suitable ship or vessel, and should and would stow, or cause to be stowed, on board the said ship or vessel, the submarine telegraphic cable, which was 150 miles in length or thereabouts, and was then at Morden's Wharf, East Greenwich, and should do various acts in fitting out and provisioning the ship or vessel, and providing sufficient officers and crew, and should and would do and perform all the several acts thereafter covenanted to be performed by him the plt., and have the said ship fully equipped in all respects and ready for sea at the Nore, on or before the 15th July thennext: secondly, the covenants of the deft. to pay to the plt. 5000*l.* by the instalments and at the times thereafter mentioned, that is to say, the sum of 1000*l.* on or before the expiration of seven days after the arrival of the said ship or vessel alongside Morden's Wharf aforesaid, the sum of 2000*l.*, on or before the expiration of twenty-one days after the said ship should have arrived alongside Morden's Wharf aforesaid, and the sum of 2000*l.* the remainder thereof, when and so soon as the said ship should put to sea from the Nore; and lastly, the stipulation for mutual bonds in these terms: "And it is hereby agreed and declared that for the true performance of the covenants by the plt. hereinbefore contained, and for securing any penalties which he may incur under these presents, the plt. and three responsible sureties shall within ten days from the execution of these presents give and execute to the deft. a bond in the penal sum of 5000*l.*; and for the due performance of the covenants on the part of the deft. hereinbefore contained the deft. and two responsible sureties shall within ten days from the execution of these presents give and execute to the

plt. a bond in the penal sum of 5000*l.*" The learned counsel for the plt. argued that the covenant on the part of the plt. to give the bond could not be intended to be a condition precedent, because he was forthwith bound to procure the ship or vessel, so that he was to do an act before the ten days had expired within which the bond was to be given, and also that the deft. having covenanted to pay the plt. 1000*l.* on or before the expiration of seven days after the arrival of the ship or vessel at Morden's Wharf, and the money being appointed to be paid on a day which might happen before the expiration of the ten days within which the bond was to be given, the giving of the bond could not be a condition precedent according to the first rule upon the subject of dependent and independent covenants laid down in the notes to *Portage v. Cole*, 1 Wms. Saund. 320. They also contended that the case fell within the 3rd rule stated in these notes, as it was a covenant going only to part of the consideration the breach of which might be paid for in damages. These rules are not proposed for the purpose of absolutely determining the dependence or independence of covenants in all cases, but merely as furnishing a guide to the discovery of the intention of the parties. For, as Lord Kenyon said in *Porter v. Shepherd*, 6 T. R. 668, "conditions are to be construed to be either precedent or subsequent according to the fair intention of the parties to be collected from the instrument, and technical words (if there be any to encounter such intention) should give way to that intention." Now what may fairly be considered to have been the intention of the parties upon the whole scope and object of the deed in question? Putting the agreement into a short form it amounts to this: The deft. says to the plt., "In consideration of your doing certain acts and giving me a bond with sureties to secure the performance of your covenants to do these acts, I will pay you a sum of 5000*l.* and give you a bond with sureties to secure the payment." And the plt. on the other hand covenants to do the acts and to give the bond in consideration of the performance by the deft. of the covenants on his part to be performed. Upon this short summary of the deed there could scarcely be a doubt that either party might refuse to perform his part of the agreement until he was secured by the bond of the other. But the counsel for the plt. say that the particular terms of the deed show that this could not be the intention. In particular, they lay great stress on the word "forthwith" in the plt.'s covenant to procure the vessel, which they interpreted to mean "immediately," and they urged this as a proof that the giving the bonds could not be meant to be conditions precedent, because this act of the plt. must necessarily have been done before the expiration of the ten days, to the last moment of which the deft. was at liberty to delay the execution of the bond. And they also insisted upon the clause for payment by the deft. of 1000*l.* before the expiration of seven days after the arrival of the vessel at Morden's Wharf, which might have happened within the ten days, and therefore they argued that the case in both these respects was within the first rule in the notes to *Portage v. Cole*. It appears to me that too great force was attributed to the word "forthwith" in the agreement, and that all that was meant by it was, that the plt. was without delay or loss of time to procure a suitable vessel for receiving the telegraphic cable, and to quicken his diligence the deft. covenanted to pay him 1000*l.* within seven days after the arrival of the vessel at Morden's Wharf. Out of regard to his own interests, too, the plt. would use all expedition in commencing the performance of the agreement, because, unless he had the vessel, with the cable on board, equipped and ready for sea by the 15th July, he would have been liable to pay

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200*l.* per week for his default. I think the plt. could not have been compelled to take a single step nor to incur the smallest expense towards procuring the vessel till he was secured by having the deft.'s bond, and that if he chose to proceed without having this security, everything he did was at his own peril. If the deft. wished to obtain the plt.'s progress within the ten days, he might have executed and delivered his bond, and then he would have performed all that was required of him till the first instalment of the 5000*l.* became due. It is a strong circumstance indicative of the intention of the parties that the stipulations with respect to the mutual bonds should be conditions precedent, that these stipulations follow all the covenants entered into on both sides, and that they are agreed and declared to be given for the true performance of the covenants thereinbefore contained. They are obviously intended therefore to be mutual securities for the performance of all the covenants by each of the parties respectively. This, I think, takes away all ground for saying that the covenants for giving the bonds go only to part of the consideration, and that a breach of them may be paid for in damages. Though, strictly speaking, they enter into and form part of the consideration on both sides, yet they extend to the whole of the covenants contained in the deed, and are an essential and vital part of the agreement between the parties. Nor is it easy to see how a breach of them could be compensated in damages, or what estimate could be formed of the measure of damages for their non-fulfilment. I do not think that anything in favour of the plt. can be made of the circumstance of the deft. not having given his bond. It appears to me that the mutual default of the parties had the effect of virtually putting an end to the agreement, because neither of them was in a situation to insist upon performance by the other. A supposed case was put at the bar, of the plt., after the ten days had expired without his bond having been given, going on to perform his covenants, and afterwards in an action to recover the amount stipulated to be paid by the deft. being met by a plea of the non-performance of the condition precedent. I have no difficulty in saying that in such a case the party who may avail himself of the non-performance of a condition precedent, but who allows the other side to go on and perform the subsequent stipulations, has waived his right to insist upon the unperformed condition precedent as an answer to the action. Looking to the whole of the deed, I am satisfied that it was the intention of the parties that each should receive from the other a bond as a security for the performance of the covenants before either was bound to proceed to perform any of the stipulations contained in the deed. For these reasons I think the judgment of the Ex. Ch. ought to be affirmed.

Judgment affirmed.

Plt. in error's attorney, *S. N. Driver.*

Def't. in error's attorneys, *Pinniger and Wilkinson.*

COURT OF QUEEN'S BENCH.

SITTING IN BANCO.

Saturday, June 3, 1865.

(Before COCKBURN, C.J., CROMPTON and SHEE, JJ.)

HOSSACK V. GRAY.

THE SHIP OSCAR.

The jurisdiction of the London Trinity-house and the Trinity-house of Leith.

The jurisdiction of the Trinity-house of Leith is restricted exclusively to Scotland, and the words in the Leith Trinity-house charter, giving that body power

to grant pilotage licences "through the seas and along the coasts and islands of the Northern and German Oceans," are mere surplusage, as against any rights of the London Trinity-house, and confer upon the Leith Trinity-house no right whatever to license pilots in respect of any part of the districts of the London Trinity-house.

The question in this case arose as follows: In the month of April 1864 the steamship *Oscar*, with passengers, left London on a voyage to Leith. From London to the North the *Oscar* was under the care of Joseph Gray, a pilot licensed by the London Trinity-house, but on the arrival of the ship at the Nore, Capt. Hossack, the master of the *Oscar*, and the app. in the case, dismissed Gray, and himself piloted the ship for the remainder of the voyage. Gray, at the time of his dismissal, offered to continue his pilotage services, and keep charge of the *Oscar* as far as Orfordness; but his services were refused by Capt. Hossack, who contended that he was entitled to pilot the *Oscar* from the Nore to Orfordness, by virtue of a licence granted to him by the master and assistants of the Trinity-house of Leith. The *Oscar* was a ship carrying passengers within the meaning of the 354th section of the Merchant Shipping Act of 1854, and at the time in question Capt. Hossack held no pilotage certificate or licence from the London Trinity-house, and no other pilotage certificate or licence but that from the Leith Trinity-house. An information was preferred by the London Trinity-house against Capt. Hossack, under the Merchant Shipping Act of 1854, before one of the magistrates of the Thames Police-court, charging him with navigating the *Oscar* on the voyage above named from the Nore to Orfordness without employing a duly qualified pilot, and Capt. Hossack was convicted in the penalty of 10*l.*, subject to the opinion of this court, which was now appealed to. In the year 1797 the corporation and assistants of the Trinity-house of Leith obtained from the Crown a charter which contained the following recitals:

And whereas it has also been humbly represented to His Majesty that notwithstanding the great increase of the trade and navigation of these realms in general, and of that part of the United Kingdom called Scotland in particular, there is no body corporate or politic in Scotland aforesaid invested with full power and authority to superintend the interest of navigation, and to examine and license pilots for the better and more safety piloting and navigating the ships of His Majesty and of his liege subjects in, through and along the adjoining seas, friths and coasts; and whereas it would manifestly tend to the increase and good government and navigation in these realms, and to the safety of the ships and vessels of His Majesty and of his subjects were the said society or corporation to be invested with sufficient authority for that purpose. His Majesty therefore, for himself, his heirs and successors, hereby further gives and grants unto the said master and assistants of the Trinity-house of Leith, and to their successors, full power and authority to examine and license pilots for the purposes aforesaid in manner following—that is to say, from henceforth and hereafter, it shall and may be lawful to and for the said corporation, at any general meeting from time to time, to examine such person or persons as to the members present at such general meeting may seem proper, upon their skill, knowledge and experience in the navigating, piloting and conducting His Majesty's ships and vessels of war, and all other ships and vessels up and down, and inward and outward of the Frith of Forth, as in and through the seas and friths, and along the coasts and islands of the North and German Oceans; and the said public examinations being so had and made as aforesaid, and the said society or corporation being satisfied of the skill, knowledge and experience of such person or persons as aforesaid, it shall be lawful for the said corporation to license and authorise all or any of the said persons so examined and found qualified to act in the capacity of pilot or pilots for all such ships or vessels, and over the whole or within such part of the bounds or limits before mentioned as the said person or persons, upon his or their examination as aforesaid, may or shall be found properly qualified; such person or persons being always obliged to pay to the treasurer of the said society such sum or sums of money as by any bye-law may be settled and ordered to be paid as the fee or fees payable on granting such licence, or warrant, or certificate thereof; reserving, nevertheless, the right of the Lord Provost, Magistrate and Council of the city of Edinburgh of appointing

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pilots for the navigation of the port, harbour and roads of Leith in the same way and manner as they did and do enjoy the same.

In the year 1821 an Act, entitled "An Act for the regulation of the corporation of the master and assistants of the Trinity-house of Leith," was passed, which confirmed the rights and privileges granted by the above charter, and that Act contained a schedule of the rates to be received by the pilots licensed by the said corporation. The licence granted to Capt. Hossack by the Leith Trinity-house set forth the authority of that corporation to license pilots for the limits mentioned in the charter, and that Capt. Hossack having been examined and found duly qualified to act as pilot, was thereby appointed by the master and assistants of the Trinity-house of Leith to take charge of any ship or vessel from Leith Road eastward to St. Abb's Head, and southward along the east coast of England to Orfordness, thence to the Nore, and *vice versa*. It was said that the Leith Trinity-house had been in the habit of granting licences to masters of vessels and others to pilot vessels in the form set out above, but the Trinity-house of London had never been aware of the granting of such licences, or that the power to grant such licences was ever claimed by the Trinity-house of Leith. By sect. 1 of the 5 Geo. 2, c. 20, after reciting that the Trinity-house of London, by long usage, and by virtue of divers letters patent, granted to them by the Crown, had been authorised and empowered to appoint pilots to conduct ships and vessels out of the river Thames and Medway through the North Channel to or by Orfordness, and round the Long-sand Head into the Downs, and from and by Orfordness up the North Channel and the rivers Thames and Medway, it was enacted that from and after the 24th June 1732, if any person should take upon himself the charge of any ship or vessel as pilot down the river Thames, or through the North Channel to or by Orfordness, or round the Long-sand Head into the Downs, or down the South Channel into the Downs, or from or by Orfordness up the North Channel or the rivers Thames or Medway, other than such person as should be licensed and authorised to act as a pilot by the Trinity-house of London, every person so offending and being lawfully convicted should, for every such offence, forfeit the sum of 20*l*.

The 48 Geo. 3, c. 104, s. 2, required the Trinity-house of London to license pilots for the purpose of conducting ships navigating "up and down or upon the rivers Thames and Medway and all and every the several channels, creeks and docks thereof and therein, or leading or adjoining thereto, as well between Orfordness and London-bridge as from London-bridge to the Downs, and from the Downs westward as far as the Isle of Wight, and in the English Channel from the Isle of Wight up to London-bridge;" and such vessels were to be conducted and piloted by such pilots so appointed and licensed, and by no other pilots or persons whomsoever, except appointed by the society or fellowship of the Trinity-house of Dover (commonly called Cinque Port pilots), within the limits therein mentioned. This power of the London Trinity-house to license pilots to conduct ships and vessels within the limits, as mentioned, between "Orfordness and London-bridge," was confirmed by the 52 Geo. 3, c. 39, and the 6 Geo. 4, c. 125, the latter Act providing that all ships navigating within these limits (with certain exceptions set forth in the Act) should be conducted and piloted within the limits aforesaid by such pilots so to be appointed and licensed, and by no other pilot or person whomsoever.

Upon this statement of facts the opinion of the court was sought on appeal as to whether Capt. Hossack, the master of the *Oscar*, was on the

occasion above mentioned qualified by the licence of the Leith Trinity-house, held by him as described, to pilot the *Oscar* between the Nore and Orfordness?

The *Solicitor-General* (with him *Maunder*) contended, on behalf of Gray, the London Trinity-house pilot, and in support of the Thames magistrate's decision, that Captain Hossack had no authority to act as pilot in navigating his ship to Orfordness, the charter bestowed on the Leith Trinity-house not giving that body any pilotage power beyond their particular local limits; that the Leith Trinity-house claimed their powers under their charter of 1797, but that for a considerable time previous to that charter the London Trinity-house had the exclusive authority under Act of Parliament to license persons to act as pilots to Orfordness; that it never was intended that the words "along the adjoining seas" were to give the Leith corporation power to license persons to navigate ships some distance from their own district on the English coast, and near to the mouth of the Thames to London. It was never contemplated by the statute 1 Geo. 4, c. 57, that the Leith Trinity-house was to come in conflict with the London Trinity-house, and the Leith schedule of pilotage charges proved that that was not intended. The 370th section of the Merchant Shipping Act of 1854 provided that the London Trinity-house should continue to license pilots from London to Orfordness on the north and Dungeness on the south. But, even if the Leith charter gave the right to license the master to pilot his own ship, the licence held by Capt. Hossack was not of the character required by the 340th section of the Merchant Shipping Act, which provided that it must be a licence to pilot his particular ship, whereas Capt. Hossack's licence was a general licence to pilot ships; that the conviction of the Thames magistrate must be supported, first, upon the ground that the Leith Trinity-house had no authority to grant Capt. Hossack a licence to pilot his ship to Orfordness; and secondly, because Capt. Hossack did not possess a licence authorising him to pilot as master in the London Trinity-house district, in compliance with the terms of the Merchant Shipping Act of 1854.

Coleridge, Q. C. (with him *Turner*) contended that the Thames magistrate's conviction should be quashed; and that both under the charter and the Act of Parliament the Leith corporation had authority to license pilots along the German Ocean as far as it went, and that was to the mouth of the Thames. The terms of the charter were, that "it would tend to increase good government and navigation in these realms;" clearly meaning that their authority to act was not to be confined to Scotland, otherwise, why was the word "realms" introduced? The 1 Geo. 4 confirmed the jurisdiction of the Leith Trinity-house along the Northern and the German Oceans; and that being so, the app. had committed no breach of duty in acting as pilot under such licence between the Nore and Orfordness, and the app. came within the terms of the Merchant Shipping Act, which confirmed all pilotage powers existing before that Act and not expressly abrogated by it. With respect to the expression "adjoining seas," that must be read in connection with and as bearing out the contention as to the force of the words, "these realms." It might be that the London Trinity-house had authority over some portion of the same district as the Leith Trinity-house, but that would not do away with the concurrent jurisdiction of the latter.

The *Solicitor-General* having replied,

Cockburn, C.J. said:—I think it is quite clear that

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the Leith Act of Parliament and the charter were intended to limit the jurisdiction of the Trinity-house of Leith to Scotland. In the first place, there was at the time of the charter being granted to the Trinity-house of Leith an Act of Parliament in existence which rendered it penal for any one to undertake to navigate or conduct a ship as pilot between the mouth of the Thames and Orfordness, going northwards and coming southwards, without a licence as pilot from the London Trinity-house. It never could have been supposed that the Crown, who is a party to every Act of Parliament, could have intended to grant authority or to confer on the Trinity-house of Leith an authority to grant licences to navigate vessels within the particular districts as to which the prior Act of Parliament was in force, and to legalise by charter that which was, by Act of Parliament, declared illegal. Then, if we look at 1 Geo. 4, which is an Act of Parliament relating to the Trinity-house at Leith, it is plain, so far as the pilotage jurisdiction is concerned, that what that Act intended to do was to confer and give additional force and effect to the charter. It could not be supposed that it was intended to do away with the statute of Geo. 2, conferring the authority on the London Trinity-house, without actually repealing or expressly repealing the authority conferred by that statute on the London Trinity-house; it could not be supposed that it was intended, by a side wind or by implication, to repeal that Act of Parliament. When we look at that Act of Parliament it is plain to my mind that it must have been the intention of the Legislature that the authority in pilotage matters which this conferred or confirmed by Act of Parliament, should be limited to Scotland, inasmuch as we find that all the rates of pilotage as settled here, in the schedule, which are so important a matter to prevent disputes between masters and pilots and the owners of vessels, and to prevent the extortion that might arise in many instances—that all those rates for piloting are confined to the different ports along the coasts of Scotland, and for navigating vessels between those ports, making it plain to my mind that the intention of the Act was to confer jurisdiction solely with regard to the coasts of Scotland. As I have just now pointed out, the whole system has been to confer local jurisdiction only within those limits of navigation within which the discretion of the persons who are to confer the licence was supposed to be limited. It certainly would seem to be an extraordinary thing to confer on the Trinity-house of Leith that which is not conferred on any such port in this country, namely, the power to grant licences to extend along the whole of the coasts of England. The only real difficulty arises from the insertion of the words in the charter and in the Act of Parliament referring both to the coasts of the German and Northern Oceans, and also to the coasts of Scotland. I cannot help thinking that was put in by way of extra caution in order to include everything, and must be taken clearly to be surplusage. To give to it any other interpretation would lead to great conflict and to unfortunate consequences, if licences were to be granted to pilot this southern end of the eastern coast of these realms to persons whose local knowledge of those parts, while it would render them admirable pilots as far as the coast of Scotland was concerned, might make them very insufficient ones so far as it related to the southern or eastern parts of England. I cannot but hold that the true construction is, that the Leith charter of incorporation is confined to the coasts of Scotland and cannot conflict with the jurisdiction of the Trinity-house of London between Orfordness and the mouth of the Thames. I therefore think that this ^{mo}viction was right.

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CROMPTON, J.—No one can read the first charter without seeing what the intention must have been; and when we remember also (as my Lord has observed) the general policy and the rules relating to general pilotage which the Legislature has enacted, I should think no one could doubt that they were intended to have only the effect which the Solicitor-General would give them. Now, unfortunately, there is a loose word or two, and Mr. Coleridge in his argument rests on "German and Northern Oceans." Taking those words together, I think from the observations made on them as to the general policy and the clear intention of the charter, if they stood alone, I should have been disposed to give them the construction that one must give to an Act of Parliament. Considering the state of the law when this Act of Geo. 4 was passed, I cannot entertain a doubt that any additional power that Mr. Coleridge wants to give to the jurisdiction of the Leith Trinity-house at that time; has been confined entirely to Scotland, and more especially so when we take the passages which my Lord has referred to as to the rates; and nothing can be stronger than the rates given in these pilotage Acts. We are now considering whether the Trinity-house of Leith could license pilots to navigate vessels into all the channels and all the ports throughout England, and, for aught I know, probably into the Thames. Now, when we look at the Act of Parliament, it is quite clear that the matters all refer to Scotland. In the first place, no bye-laws are to be made but those sanctioned by the Lord President, the Lord Justice Clerk, the Judge of the High Court of Admiralty, and His Majesty's Advocate of Scotland. Could it be that it was intended to exclude the law officers here, and yet that it was to apply to England by granting a power to the Scotch courts, and those Scotch bodies, to grant licences all through England with a power of this kind? Then, again, before being sanctioned they are to be hung up in the Custom-house, the Act giving them a power to hang them up in all custom-houses where these pilot matters are to prevail; and it also says that they are to be subject to the Lord President, who shall cause the same to be so hung up in the several custom-houses of Scotland, and in the Trinity-house of Leith. Then the notices of appointments are to be affixed in the Trinity-house of Leith; and then there are penalties attaching to these parties. Now, supposing Mr. Coleridge's argument to be good, and if a party who took charge of a vessel on the English coast were to be guilty of drunkenness or incapable, he is to be fined and punished, but there is no power of punishing him except by taking him, according to the provisions of the subsequent Act of Parliament, before the penal jurisdiction of Scotland. It seems quite inapplicable to any such case. Considering that, and considering all the provisions of the Act, and that it is confined to the northern ports of England, one cannot suppose it was the intention of the Legislature by the statute to give the Trinity-house of Leith a power of granting such licences as would allow Scotch pilots to come down to pilot a vessel between the Nore and Orfordness, and all the branches of the seas and the coasts that are referred to there. I think it is clear that the resp. is entitled to our judgment.

SHEE, J.—I am of the same opinion.

ADM.]

THE ALICIA ANNIE AND THE AMINTA v. THE SCINDIA.

[ADM.]

MARITIME LAW REPORTS.

VICE-ADMIRALTY COURT, CAPE TOWN.

March 16 and 17, 1865.

(Before Acting Chief Justice BELL.)

THE ALICIA ANNIE AND THE AMINTA v. THE SCINDIA.

Salvage service and wrecking—Demands of excessive salvage: security discouraged—Old and new practice as to the mode of granting awards—Court now guided, not so much by value of the property saved as by the meritoriousness of the service rendered—General review of extreme awards—Court not necessarily bound to the extent of the salvage amount actually tendered and paid into court.

Where two ships claimed as salvors of a derelict ship, and it was proved that the master of one of them abstracted goods from the derelict with an evident intention of not restoring or accounting for them:

Held, that the misconduct of the master so improperly removing goods tainted the whole salvage service of his ship, and deprived his crew as well as himself of all participation in the salvage award.

BELL, Acting C. J., after reviewing the whole of the voluminous evidence in this case, said:—The *Scindia* was a ship sound in hull, having all her standing-rigging, except that of her mainmast, well under the command of her helm when steered, but deserted by her crew, and found in the open sea in quiet weather within view of an anchorage. She was taken possession of by the present claimants as salvors, her ports and scuttles closed, her sails set, her anchors bent on to cable, and she was navigated safe to the anchorage without misadventure or risk of any kind, except the possible, but, in the state of the weather, the improbable one, of a gale of wind from the south-east. For these services the salvors have claimed a half of the value of the *Scindia*, her cargo and freight; which for ship and cargo has been ascertained to be 7000*l.* and 21,281*l.* respectively. With regard to the freight the salvors state its amount to be 3000*l.*; but of this there is no evidence. The salvors were willing, however, to take it to be 2000*l.*, and the owner of the *Scindia* assented to this. The aggregate value of the ship, cargo and freight then is to be taken as 30,281*l.*; and the half of that sum, or 15,140*l.* 10*s.*, is what the salvors ask for their services, having, previously to proceeding, demanded a sum of 20,000*l.*, and insisted upon security to that amount being found before they would consent to liberate the *Scindia*, which, it is worth observing, after having some slight repairs done to her, having discharged the damaged part of her cargo, and had the remainder re-stowed, proceeded on her voyage to England, where, by this time, she may have safely arrived. I should observe here, that among the affidavits for the salvors I found some to the effect that the valuations put upon the *Scindia* and her cargo under the authority of the court were much too low; but no application was made for a re-valuation, nor was any use made of these affidavits at the hearing of the case. When the case for the salvors was opened, it was urged upon the court that the rule in such cases was to award certain fixed proportions of the value, such as a moiety, a third, a fourth, or a fifth, according to the opinion entertained by the court of the extent of the services rendered and the benefits received; seldom less than a third, and generally one-half being said to be given, and great stress was laid upon the value of the saving vessels and the risk they ran, the *Alicia Annie* and her cargo and freight being stated to be of the value of 18,000*l.*, and the

Aminta, her cargo and freight, of the value of 26,000*l.* These values, however, were mere statements, no evidence of either value having been produced. It was admitted for the salvors that they had not run any risk for their ships or their lives from bad weather, and that they had not exhibited any great degree of skill, none having been required; but it was urged that they had bestowed great labour in getting the *Scindia* under sail, bending on the anchors, and preparing for mooring. I am not, however, able to find that any such great amount of labour was either necessary or bestowed. With respect to the *Scindia* herself, it was urged that she was in imminent danger from her proximity to the coast, and the chance of south-east or landward gale arising. No doubt she did run that risk, and if she had been allowed to remain exposed to it long enough without any one coming to her rescue, she would in all moral probability have been driven on shore and have perished; but the barometer all along showed that she was in no very immediate danger of such a catastrophe. I was surprised when security was asked for so large a sum as 20,000*l.*, and equally so to see that they prayed for a half of the value of the property saved, and to hear it insisted on from the bar that the course still observed was to give a definite proportion, which was seldom less than a third, because I had thought that the old practice of the Admiralty Courts in awarding definite proportions had been exploded, and that more rational and just views now prevailed in this matter. It is no doubt true that formerly such amounts of salvage were given as must have made it questionable with those interested whether it would not have been as well in some of the cases that the vessel had been allowed to perish. It is hardly too much to say that salvage at that time did almost as much damage as wrecking; it mattered little to those interested whether their loss arose from the act of the sea or from the act of man. But with the progress which has been made in other things towards a more sound way of thinking, the Courts of Admiralty have, in estimating salvage compensation, adopted the rule of taking a general view of the nature of the services rendered, the danger incurred, the duration of the services, who and what the salvors are, and the situation and condition of the vessel saved. Now, in this case I am of opinion that the services rendered, though necessary to the preservation of the *Scindia*, exceeded but little those of ordinary navigation; that they were given without any danger whatever incurred by those who rendered them; that the duration of the services exceeded one day only by three hours; that the salvors were merely merchant vessels prosecuting an ordinary trading voyage not requiring any great expedition or exacting from the masters of the vessels any great urgency, such as has been the case where passenger and mail steamers have been the salvors; and that the situation of the *Scindia*, the vessel saved, though undoubtedly one of some degree of risk, was not one of immediate peril requiring immediate relief. Such being my opinion of the services rendered and received, I find that no fixed portion of the value saved is now awarded; that the value saved is merely one element in the consideration of the salvage that ought to be given, private right and justice having weight given to them, as well as to public policy, in the encouragement of services for the rescuing of life and property, and I find that, in administering the law according to this principle, sums have been given without reference to what might be their proportion to the value of the property saved, but which, if calculated with such reference, vary from one-eightieth upwards. I find this from the perusal of a great variety of cases

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beyond those cited from the bar, and more modern in date. The one to which I have referred, in which one-eightieth was given, was that of the *Rajasthan*, 1 Swa. 171, where the value saved was 40,000*l.*, and the salvage awarded was 500*l.* I have, however, selected three of the many cases as fittest for my consideration in fixing what, in my opinion, the amount of salvage ought in this case to be, as one exhibits the highest and another the lowest amount of salvage that has been given in late times. The first of them is the case of the *Windsor Castle*, to be found in 2 Irish Rep. for 1843, where the judge, Dr. Stock, whose judgment, which I read rather as an interesting study than a dry legal report, awarded 5000*l.* out of 20,000*l.*, or a sum equal to one-fourth. In that case the vessel saved was in imminent risk of perishing entirely upon a rock-bound lee coast, on which a heavy surf was breaking, while current and wind were drifting her right upon it, and the operations of the salvors were so great and so momentarily attended with peril, as to exceed the belief of nautical persons, though incontestably proved to have actually occurred, and lasted over several days, during which the salvors endured excess of fatigue, and the extremity of danger, and under all the circumstances the rescuing of the ship might be called a recovery from absolute total loss. But for this salvage the vessel must irretrievably have perished, and her salvors with her. The second case is that of the *Ella Constance*, 33 L. J. 4, 189. There the vessel succoured was a steam passenger ship, which had consumed all its fuel, its two masts, and every available piece of wood; while in this state, and lying still upon the waters, she was come up to by a mail steamer, which towed her into Malta, a harbour it reached in eleven hours. In that case the value saved was 16,000*l.*, and the sum awarded was 400*l.*, a fortieth of the value saved, although it was urged, with contradiction no doubt, that the vessel saved was utterly helpless, as she could not have sailed under canvas. The third case is the one most analogous to the present. It is that of the *Earl of Eglinton*, 1 Swa. 7. This vessel was driven on shore in Simon's Bay, and struck heavily on the beach. In that position, if the weather had become boisterous, the vessel would have been in very great danger—the suggestion that was made in the present case; but she was got off by the exertions of the salvors, which were rendered without any risk of their property or their lives, as in the present case. The value of the property saved in this instance was 85,000*l.*, and the salvage awarded was 2000*l.*, or one forty-third of the value saved. No doubt, in this last case, the services were rendered by naval officers, to whom less is generally awarded than to civilians; but, on the other hand, the services rendered were much greater than in the present instance, and by a much larger number of persons. After a careful review of all the circumstances which I have remarked as necessary to be taken into consideration in cases of this nature, and particularly of the nature of the services rendered by the salvors, I am of opinion that the tender by the resps. in this case of 2000*l.* was sufficient, and ought to have been accepted. By the agreement of the two captains of the salving vessels, this sum would have to be divided equally between them. The court can have no difficulty in awarding to the ship *Aminta* one-half of the sum tendered, but the case is different with regard to the *Alicia Annie*. After all the vessels arrived in Algou Bay a variety of articles, which are specified in a list, were handed over by Kirby, the master of the *Alicia Annie*, to the collector of customs, as having been taken out of the *Scindia*. To the affidavit of the collector stating this fact there was

appended a memorandum by Orpen, the officer who made out the list, to the effect that he had reported to Kirby a report that he had been pillaging the *Scindia*, when he admitted that he had some things taken out of that vessel after he had first denied that he had any, and that the officer had thereupon ordered him forthwith to return them to the *Scindia*. This memorandum was not authenticated by the oath of Orpen, but Kirby, feeling the prejudice which it would operate against him, made affidavits, not denying that he had taken the things out of the *Scindia*, but alleging that he had returned them voluntarily. Whichever of these stories may be the true one matters little, because either of them, and both together, establish the fact that Kirby had taken articles out of the *Scindia* without any explanation why he did so, except such as of itself is sufficient to inculcate him, namely, that he did it "while as yet it was doubtful whether the derelict could be brought into port." Moreover, Kirby delivered the articles in question as being all the articles he had taken out of the *Scindia*; whereas, after the case had been heard, an affidavit was produced in this court, which was sworn in Liverpool by Fraser, the officer who took the *Alicia Annie* home for Kirby, swearing that before he, Fraser, sailed from Algou Bay a boat left the *Alicia Annie*, with a message that the articles sent in it were all that Capt. Kirby had which belonged to the *Scindia*; but that at sea he found a variety of articles having upon them the name of the ship *Scindia*, which were specified in the affidavits. In the affidavits used at the hearing there were two in which it was sworn that from the *Aminta* boats had been seen going to and from the *Alicia Annie* and the *Scindia*, before the *Aminta* came up to them; and Calvin swore that while he was already in charge of the *Scindia*, an order came from Kirby to him to deliver to a barque which had also come up, rope and ship's provisions from the stores of the *Scindia*. The matter then stands thus with Kirby: he takes a great variety of articles from the derelict, and either voluntarily or compulsorily delivers over part of them as if they were the whole, and detains fully as many, if not more. In taking these articles from the *Scindia*, Kirby cannot pretend to have acted the part of a salvor; it was that of a wrecker; and yet the abstraction of these articles was the first service he rendered to the derelict. What I have before stated from the evidence shows that Kirby was never in a condition to render efficient salvage service to the derelict. In truth it may be said that, so far as the *Alicia Annie* was concerned, the *Scindia* would not have been assisted at all, but would have been allowed to fill gradually and founder. It was the accident of the *Aminta* coming up that rendered the salvage service successful. The state of the crew of the *Alicia Annie* would not admit of her taking charge of the derelict, and the services which she did render admitting of the character of salvage were almost merely nominal. This of itself would suggest an objection to a claim for salvage on behalf of the *Alicia Annie*, but for the incautious agreement made with the *Aminta*, whereby the *Alicia Annie* was to receive half the salvage, without any stipulation as to the amount of service to be rendered, so that the services rendered by the *Aminta*, which were efficient, might be argued perhaps to be imputable to the *Alicia Annie*. It would seem to me to be doubtful whether any salvage could be claimed on behalf of the *Alicia Annie*, even if the conduct of her master had been different from what it was. But the conduct of Kirby in extracting articles from the *Scindia* deprives him, in my opinion, of the character of a salvor, and disentitles him to any reward for services, even if they had been much greater than they were. I cannot separate the case of the crew of the *Alicia Annie*

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from that of the master, because what was done by him was patent and open to every one, yet it was neither hinted at nor disclosed by any one of the crew. As to the owners of the *Alicia Annie*, perhaps in a matter of this nature they ought not to be made responsible for the conduct of their agent, which the master of the ship certainly is; but on the other hand neither the ship *Aminta* nor the ship *Alicia Annie* were the salvors. It was not through exposure of either of these ships that the salvage was effected; it was due to the exertions of the crew of the *Aminta*, and the property of the *Alicia Annie* not having been exposed to risk, the compensation of her owners could be but trifling. Only 1000*l.* of the 2000*l.* could on the whole be awarded to the *Alicia Annie*. If that had been honestly earned—and but for the conduct of Kirby I must have assumed that, under the agreement, it had been honestly earned, though the services were in truth rendered by the crew of the *Aminta*—I should have awarded 500*l.* to the crew, 300*l.* to the master, and 200*l.* to the owners. I am disposed therefore to award 200*l.* to the owners. It has not escaped me to doubt how far 2000*l.* having been tendered and brought into court by the resps., it is competent for the court to disallow any part of that sum; but on giving the matter my best consideration, and adverting to the peculiar nature of the jurisdiction which Courts of Admiralty exercise in questions of this nature, I have come to the conclusion that the court has such power. The court does not sit merely to adjudicate the rights of the individual litigants before it; it sits to administer justice at the same time and protect the public policy of the State, which is, on the one hand, that persons should be encouraged to adventure their lives and property for the succour of the lives and property of others imperilled on the high seas; and on the other, that persons under colour or pretence of succouring others should not be permitted to plunder them. It would be *passim* exempli, in my opinion, if the master of the *Alicia Annie*, after plundering the derelict, should be allowed to profit from salvage services rendered, not by him but by others, through the accident, in the first place, of those others having made an incautious agreement with him, and in the second place, of the resps. having, through a desire to avoid litigation, tendered and brought into court a specific sum. I apprehend it would have been competent to the court, notwithstanding such tender, to have disallowed any salvage compensation whatever. If so, it must equally have the power to reduce it, especially if to omit doing so would so far defeat the policy which it is the duty of the court to protect. It is competent to the court to defeat an agreement between a master or owner and an apprentice, whereby the former is declared entitled to take whatever may become due as salvage to the apprentice, and by express statute any such agreement with a seaman is declared to be wholly void. It is, moreover, competent for the court to award a higher sum than a salvor may have accepted under an erroneous idea of the value of his services, even although the salvor may have given a receipt in full, with perfect knowledge and comprehension of all the circumstances; and even to award a higher sum than that claimed by the suit, directing a fresh suit with that object to be instituted for the surplus. Such extraordinary powers, not competent to other courts, can but spring from the force that is given to the policy of encouraging salvage services in the interest generally of all those who have to pay, though the immediate effect of the exercise of the jurisdiction in the individual instance may be to entail heavier payment. It is for the benefit of the general trade of the country that salvage services should be liberally paid, and that no one should be allowed to come between the payment and those by

whom the services were rendered; and the court exercises a power to protect this by setting aside what in other courts would interfere with their jurisdiction. By parity of reasoning, the court must have the power to protect the trade of the country from being plundered, by withholding from a pretended salvor compensation never earned, although the same may have been tendered by the party supposed to have been succoured, but who has in fact been plundered. Under all circumstances, the Court would pronounce that the tender of 2000*l.* must be held to be sufficient; out of which the *Aminta* would be paid the amount awarded to her, the remainder being retained in court subject to any final decision as to the claim of the owner of the *Alicia Annie* (as apart from the master and crew of that vessel, who would have nothing), and any final order as to costs.

NORTHERN CIRCUIT, LIVERPOOL.

March 30 and 31, 1865.

(Before SHEE J. and a Special Jury.)

THE CASE OF THE GREAT EASTERN STEAMSHIP AND ITS SETTLEMENT.

STYRING v. BARBER AND OTHERS.

Edward James, Q. C. and R. G. Williams for the plt.

Brett, Q. C., Mellish, Q. C. and Quain for the defts.

This was an action against three of the directors, Mr. Barber, Mr. Brassey and Mr. Gooch, of the Great Ship Company, charging them as directors of that company, with wrongfully and collusively, and with intent to defraud the shareholders of the ship, and procure it to be sold to a certain joint-stock company, of which they were shareholders and directors, at a price much less than the real value, instigating and procuring the mortgagees to take possession of and sell the ship, and charging that the ship was so sold accordingly, whereby the plt., who was a shareholder, was deprived of the ship, and his shares were rendered useless; and charging further, that the defts., by making false declarations in their reports, induced the plt. to lend money and to continue to hold shares. The plt.'s case, according to his counsel's statement, was as follows: that he, the plt., being a share and debenture holder in the Great Ship Company, came forward to complain of the defts., that by their conduct and impropriety in the management of the company he had lost the whole of the money invested in it. That the company was established in 1858, at a capital which was gradually increased until it reached the enormous sum of 530,000*l.*; that it was now wound-up, and 15*l.* was all that had come into the hands of the official liquidator, and that the whole of this enormous capital had been dissipated upon the ship; that the ship had been built by Mr. Brunel for long voyages, and that she had been employed on short ones, in which none of the points of advantage which she possessed could be brought into use, while, on the other hand, she was incumbered for such trade by her size and capacity, and could not compete with the largely subsidised lines already in force; that under such a disadvantage was she with reference to those shorter voyages, that in the course of nine of them (extending over some three years) the expenditure amounted to upwards of 278,000*l.*, while the receipts reached something like 118,000*l.* only; representing a receipt of some 13,000*l.* per voyage against 31,800*l.* expenditure; that this being the financial position of the company brought about by

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the mismanagement of the debts. (the directors) they nevertheless had made representations of a favourable kind, inducing the advance of more capital by the shareholders; that such representations were false, and whether the directors made them knowing them to be false, or having the opportunity of finding out whether they were true or not, made little difference, if they induced others by them to alter their position unfavourably; that in Oct. 1863 the affairs of the company became so disastrous that the shareholders were summoned, and against the wishes of the directors a committee was appointed to report upon the position of the company; that shortly after the report of the committee was presented, and it recommended that three new directors should be at once chosen, but as the time for the retirement of these officers had not properly arrived, the old directors, the debts., though continuing in their office, were to be directed to follow in all respects the course pointed out by the new officers; that at a previous meeting of the shareholders the chairman Mr. Barber had declared that the directors had no plan or policy to propose, and that unless 30,000*l.* could be immediately raised the ship must be sold in fourteen days. The report of the committee set forth the purpose for which the ship was built, and the disasters and position of the company; but it differed from the directors in the hopeless view they appeared to take of the actual condition of things and the necessity for a sale, the report stating that "it was assumed that the price likely to be realised might perhaps pay off the mortgages and debts." The report presented the following statement:

1. That the ship was designed to carry so large a quantity of freight and so large a number of passengers, with coal sufficient to complete the longest voyage without stopping, as to complete successfully with any known means of conveyance.
2. That the ship was not designed for a short voyage to run against heavily subsidised lines, with one-horse steam-power to 3½ tons of carrying power, while she had but one-horse steam-power to eight tons of carrying power. The result of such competition has been, as every one ought to have foreseen it would be, a loss in three years and a half of 161,869*l.*
3. That the ship was designed to run between distant ports, where the charge for passengers is the highest, and freight dealer in proportion than the passenger rate, the charge to Calcutta by the Peninsular and Oriental Company being 36*l.* per ton; but she has been placed on the cheapest route both for passengers and freight, and where the competition by ships whose size is suited to the duration of the voyage is daily instead of fortnightly.
4. That not one of the qualities specially provided for in the construction of this ship has had in such voyages any chance of being properly exhibited, while she has, from her extra size, incurred on short voyages greater proportionate delays, risks and expenses. Successes might as well be expected from employing an Irish steamer between Hungerford and London-bridge, as from this ship running between England and America.
5. That it was now proposed to place her on an Indian or Australian voyage, whichever, after the most careful consideration, may be considered the best for the interests of the company.
6. That the results of the American voyages are known, and now, after nearly ruining the reputation of the ship, and after such mismanagement and loss, the whole of which will have to be borne by the shareholders, several of the mortgagees are trying to force on the sale of the ship with the intention, it is believed, of being themselves among the principal buyers.
7. That the directors have never yet managed the ship successfully for the shareholders. They have never shown confidence in her. If they became parties to the proposed purchase it must be with the expectation of doing better with her on their own account, and the inference will be irresistible that they have not done their duty to you; for, whether the cost of the ship be 400,000*l.* or she be bought at a nominal price, to work her with the recent annual loss will be equally ruinous. The directors and bondholders now urging on the sale of the ship cannot be buyers honestly at any price.

These latter passages in the report, the counsel for the plt. contended were prophetic; for on the day when the meeting of shareholders was to be held to discuss the report, and an hour earlier in the day, the directors being themselves bondholders, and some of the other bondholders, held a meeting together, and on the motion of Mr. Gooch and Mr. Barber determined to sell the ship. In Jan. 1864 the ship was put up to auction at an upset price of

130,000*l.* and not sold, and on the 9th Feb. the prospectus of a new company, namely, "The Great Eastern Steamship Company (Limited)" appeared, which was formed for the purpose of buying the ship. The bondholders of the old company formed a large proportion of the shareholders of the new, and the old directors (the debts.) were the directors also of the new, and, indeed, the whole executive in each, of solicitors, brokers, &c., was the same. A second auction was held, and the new company bought the ship for the price of 25,000*l.* (having refused to rest for a month), when a Mr. Hawes offered 12,000*l.* and upset the bid of another gentleman who would, as the plt. alleged, have given more. This had reference to the bid of a gentleman which the auctioneer was instructed to decline on the ground of the bidder's inability to make a deposit at the time, and which was the subject of an action in the summer assizes at Liverpool. Having thus got possession of the ship, the new company at once let it to the Atlantic Telegraph Company for the sum of 50,000*l.* which was not a bad stroke of business in the interests of the new management.

Such was in substance the case for the plt., which was supported by the evidence of Mr. Hawes and Mr. Richardson, in addition to various reports and statements put in, to show what steps were taken at the different meetings of the shareholders to stem the disastrous current of affairs. It did not appear, however, that the shareholders, as a body, had ever been opposed to the course adopted by the directors, or desired to substitute the long voyages mentioned in the report for the shorter ones to America; and with reference to the meeting of the bondholders at which it was decided to sell the vessel, it appeared that at the time it was held the debts. had ceased to be the directors of the old company, and the new one did not yet exist, while Mr. Brassey was not shown to have had anything to do with that meeting whatever. This being so, the debts.' counsel submitted, that there was no case to go to the jury on the counts for false representation, mismanagement, and so forth; but his Lordship held that, inasmuch as there were demurrers to determine the legal validity of these counts, the question of fact on them should be determined by the jury. With reference to the first count, charging an improper combination with the bondholders to realise their security and sell, it was submitted that this was a count that must be proved strictly, the proper remedy after an order to wind-up the company being, not at the suit of a shareholder, but at that of the official liquidator, and probably in Chancery rather than at law; and as the count charged that, at the time of the sale, the debts. were directors of both companies, whereas the proof showed them to be directors of neither, it must be withdrawn from the jury. The court having adopted this view, it was agreed, after a consultation among counsel on both sides, to allow the plt. to withdraw a juror, the Attorney-General for the County Palatine stating that, with regard to an expression he had made use of as to "gigantic imposition," it was used in reference to the ship herself (for such he had always deemed her), and not to the company; and that upon the whole of the directors' reports being read, rather than isolated passages, the plt. must admit that there could be no charge of misleading representation, or, generally, ground of imputation.

Brett, Q. C. said that the debts. consented to the course of a juror being withdrawn upon the withdrawal of all imputations; and

His LORDSHIP said, he thought it was a very proper and very handsome way of settling the matter.

ADM.] BELFAST HARBOUR COMMISSIONERS v. LAWTHER AND MARINE INVESTMENT SOCIETY. [ADM.]

COURT OF CHANCERY, IRELAND.

DUBLIN, Monday, June 5, 1865.

(Before the LORD CHANCELLOR.)

THE BELFAST HARBOUR COMMISSIONERS v. LAWTHER AND THE MARINE INVESTMENT SOCIETY.

THE EDWARD CARDWELL.

Freight and mortgage—Mortgagee's lien on freight of landed goods.

Where the owner of a ship lands goods on a wharf in his own name, the lien which he has on the goods until the freight is paid is outside any statutory endowment; the lien given to the ship by the statute on such goods merely applying where the owner of the goods takes them himself out of the ship and lands them on the wharf in his own name, and this because the lien for freight would be gone when the owner of the goods landed them if the statute did not make provision to preserve it:

Seemle, where the owner and mortgagee of a ship lands goods on a wharf, retaining his lien on them for freight, whether such lien would pass to the mortgagee, even admitting the mortgagee had been entitled to the accruing freight on the goods before they left the ship and were landed.

Brewster, Q. C., Chatterton, Q. C. and Andrews were counsel for the petitioners.

Murdonough, Q. C., Jellett, Q. C. and Porter for the Belfast Marine Investment Society.

The Solicitor-General, Harrison, Q. C. and Falkiner for Mr. Lawther.

The LORD CHANCELLOR (of Ireland).—In this case a charter-party was entered into between Mr. Lemon and Co. of Belfast and Mr. Mitchell of Miramichi, for the employment of the ship *Edward Cardwell*, of which the deft. Lawther was agent. As such agent he (Lawther) advanced 2000*l.* on the freight of two-thirds of the cargo; and on the other third, paid 300*l.* on account of the ship, and gave Messrs. Lemon an acceptance for 1000*l.* on getting authority from them to sell their part of the cargo on their account, and to deduct from the proceeds the amount of freight payable by them. After Lawther had so advanced 2300*l.*, the Marine Investment Company became mortgagees of the vessel for 6500*l.* All Lawther's advances were made and the securities given to him before the intervention in Belfast of the Marine Investment Company; but shortly after that a person of the name of Tribe, who said he was authorised by the Marine Investment Company to intervene in the matter, came to Belfast, and then a controversy arose between him and Lawther as to the ship's register, which Lawther, as representing Mr. Mitchell, had got from the captain, on the arrival of the ship. The parties went to the police office, under the powers of the Act of Parliament, and Mr. Lawther rather complicated the transaction by a step which might be within his authority, but which was not very well-advised, namely, by appointing himself master of the ship, a position for which he was wholly unfit. However, the transactions as to the register were entirely beside the question to be disposed of in the present case, which had reference—not to the register of the ship—not to the ship itself—but to the lien, if lien there were, on the cargo for the freight. The way the matter then stood was, that on Oct. 15th the Marine Investment Company intervened after all the transactions he had alluded to had taken place between Mr. Lemon and the other parties. Lawther had been and was then the agent of Mr. Mitchell,

and Mr. Mitchell was still the owner, subject to the claim of the Marine Investment Company. Mitchell was the owner of a part of the cargo, and Lawther was his agent; Lemon was the owner of another portion of the cargo, and Lawther was also his agent; and Lawther had a claim on his own account for the sum of 3000*l.* The Marine Investment Company claimed the ship as absolute owners, and made their title as such. Under these circumstances, when the harbour commissioners received the notice from the Marine Investment Company, they were placed undoubtedly in a position of considerable difficulty. They knew nothing whatever about the dealings between Lawther and the other parties, and still less did they know anything about the Marine Investment Company, who did not interfere for two months after the ship arrived, and a week at all events after the cargo had been discharged. Under these circumstances the harbour commissioners refused to give up the property to Lawther after the notice they had received from Mr. Tribe, and Lawther brought an action against them for the value of the cargo. The harbour commissioners, being embarrassed by these claims of lien, applied to the Court of C. P. under the Interpleader Act to stop the action, and to compel the Marine Investment Company to give up their claim, or become defts. in the suit. The Court of C. P. unfortunately differed in judgment. The Marine Investment Company contended that, having given notice to the commissioners on the 16th Oct. under the statute, the commissioners were bound to obey the Act of Parliament, and to require the goods holder to lodge the amount claimed by them, and then go through the ceremonies which were prescribed by the subsequent sections of the Act. That was a very convenient arrangement where it could apply, but there could be no doubt that it applied only to cases of a very simple character which could be easily disposed of. It related only to the case where the owner of the goods took them out of the ship and landed them on the wharf. There the lien for freight would be gone if the Act did not make some such provision for preserving it; but this did not apply at all when the shipowner himself landed the goods in his own name. He, in that case, retained his lien until the freight was paid. The Act contemplated disputes only between the freight owner and the goods owner, but that was not the case here. This was a case between two conflicting claimants of lien, and the persons claiming the lien were the mortgagee and mortgagee of ship, and not the shipowner and goods owner at all. The case was therefore entirely outside the Merchant Shipping Act in every respect; and the Marine Investment Company was entirely wrong in contending that the harbour commissioners were to follow it literally. The point upon which the Court of C. P. differed was as to whether the Act applying was a preliminary question, and therefore there could not be an interpleader. It appeared to him that this preliminary question was as much within the authority of the court as any other. It was argued that, because the Court of C. P. had refused to interfere that, therefore, the authority of Chancery was excluded; but that would be a very great denial of justice. If one court refused a prohibition, there was nothing to prevent the suitor going to another court; though, if the one court went into the merits and decided upon them, then there would be no opportunity of going to another court. He believed that he had full power to entertain the case, and to dispose of it on the hearing, if the questions were ripe for hearing; which, in his mind, they appeared to be. He would, therefore, discuss the real merits of the case as between the parties, having endeavoured to clear away the cloud which the contentions of the

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parties had raised around it. First, with regard to Lawther's title; he represented in himself Mr. Lemon and Mr. Mitchell. He was the actual assignee at all events for 1000*l.* of the freight long before the mortgage to the Marine Investment Company, and certainly long before such mortgage was registered. He had also a charge on the freight for the amount of 300*l.* which he had spent upon the ship. In addition to that, when he landed the goods on the wharf he was the representative of Mr. Mitchell, the mortgagor of the ship, and in that character he had ample power to deal with it as he liked as long as nobody interfered. If he had been paid the freight by Lemon, the mortgagee never could have touched it. The mortgagee had a right to the accruing freight of the ship; he had a right to the freight which had been earned by the vessel during the voyage; but no case had decided that, if the goods were taken out of the ship by the mortgagor and lodged on the wharf, though the mortgagor had a lien upon them for freight, that that lien passed over to the mortgagee. He was not going to decide whether it did or not, because the question did not arise in this case. It was plain that Lawther and Lemon could deal with the cargo and freight as they pleased until the intervention of the mortgagee, and they arranged to take, instead of the lien on the goods which might or might not exist, a very definite mode of payment. Instead of the terms agreed upon by the charter-party, it was arranged that other terms of payment of the freight by Lemon should be substituted; that Lawther should sell the goods as agent of Lemon, and should return out of the proceeds of the sale a sum equal to the freight. It appeared to the court that when that arrangement had been made binding by those who had the power to make it, the mortgagee could not afterwards step in to disturb it. Before the mortgagee took possession of the vessel he left the freight in the hands of the mortgagor, to be dealt with as he pleased, and if he parted with it for valuable consideration there was an end of the claim. Mr. Mitchell's portion of the cargo was freight free, and therefore the Marine Investment Company had no claim upon it. He would therefore give the commissioners an injunction against actions by either of the other parties, and direct their costs to be paid by the Marine Investment Company.

COURT OF ADMIRALTY.

Wednesday, May 3, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE SUPERB V. THE FLORENCE BRAGINTON. (a)

Collision—Rules of the road.

Where two sailing vessels are crossing so as to involve risk of collision, and they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled and the other ship free; in which case the latter shall keep out of the way: but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.

Deane, Q. C. and Vernon Lushington for the *Superb*.

Brett, Q. C. and E. C. Clarkson for the *Florence Braginton*.

(a) See the *Shipping and Mercantile Gazette* of May 4th.

Dr. LUSHINGTON gave judgment in this case, which came on by an action brought by the barque *Superb*, 321 tons, from Shields to Alexandria, laden with coal, against the barque *Florence Braginton*, 367 tons, from Sunderland to Hong Kong (also coal-laden), to recover for a total loss, arising from a collision which took place between two and three o'clock in the morning of the 27th Dec. last, in the Wold off the coast of Norfolk. According to the statement of the *Superb* the wind was about N.W.; according to the *Florence Braginton*, it was W.N.W., the weather being represented as dark and cloudy; and the tide at about low water. The case for the *Superb* was: that she was taking her fairway course through Hasborough Gat, steering S.E. by S. $\frac{1}{2}$ S. under topgallantsails, topsails, foresails and jibs, with topsail stowed and yards about square, making from five to six knots, carrying her red and green lights, when the *Florence Braginton* was seen a little abaft her port quarter, distant only about three-ships' lengths, overhauling and rapidly approaching her; that the helm of the *Superb* was thereupon immediately put hard aport, and the *Florence Braginton* was hailed loudly to starboard her helm and keep off, notwithstanding which she almost immediately ran stem on into the port mainrigging of the *Superb*, driving her deck beams right out on the opposite side, and doing her great damage. The *Florence Braginton*, on whose part a cross-action has been brought, pleaded that she was proceeding under topgallantsails, topsails, jib and spanker, and with the clews of the courses about half up, close-hauled on the starboard tack, heading S.W., making two and a half to three knots, exhibiting her proper lights, when the port light of the *Superb* was descried at a short distance from and on her starboard bow; that she (the *Florence Braginton*) was kept on her course, but that the *Superb*, which had the wind free, instead of keeping out of her way, as she ought to have done, ran against her and struck her about midship on her stem and cutwater, and that the two vessels remained for some time in contact, during which considerable damage ensued. The first question to be determined was, whether the case could be discussed without reference to any of the articles established by statute. It was truly stated that the case must fall within the 12th or 17th articles, and there could be no difficulty in ascertaining what is the true construction of these articles when the facts are thus determined on as applicable to this particular case. It appeared from the evidence, or at least it was alleged, that at the time of collision the *Florence Braginton* was under a starboard helm, and that the direction she was sailing in was about S.W., the wind, as represented by her, being W.N.W.; and with regard to the *Superb*, she was sailing S.E. by S. $\frac{1}{2}$ S., which appears to be the ordinary course from the neighbourhood of the Wold for vessels bound south. It seemed a little startling to find a vessel so proceeding close-hauled on the starboard tack, with the wind at S.W., looking at the facts of the case, and where she was and what the ordinary course was; but still there may be very good reasons in navigation which may induce persons so circumstanced to pursue such a course. Looking at the evidence of the pilot of the *Florence Braginton*, was it consistent with probability, and therefore could credit be given to the statement he made when he said: "We weighed anchor and proceeded under all sail, except that the clews of the courses were not let down. We were close-hauled on the starboard tack heading S.W. I wanted to get her into a fairway, so as to be in a better sailing position for getting her before the wind." Was such a course consistent with the ordinary course which seamen would pursue or consistent with probability? If the case came within the 17th article, and if, in

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point of fact, this vessel, the *Florence Braginton*, was following the other vessel and overhauled her, and came up to her, and ran into her, then it would be perfectly clear that she would fall within the limits of the 17th article, viz., that "every vessel overtaking any other vessel shall keep out of the way of her;" and under those circumstances the *Florence Braginton* would be—supposing that she was following the other vessel, and had overtaken her, and was going at a faster rate, or from any other circumstance was overtaking her—to blame for not having kept out of the way. If she was to blame, then the other vessel was to blame also, for she ported her helm, whereas she was bound by the 18th article to keep her course unless there was some reason, which does not appear to exist on the present occasion, why she should alter her course. If the case does not fall within the 17th article, it must fall within the 12th, which states that when two sailing vessels are crossing,—and if the two vessels were not following each other, or meeting, they must have been crossing,—so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled and the other ship free, in which case the latter shall keep out of the way; but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward." The first question to determine then was, which vessel was to windward, and it appeared to the court, from the facts, that it was not the *Florence Braginton* that was to windward, but the *Superb*. It was the duty then of the *Superb* to keep out of the way. Why did she not do so, and what satisfactory reason has she assigned for not doing so? If she saw the *Florence Braginton* too late, and might have seen her at an earlier period, and could, by porting or star-boarding, have got out of the way, she must be to blame; and, upon all the facts elicited, the Court and the Elder Brethren have arrived at the unanimous conclusion that the *Superb* was solely to blame for the collision. There must be a decree to that effect in both actions.

The Masters of the Trinity House assisting the court were Captain Drew and Captain Lambert.

Friday, May 5, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE ELIZABETH v. THE LOTUS. (a)

Collision.

Where one ship is run down by another, though no default, previously to the collision, on the part of the ship run down, the fact of the latter ship not having taken all proper measures and the most prudent means to mitigate the consequences of the collision, subsequently to its occurrence, does not necessarily disentitle her to indemnity against the ship running her down.

Milward, Q. C. and E. C. Clarkson appeared for the *Elizabeth*.

Dean, Q. C., Brett, Q. C., and Vernon Lushington, for the *Lotus*.

Dr. LUSHINGTON, gave judgment in this case, which was an action brought by the owners and master of the late barque *Elizabeth*, 311 tons, from Demicrara, with timber, and calling at Queenstown, for Greenock, against the steamer *Lotus*, 459 tons, from Liverpool with a general cargo for Bordeaux to

recover for the total loss of the barque arising from a collision which took place about 7 p.m. on the 21st of last Dec. off the Bishop's Light, in the St. George's Channel. It was agreed on both sides that the wind was E. by N. The barque stated the weather as clear and starlight with a moderate breeze, and a head sea; the tide being flood and running north from three to four knots. The steamer represented the night as dark and cloudy, with a slight haze on the horizon and the tide as ebb. The case for the *Elizabeth* is that, while under two courses, two topsails short reefed, maintop-gallant sail, mizen-topsail, mizen-topmast staysail, mizen-trysail, upper and lower mizen-topmast staysails, main and outer jibs, making four knots, closehauled on the starboard tack, heading N. $\frac{1}{2}$ E., and carrying the proper lights, the steamer was seen two to three miles off, between four and five, on her starboard bow, with all her lights visible; that the *Elizabeth* was kept on her course close-hauled to the wind, on the starboard tack, in the expectation that the *Lotus*, which was under both steam and sail, would keep clear of her, but that although the bell of the *Elizabeth* was rung, and those on board her shouted to the *Lotus*, the *Lotus* came on at great speed, shutting in her green light, and with her port bow struck the *Elizabeth* a violent blow on her starboard bow, did her a great deal of damage and caused her afterwards to founder; and thereby the *Elizabeth*, her cargo, and the private effects of her master and crew, were totally lost. The master and crew of the *Elizabeth* were taken on board the *Lotus*. The answer on the part of the *Lotus* pleaded that she was steering S.W. $\frac{1}{2}$ W. making under steam and canvas nine knots, carrying the regulation lights, when the barque's green light was descried about a quarter of a mile distant, bearing about three points on her port bow; and nearly at the same time a red light from another vessel was sighted on the starboard bow; that thereupon her helm was put hard a-port and her engines stopped and reversed; that she cleared the vessel which she had sighted on her starboard bow, which passed ahead of her, but that the *Elizabeth* with her starboard bow struck her (the *Lotus*) on her port bow. There are two questions which arise here. The first is as to the original collision. There cannot be a shadow of doubt in the world that it was the duty of the *Elizabeth*, which was closehauled on the starboard tack according to the regulations, to have kept her course. That she did, and therefore there is no imputation upon her, unless indeed the court were to adopt the argument of Dr. Deane, that by possibility she might have taken a measure contrary to law which might have obviated the consequences—a proposition that cannot be entertained. What is the excuse on the part of the steamer? It is not attempted to be proved that it was a very dark night, the allegation simply states it was a cloudy night and a little hazy. According to the evidence of the *Lotus*, taking it *verbatim* to be true, this nondescript of a vessel is descried at the distance of half-a-mile according to one witness, and 200 hundred yards according to another. If she was seen at the distance of half-a-mile there was ample time to have taken proper measures to have avoided the collision; but if the statement be correct that she was seen at 200 yards, what becomes of the look-out on board the *Lotus*? There is not a shadow of doubt that this collision is to be attributed to the fault of the *Lotus*. Then comes the other question—one which has come before the court in many instances previously. It is said, though you may be to blame as the wrong-doer for the original collision, yet you are not liable, under certain circumstances, for all the consequences of that collision—a proposition nobody would contest. But it is said here that there was a want of

(a) See the *Shipping and Mercantile Gazette* of May 6th.

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ordinary skill and diligence, which caused the destruction of the vessel, which otherwise might have been saved. The court always looks at all the circumstances of a collision of this kind, which creates terror, fear and panic amongst the crew, and deprives those who have the command of the vessel of that entire command of the understanding to adopt the most proper means, and the wisest and best measures to prevent damage. It is not necessary, in order to entitle the *Elizabeth* to recover, that she should show, that, subsequently to the collision, she took all the proper measures and all the wisest measures to be adopted; neither is blame to be attached to the *Elizabeth* because her crew were seized with panic, and did not perform their duty as they ought to have done. The question is, whether there was not a cause which occasioned and will account for that very panic itself; and when the occasion of the collision is considered, and that the occurrence took place at night, there appears no dereliction of duty here which can prevent the claim of the owner of the *Elizabeth* to indemnification. The court therefore pronounces against the *Lotus*.

The Court was assisted by Capt. Farrer, and Capt. Were.

Thursday, May 12, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE BOANERGES AND THE ANGLO-INDIAN. (a)

Collision—Rule of the road.

Where two ships are crossing each other, the one sailing free and the other closehauled, it is the duty of the ship sailing free to give way on one side or other to the ship that is closehauled; and where the one ship is to keep out of the way, the other is to keep her course; subject to any special circumstances in each particular case which may render a departure from the above rules necessary in order to avoid immediate danger.

Brett, Q.C. and E. C. Clarkson appeared for the *Boanerges*.

Deane, Q.C., and Potter for the *Anglo-Indian*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the ship *Boanerges*, 1237 tons, from Victoria and Hong Kong, with a general cargo and passengers, for San Francisco, California, against the barque *Anglo-Indian*, of 1200 tons, from Foochow, with a cargo of tea, for Sydney, to obtain compensation for damage sustained by a collision between the two ships, about 8 a.m. on the 3rd April 1863, in the China Sea, abreast of the Pratas Shoal. The *Boanerges* stated the wind as N.E. half N., and the weather as hazy; the *Anglo-Indian* represented the former as N.N.E., and the latter as thick and hazy about the horizon, but clear above, and with moderate breeze. The case for the *Boanerges* set forth that, while under all plain sail (royal excepted), proceeding closehauled on the port tack, heading E. by S. half S., making seven knots, the *Anglo-Indian* was seen bearing about four points on the port bow, at the distance of about one mile and a half, coming with the wind free, and having studding sails set on her port side, and thereupon the *Boanerges* was kept on her then course, closehauled to the wind, on the port tack, in the expectation that the *Anglo-Indian* would keep out of the way of the *Boanerges*, as she was bound to do. The *Anglo-Indian*, however, instead of so doing, approached the *Boanerges*,

and ran into, and with her starboard main rigging or backstay carried away the jibboom of the *Boanerges*, after which the *Anglo-Indian* struck with her starboard side the *Boanerges* on her starboard bow, and the two vessels remained together for some time. When they were got clear of each other, it was found that considerable damage had been done to the *Boanerges* in the said collision, and she being unable to prosecute her voyage in her then condition, proceeded back to the port of Victoria, Hong Kong, where she arrived on the 4th April, and three of the crew of the *Anglo-Indian*, who had boarded the *Boanerges* during the said collision, were landed from her. The defence on the part of the *Anglo-Indian*, for whom a cross-action was brought, was, that she was steering S. by W., under all plain sail, with port studding-sails set, making from seven to eight knots, when the *Boanerges* was seen and reported at the distance of from three to four miles off, broad on the starboard bow of the *Anglo-Indian*, steering about E., closehauled on the port tack, with her masts nearly in one, and heading to go astern of the *Anglo-Indian*; that the *Anglo-Indian* kept her course; that the *Boanerges*, as she approached, kept edging off the wind under a port helm, and being a much more powerful ship, and a faster sailer than the *Anglo-Indian*, overhauled her, and approached her on her lee quarter; that the master of the *Anglo-Indian*, who came on deck when the *Boanerges* was first reported, seeing her so manoeuvring, believed she wished to speak his vessel, and kept his course; that as the *Boanerges* came near the *Anglo-Indian*, some one on board the *Boanerges* called out, "What is your Greenwich time?" in reply to which the master of the *Anglo-Indian*, perceiving the *Boanerges* coming still closer, ordered the helm of the *Anglo-Indian* to be put hard down, and called out to the *Boanerges*, "Mind your helm;" that thereupon the helm of the *Boanerges* was hove hard a-starboard, and she instantly shot up with her stern and port bow right into the lee main rigging of the *Anglo-Indian*, going in from aft forward, and stripping the main rigging clean off, and doing an immense amount of damage to her and her cargo; that the vessels remained in contact about an hour, when they got clear, and the *Boanerges* sailed away without rendering any assistance to her, but, on the contrary, taking away three of the crew of the *Anglo-Indian* who were then on board her. It is not to be wondered at that there should be a certain degree of doubt attending the facts of such a case, when it is considered how long ago it is since the collision took place, and that the witnesses were not examined till after the lapse of so great an interval of time. Still, perhaps the safest course would be to take the facts as admitted on both sides in the first instance as a guide, and then afterwards to proceed to those facts which are in a state of dispute. It was agreed on all hands that the *Boanerges* was closehauled on the port tack, heading E. by S. half S.; and it was agreed also that the *Anglo-Indian* was on a course S. by W., and that the wind was N.N.E. It was clear that the two vessels were crossing each other, and that it was the duty of the vessel sailing free to have avoided; that is, to have given way, on one side or the other, to the vessel which was close hauled, and that is a position which does not appear to have been controverted by the learned counsel who argued on behalf of the *Anglo-Indian*. That puts the case in very nearly the same position as it would be if the regulations applied; because, if so, it would fall within the 12th article, which would direct that the *Anglo-Indian* would be bound to have avoided the other ship; and it would also fall within another article, the 18th, which states: "Where by the above rules, one of two ships is to keep out of the

(a) See the *Shipping and Mercantile Gazette* of May 13th.

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way, the other shall keep her course, subject to the qualifications contained in the following article." As far as the court will perceive, the *Anglo-Indian* was clearly to blame, unless it could be shown that the *Boanerges* was guilty of some dereliction of her duty which absolutely brought about the collision, and that the *Anglo-Indian* did all that was right on her part, and that the whole fault lay on the *Boanerges*; otherwise it was quite clear that the *Anglo-Indian* was to blame, because she had the wind perfectly fair, and she desisted the *Boanerges* at a great distance, and at so great a distance that she might have done one thing or the other with perfect safety if she had thought fit so to do, but she seems not to have thought it necessary to adopt earlier measures. You may depart, and must depart, from a rule if you see with perfect clearness, amounting almost to positive certainty, that adhering to the rule will bring about a collision, and violating a rule will avoid it; and indeed that is provided for by the 19th article. The next question was, what was the conduct of the *Boanerges*? Can it by possibility be said, even if the *Boanerges* was to blame, that that would excuse the other vessel? But that could not be so; because, according to her own statement, she did nothing at all until the end of the whole matter, and then she starboarded. That, as the *Anglo-Indian* has pleaded, the *Boanerges* ought to have kept her course, is true enough; but that she was bound to have gone astern of her, as in the answer it is stated she could and ought to have done, is very doubtful. As to the *Boanerges* starboarding her helm in the last instance, the whole of the evidence went to show that it did not affect the collision. The judgment must be in favour of the *Boanerges*, and the *Anglo-Indian* be held to be solely to blame for the collision.

The Court was assisted by Captain Bax and Captain Webb.

Saturday, June 10, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE ELEANOR v. THE ALMA. (a)

Collision—Defective look-out.

A ship going with the wind free, and not keeping such a look-out at night as to enable her to see the lights of another ship lying to or driving, so as to ease until close upon her, held liable for the whole consequences of the subsequent collision that took place.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the brig *Eleanor*, 206 tons, from Folkstone, in ballast for Seaham, against the brig *Alma*, 248 tons, from Shields, coal-laden for Southampton, to recover for the consequences of a collision between eleven p.m. and a quarter past twelve a.m., on the 20th May 1864, about four miles from the Kentish Knock light-vessel. The *Eleanor* stated the wind as N.N.W. and the weather as squally, with thunder; the *Alma* represented the former as about N. and the latter as stormy, accompanied with thunder and lightning. The case for the *Eleanor* was, that she had her proper lamps burning, and that the night was dark, and so clear that the lights of vessels could be distinctly seen a mile off; that just before the collision her foretopsail sheet broke, whereupon the watch below were called and came on deck, and two of the crew were then sent aloft to secure the broken foretopsail sheets, the *Eleanor* being hove to, with her foreyard aback and her head W. by S. on the starboard tack; that the ebb-tide was running at about three knots, and the *Eleanor* was

hove to, and was driving to leeward in a S.S.E. direction of from two to three knots an hour, when the two coloured lights of the *Alma* were seen bearing E.N.E., distant about one mile; that the *Alma* came on in a direction for the *Eleanor's* stern, and, as a collision was becoming imminent, the hands from aloft were called down, and they watched the *Alma*, which kept her course towards the *Eleanor* until she was about a quarter of a mile distant, when the *Alma* starboarded her helm and shut out her red light; that the *Alma* continued to approach the *Eleanor* under a starboard helm, and just before coming up with that vessel those on board the *Alma* ported, whereby her course was again altered, so that she almost immediately afterwards, and within about ten minutes from being first seen, came violently into collision with the *Eleanor*, the starboard bow of the *Alma* striking the wood-ends on the port side of the *Eleanor's* stern and port-quarter, occasioning her considerable damage, and causing her to fall heavily alongside the *Alma*, damaging some of the planks in the *Eleanor's* port bow, and occasioning further damage to her hull, sails, and gear; that the vessels cleared immediately, and on so doing those on board the *Alma* were loudly and repeatedly hailed to heave to, to which an answer was made, but could not be made out by those on board the *Eleanor*, and as the *Alma* was not hove to, the *Eleanor* as soon as possible stood after her, and at daylight spoke her and ascertained her name and port; that afterwards the *Eleanor* was steered for Dover Roads, and having been taken in tow by a steam-tug, was taken into Dover harbour, and there moored at about three p.m. of the 21st of the same month for the purpose of undergoing the necessary repairs. The defence of the *Alma* set forth that the tide was about one hour ebb, and of the force of about one knot; that she was proceeding under all plain sail, excepting her top-gallant sails and flying jib, heading W.S.W., making six to seven knots, and carrying the Admiralty regulation lights, when the *Eleanor* was made out about one point on the port bow, at the distance of about half-a-mile, with no light visible on board her, and the *Eleanor* was watched to ascertain the direction in which she was proceeding, and directly afterwards the green light of the *Eleanor* became visible, and it was thereupon concluded that she was on the starboard tack proceeding about W.N.W., and the helm of the *Alma* was put hard a-starboard to pass under the stern of the *Eleanor*, and whilst the *Alma* was so passing the *Eleanor*, the *Eleanor* ran astern, and with her port quarter struck the *Alma* on her starboard quarter and carried away two of her main chain-bolts, and the *Eleanor*, after so doing, fell alongside the *Alma*, and the two vessels almost immediately cleared. The plts. therefore, in effect, allege that at the time of collision they were lying to. If they were lying to in the ordinary sense of the term they would be making little way, or be almost stationary, and if that was the state of the case, then the result in law would clearly be this, that other vessels sailing free, as the *Alma* was at the time, ought to get out of the way. With regard to the burden of proof, it having been proved by the *Eleanor* that she was lying to in the ordinary sense of the term, the burden of proof would be up to the *Alma* to show how she came into contact with her. But attention must be called to the facts which have been proved beyond doubt. From these it appears that the *Alma* was a vessel coming from the N., and that the *Eleanor* was going to the N., and that the collision occurred in the immediate neighbourhood of the Kentish Knock light-vessel. The wind was, according to the plts. N.N.W., and, according to the deff., about N. And here it is important to consider what was

(a) See the *Shipping and Mercantile Gazette* of June 12th.

THE PRINCESSAN LOVISA v. THE ARTEMAS.

[ADM.

e night, whether it was a very dark
her it was a night of a different
ic collision occurred on the 20th
is represented on both sides to
ally, with thunder, and no rain
igh, says the plt., for any one
mile or more, and to enable those
Eleanor to pursue the *Alma* with-
ill daylight. If it was necessary
pinion from the evidence, as to
a very dark night, it might be
t was not a very dark night; first,
party, in the preliminary acts, allege
a very dark night, and also because,
evidence, the *Eleanor* was not seen
any lights, but by her sails alone,
of half-a-mile; therefore, the night
been peculiarly dark. Under the cir-
ch have been stated in evidence, the
to have pursued this course, that, in
her having damaged some part of
ought it right, having endeavoured
r to avoid a schooner, of which we
more, to lie to with her foreyard
was the consequence of this? The
that at the time in question she was

Her account is this, that at the time with her foreyard aback, and S., and was driving to leeward in a direction at the rate of between two miles per hour. That is her representation of the place. Under the circumstances of that state and condition that she was to exercise any extraordinary skill or extraordinary precautions in order to avoid vessels coming into contact with her? In consequence of her driving, as she has testified to have done, in a more dangerous position in a condition more likely to protrude than would ordinarily be the case of a vessel lying to? Is it to be considered under the circumstances stated, the vessel at such a sufficient distance, and wind free (for she had the wind very light to her own statement), that if she had taken proper measures in due time, the collision could have been totally avoided? Upon consideration of the case, the court was of the opinion that the court was of the opinion that opinion is shared in by the Elder Judges. Were and Capt. Trichett, assisting the *Alma* was solely to blame for the collision at that place, the ground of such opinion is that the night was sufficiently clear for the vessel to see the *Eleanor* in due time; that, in the *Alma*'s own evidence, she did not stop until the last moment, or two or three minutes before the collision, and that those on board did not keep a proper look-out, and the consequence was she ran into the *Eleanor*. And Vernon Lushington appeared for the

nd *E. C. Clarkson* for the *Atma*.

Monday, May 22, 1865.

the Right Hon. Dr. LUSHINGTON.)

SSAN LOVISA v. THE ARTEMAS. (a)

1 vessels and rules of the road.

of the road as laid down by the 11th Admiralty Regulations of 1862 (with regard to starboard tack vessels,) is, sailing vessels meet end on, or nearly end on, risk of collision, the helm of both

vessels shall be put to port, so that each may pass on the port side of the other. And this article is subject only to the reservation contained in the 19th article as to the "dangers of navigation, and where the special circumstances of any particular case render the departure from the rule necessary in order to avoid immediate danger."

Brett, Q. C. and Vernon Lushington appeared for the Princess Lovisa.

Deane, Q. C. and E. C. Clarkson for the Artemas.

The Court was assisted by Capt. Shuttleworth and Capt. Lambert.

Dr. LUSHINGTON gave judgment in this case, which was a claim raised by the Swedish barque *Princessan Lovisa* 300 tons, from Shields for Alexandria, against the brigantine *Artemas*, 162 tons, from London for Hartlepool, for the loss arising from a collision between them, about 1 a.m. on the 11th July 1864, in the North Sea. The barque stated the wind as E. by N. and the weather as thick and hazy; the brigantine represented the former as N.E. by E. to N.E., and the latter as foggy at intervals. The case for the *Princessan Lovisa* was, that she was steering in charge of a licensed coasting pilot, to the Downs, S. half E., the tide being ebb and running about one knot, that she was making five or five and a half knots an hour, carrying her Admiralty regulation lights and occasionally sounding her foghorn, when a dim light of a vessel, the colour of which light was not distinguishable, was observed about a quarter of a mile distant, and about one point on her port bow; that her helm was put hard aport, but that the other vessel, the *Artemas*, came on, and, with her green light visible, ran with her starboard bow upon the stem and port bow of the *Princessan Lovisa*, carrying away the barque's bowsprit and jibboom, and doing other great damage forward; that the two vessels remained some time in collision before they cleared one another, and the *Princessan Lovisa* was obliged to put into the Humber. The answer filed for the *Artemas*, on whose part a cross-action was brought, alleged that she was proceeding close-hauled on the starboard tack, heading N. half W., the tide being about half ebb, making at the rate of two and a half knots an hour, and she was going three and a half knots, exhibiting her proper lights, when the green light of the barque was seen, distant a quarter of a mile, and bearing about two points on the starboard bow; that the *Artemas* was kept on her course, close-hauled to the wind on the starboard tack, in the expectation that the *Princessan Lovisa*, which was on the opposite, the port, tack, would keep out of her way; that the *Princessan Lovisa*, instead, however, of keeping out of the way of the *Artemas*, as she ought to have done, ran into her and struck her on the starboard bow, near the cathead, and did the damage of which she now complained. It was then pleaded that the *Princessan Lovisa* drove the head of the *Artemas* round to the S.W., and the two vessels then fell alongside each other, and remained in contact for about an hour, when they were got clear; after which the *Artemas* proceeded to Grimsby, where she arrived at about 7 p.m. of said day. It was a matter of great importance to bear in mind the rules and regulations which were now laid down for the government of vessels at sea, and which, though sometimes appearing to bear hardly in particular cases, the court was bound to see carried into effect as far as possible. With respect to those rules and regulations, the court was of opinion, as to all vessels that are at sea, sailing at sea, that those rules and regulations are intended—three of them—to comprehend vessels going which way they will. For instance, the 11th article is as to sailing vessels meeting end on, and the 12th as to two sailing ships which are crossing;

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THE LLOYDS AND THE AMANDA v. THE HORTENSE.

[ADM.]

and in the opinion of the court all vessels not meeting end on are vessels crossing, with the exception of those mentioned in the 17th article as overtaking any other vessel. It certainly was the intention of those who framed these regulations to provide for every possible case that could occur with respect to vessels meeting or coming across each other on the sea. The 11th article states that "if two sailing ships are meeting end on or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." That was a positive rule, without making any exception whatsoever with regard to a starboard tack vessel; and those who framed these rules must have had before their eyes the case of starboard tack vessels. It was clearly the duty of one of the vessels in this case, being on the starboard tack, to port, unless she came within the 19th of these rules, which provided that "In obeying and construing these rules due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the rules necessary in order to avoid immediate danger." This 19th article was one of great importance, and it was necessary strictly to understand what it meant. Of course it was but wise and fit that regard should be had to all dangers of navigation. The words of the 19th article were, "that due regard is to be had to any special circumstance which may exist in any particular case, rendering a departure from the rules necessary in order to avoid" not danger, but "immediate danger," and the object in so framing the 19th rule, was to render as far as possible compulsory the observance of the rules. Of course it would be madness to say, where there was danger immediately impending of any kind, that vessels should observe any set rules whatever. Now, were these two vessels meeting end on, or were they not? If they were meeting end on, according to the statement of the *Artemas*, she did not do as she was bound to have done, because she did not alter her course at all, unless there were particular circumstances rendering a departure from the rule necessary for the sake of avoiding immediate danger. The *Princessan Louisa*, according to her own preliminary statement, was steering S. half E., and was making about five or five and a half knots." The preliminary act of the *Artemas* states as follows: "The course of the *Artemas* was N. half W., and she was making about three and a half knots an hour." Were not these two directly opposite courses? It could not be permitted to either of the vessels to negative what they have stated in their preliminary acts. One preliminary act, may contradict the other, but must not contradict itself. The result is, that these two vessels, according to their statement, were both meeting straight forward, because the question put in the preliminary acts was, "What was the course and speed of the vessel when the other was first seen?" The pleading on behalf of the *Princessan Louisa* set forth, that the "dim light of a vessel, the colour of which light was not distinguishable, was observed about a quarter of a mile distant, and, about one point on the port bow of the *Princessan Louisa*." The statement on behalf of the *Artemas* in her pleading was, that "the green light of a vessel which afterwards proved to be that of the barque *Princessan Louisa*, was seen at the distance of about a quarter of a mile, and bearing about two points on the starboard bow. The *Artemas* was kept on her course." According to the evidence, each vessel saw the other either one point or two-points on such and such particular bows; and on this evidence was it not clear that these vessels were meeting each other? If these vessels were meet-

ing within the 11th article, then the question as to the *Princessan Louisa* would be, whether she ported in time and sufficiently. But the other vessel must be to blame, inasmuch as, according to her own statement, she did nothing at all. If these vessels were crossing each other within the 12th rule, then it would appear clear according to the evidence, that the duty of porting in time belonged to the vessel going south. Whether she did so in time, and the collision was brought about by the starboarding of the vessel going north, was another and different question. Upon careful consideration of the evidence on both sides the court was of opinion that both vessels were to blame for the collision; that the case came within the 11th article, and that the *Artemas* was to blame for not having ported her helm. The court was also of opinion that the *Princessan Louisa* vessel was to blame, it being her duty to have got out of the way, and that she did not adopt in time the proper measures to effect it.

Tuesday, May 30, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE LLOYDS AND THE AMANDA v. THE HORTENSE. (a)

Salvage—Multiplicity of suits—Costs.

Where two sets of salvors proceed by separate suits against the ship saved, and their respective claims might have been more conveniently prosecuted under one suit, the Court marks its disapproval of the two suits having been instituted by only giving the claimant under the second suit half costs.

The Queen's Advocate and Dr. Swabey appeared for the *Lloyds*.

O'Mulley, Q. C. and Dr. Wamby for the *Amanda* and

Deane, Q. C. and Potter for the owners of the *Hortense*.

Dr. LUSHINGTON gave judgment in this case which came before the court on two separate suits the one by the Norwegian brigantine *Lloyds*, and the other by the fishing-vessel *Amanda*, against the French vessel *Hortense* for a reward for salvage services rendered to the *Hortense* in Portland Road from the 24th to the 30th of last October. The *Hortense* appeared from the proceedings that the *Hortense*, ninety tons, while on a voyage with a cargo of wine from Bordeaux for Brussels, encountered very severe weather, and having been thereby rendered unseaworthy, was abandoned by the master and crew. The *Lloyds*, on her way from Looe for Porsgrund, in the last, when about thirty miles S. E. of Portland, the wind being west and moderate, fell in with the *Hortense*, which was then a wreck and bottom upward her masts, sails and rigging being attached, the masts being broken off, but attached to her by the rigging. The *Lloyds* took the wreck in tow for Portland, and, after towing it for some hours, engaged the fishing-cutter *Amanda* to assist, whereupon an agreement was entered into to the following effect, between the captain of the *Lloyds* and the captain of the *Amanda*, viz., that the *Amanda* was to tow the wreck to Portland or at other harbour that might be thought fit; and the *Amanda* was to have one-third and the *Lloyds* two-thirds of the salvage. It was then represented that the vessels took the wreck in tow; but the *Lloyds* having had several of her ropes and hawsers broken in towing, it was deemed advisable that a steam-tug should be procured, which, being obtained in Por-

(a) See the Shipping and Mercantile Gazette of May 31st

proceeded to the wreck, took it in tow, with it in Weymouth Harbour on the value of the property salvaged was 1275*l*. For the owners of the wreck it led that separate actions should not be brought, as the interests of the salvors and that unnecessary expense had been occasioned, for which the parties should be made responsible; that the which the salvors had entered their 000*l*., was far beyond what they might expect to recover; that they should have a smaller amount; and that a moderate sum would be sufficient for the assistance they received, the principal service having been rendered by the steam-tug, for which they had been compensated. There was no doubt that the *Hortense* was derelict, bottom up, in a state of imminent danger, and in such a state that it was hardly possible the cargo could be saved. The Norwegian vessel got off her, and had towed her for twelve miles. The *Amanda* came up, and the agreement had been mentioned was entered into. The court regretted that an affidavit had been made by the master of the *Amanda* to the effect that she shared equally, whereas the agreement was that the *Amanda* was to have one-third and the *Hortense* two-thirds, and such agreement would have been forgotten by the master of the *Amanda*. As to the amount of the action, it was of so much importance in the present case, as it did not put the parties to the expense of bail, but where bail was required it was of great consequence. It was stated that the petitioners those on board her coming on her way for Portland Roads) turning the *Hortense* round, she being wrecked and lying like a log in the water, and had some distance, when, in consequence the wind having increased to a gale and the sea, and from the heavy sea on, she was in considerable danger, which the *Lloyds* gave it up, and she slipped from the *Hortense*. But it was impossible the *Amanda* could have done so stated. The steam-tug was the vessel, and it was impossible that the *Amanda* could have performed the necessary to place the *Hortense* in safety, even for the steam-tug, and there was no way that she was in safety when the vessel arrived. That, however, did not deprive her of remuneration for contributing to the saving of the property. The agreement must be established, and the court would confirm the award, according to it; to be allotted, 25*l*. to the *Amanda* for fetching the tug; the *Hortense* the amount of her loss, 25*l*. With the costs, the *Lloyds* is entitled to her's; the *Amanda*, looking how her case has been, and how unnecessary the institution of a second suit was, and how much more justice of the case would have been admitted if one suit had been brought, the only way to be allowed half her costs.

Thursday, June 1, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE RENOWN v. THE RATTLER. (a)

Collision—Ships' lights.

Where a steamer proceeding at a rapid rate comes into collision with a sailing ship, which collision might have been avoided had the steamer kept a good look-out, the fault of the sailing ship not having carried her light in the exact position directed by the regulation will not relieve the steamer from the liabilities of the collision.

Deane, Q. C. and E. C. Clarkson appeared for the *Renown*.

Brett, Q. C. and Vernon Lushington for the *Rattler*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the barque *Renown*, 324 tons, from Trinidad, with a cargo of sugar and molasses, for Greenock, against the steam-tug *Rattler*, from Liverpool for Queenstown, to recover the loss resulting from a collision between them in the vicinity of the South Hack, in St. George's Channel, about two a.m. on the 14th May 1864. The barque stated the wind as S.W., and the weather as quite clear; the steam-tug represented the former as S.S.W., and the latter as dark and cloudy. The case for the *Renown* set forth that she was steaming N.N.E., the tide being about half-flood, running about two knots, exhibiting the Admiralty regulation lights, properly screened, and brightly burning, and she was making three and a half knots, when the white masthead light of the tug was observed by those on board the barque at the distance of at least five miles, and bearing about four points on her starboard bow; that the barque kept her course as required by law, and the steam-tug continued her course with all her lights then in view until she came within hail of the barque, whereupon those on board the barque, seeing her approaching very near, hailed loudly to attract the attention of those on board the steam-tug; that immediately upon their so hailing, the helm of the tug was put hard a-port, and she ran right athwart hawse of the barque with her port side, knocking away the barque's cutwater, and carrying away her jibboom and all her head gear, and doing considerable damage. The *Rattler*, on whose part a cross-action was brought, pleaded that she was steering S. W. by W., making nine miles per hour, the tide being flood, and carrying her regulation lights, when the green light of a vessel was seen on her starboard bow, distant about a mile, which passed the *Rattler* to starboard, and shortly afterwards a vessel under sail, with no lights visible (which subsequently proved to be the *Renown*), was observed, distant apparently about 100 yards, nearly ahead, a little on the *Rattler's* port bow, that the helm of the *Rattler* was immediately put hard a-port, but a collision nevertheless ensued, the jibboom and cutwater of the *Renown* striking the port quarter of the *Rattler*; that the *Rattler* afterwards offered assistance, but it was not required, and the *Renown* proceeded on her course and the *Rattler* put back to Liverpool. It was further pleaded that before and at the time of the collision the *Renown* was not carrying her regulation side lights as required, so fixed as to throw the lights from right ahead to two points abaft the beam on the starboard and port sides respectively, and that the collision was thereby occasioned. The first point to dispose of was, were the lights of the *Renown* placed according to the directions contained in the regulations prescribed by

(a) See the *Shipping and Mercantile Gazette* of June 2nd.

[Priv. Co.]

THE PENINSULAR, & C. STEAM COMPANY v. SHAND.

[Priv. Co.]

statute? Supposing the lights were not fixed in the manner prescribed, the next question was, whether their having been differently fixed brought about and was contributory to the collision? It is clear that there were lights on board the *Renown*; that they were burning; and that, though there may have been a defect in the way in which they were placed, yet there they were. The third point is as to the conduct of the *Rattler*, who was going at the rate of 10½ knots an hour. Going at this rate, if a good look-out had been kept, she must have discovered the *Renown* sooner than she did, even if the *Renown* had had no lights at all. According to the evidence of the gentleman who comes from the Board of Trade, and who, we presume, acts in pursuance of directions he receives therefrom, we think that the lights of the *Renown* were not so placed as would be approved of by the Board of Trade; but we are also of opinion that the so placing of the lights did not contribute to this collision, but that, if there had been a good look-out on board the *Rattler*, the vessels were proceeding on such different courses that the *Renown* must and ought to have been seen in time to have been avoided by the *Rattler*. As to whether, without regard particularly to the lights, the *Rattler* was not to blame for the rate at which she was sailing, and for not keeping a good look-out, and whether, if she had kept a good look-out, she might not have seen the *Renown*, we are all of opinion that the *Rattler* was solely to blame, and therefore our finding must be against her.

The Court was assisted by Capt. Redman and Capt. Weller.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATERSON, Esq., of the Middle Temple, Barrister-at-Law.

Thursday, July 20, 1865.

(Present—The Right Hon. KNIGHT BRUCE and TURNER, L.JJ., and Sir J. T. COLERIDGE.)

THE PENINSULAR, & C. STEAM COMPANY v. SHAND.

Bailment—Carrier—Restrictions on liability—Liability for loss of passenger's luggage—Lex loci contractus.

S. paid one entire sum for his passage from England to the Mauritius by the ship of the P. Company, and signed a ticket purporting that he accepted the conditions printed thereon, one of which was, that the company would not be responsible for loss of the luggage of passengers. Some luggage was lost seen at Suez, in the company's possession, but was not afterwards to be found. In an action by S. for the value of the lost luggage:

Held (reversing the judgment of the court of Mauritius), that the liability of the company was to be determined by the lex loci contractus, or English law, and not by the French law, and inasmuch as by English law a common carrier could restrict his liability by express contract, and it was so restricted, the company were not liable.

This was an appeal from a judgment of the Supreme Court of Mauritius, in an action by the resp. against the apps.

The plaint issued by the resp. set forth that the apps., being common carriers of goods for hire from Southampton to the Mauritius, the resp. and his family became first-class passengers from Southampton to Mauritius, together with their luggage, and that the resp. delivered to the apps., who received the same from the resp., a certain bale or package, consisting of articles belonging to the resp., viz., great coats, plaids, cloaks, shawls, and

similar articles, well and firmly put up and bound together in one package, and legibly and properly addressed with the name of the resp. as passenger to Mauritius aforesaid, and to be safely conveyed by the apps. from Southampton to Mauritius, and to be delivered there to the resp. Yet the apps., not regarding their duty as common carriers, did not safely carry the said package from Southampton to Mauritius, nor deliver the same to the resp.; but, on the contrary, so negligently and carelessly conducted themselves, that by their negligence, carelessness, and default, the said package or bale and its contents were wholly lost to the resp., who thereby sustained damages to the amount of ninety pounds sterling.

The apps. appeared to the said action and disputed their liability to the said claim.

The apps. were an incorporated public company for the carriage of passengers and their baggage, and also merchandise and effects by sea, between Southampton and India, China, Australia, the island of Mauritius, and other parts beyond the seas, and have their head office or place of business in Leadenhall-street, London, and other offices and places of business at Bombay, Calcutta, the Mauritius, and other places abroad, and are common carriers of passengers and their luggage, and of goods and merchandise between the before-mentioned places and other places beyond the seas. The island of Mauritius is one of the termini of the apps.' lines of communication, their vessels bound there not going beyond that place. They carry Her Majesty's mails there, and have accredited agents there, Messrs. Ireland, Fraser, and Co., by name.

The resp. having been appointed chief judge of the island of Mauritius, and being about to proceed there with his family in the month of July 1864, engaged with the apps., as such common carriers, to convey him, his wife, two children under ten years of age, and his European female servant, Elizabeth White, with their respective personal baggage and effects, from Southampton to the Mauritius, by the apps.' ordinary line of communication between those places, and paid the apps. at their head office in London the sum of 315*l.*, in exchange for which he received a printed ticket which he signed, and which contained the words, "I hereby accept this ticket subject to the conditions and regulations indorsed hereon."

Among the conditions indorsed on the ticket were the following:

Baggage.—The attention of passengers by the overland route to and from India, China, &c., is respectfully requested to the undemoted regulations in reference to baggage; much trouble and loss is occasionally caused by their neglect: and the Egyptian transit administration will not accept any responsibility unless they are strictly complied with:

All baggage should be addressed in paint, in full, and in addition passengers will be supplied on board the steamers with printed "destination labels," which should be affixed to all packages, however trifling, before arrival at Alexandria or Suez.

First-class passengers are allowed 336*lbs.* of personal baggage, free of freight, and children (over three and under ten years) and servants 168*lbs.* each.

The insurance of baggage can be effected on very moderate terms.

Passengers requiring information respecting their baggage during the voyage can obtain it by application to the officer in charge.

Passengers who may miss any package of baggage on arrival at their destination are recommended to apply, without delay, to the company's agent, giving full particulars in writing, when application will at once be made to the nearest baggage depôts at Bombay or Southampton.

Notice.—All parties are requested to take notice that the company do not hold themselves liable for detention or delay of passengers arising from accident or from extraordinary or unavoidable circumstances, or from circumstances arising out of, or connected with, the employment of the company's vessels in Her Majesty's mail service, and that the company do not hold themselves liable for damage to, or loss or detention of, passengers' baggage, or for any consequences arising from the restrictions of quarantine, wheresoever imposed.

Amongst the resp.'s baggage was a package con-

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[PRIV. CO.]

plaids, coats, cloaks, and shawls for the use resp. and his family, which being required for personal use on the voyage from Southampton to Alexandria, were suffered by the apps. to remain in the custody of the resp.

resp. and his family proceeded in the *Ceylon* to Alexandria. On reaching the bay of Alexandria the resp.'s officer in charge of baggage on board the ship took possession of all such of the baggage of the passengers on board as had been suffered to remain in the possession during the voyage, and amongst the things of the resp.'s package of plaids, shawls, and cloaks, and took the same under their custody, and left nothing in the hands of the resp., or other passengers, but a small bag sufficient to contain such articles as were absolutely necessary for the resp. to use during a night or two at Cairo. At the time the resp. took possession of the resp.'s package of baggage it was properly and sufficiently secured and the apps. with two very full addresses upon it for the resp. The resp. was told by the company's (the officers on board the *Ceylon* when they took possession of the said package, that it should meet him on the other side," meaning at Suez, on the morning of the resp.'s arriving at Suez he and his family were put on board another of the apps.' vessels, the *Norna*, which was to carry them to Mauritius (and which was lying at some distance from the shore), by means of a small vessel belonging to the apps. employed for that purpose. The resp.'s servant Elizabeth White carried the bundle of coats, cloaks, &c., on board the *Norna*, when one of the stewards of that vessel refused to do so, and that he would take charge of the package. The package was never seen by her or by the resp., or any of his family afterwards; Elizabeth White missed it the same evening, when on board the *Norna*, and on making inquiries was told she had got it in the morning. On that morning the steward said that he had taken it on board the *Norna*.

Various excuses for the absence of the package were made by the officers and stewards of that vessel, by whom the resp. was told that it had got to the bottom of the ship's hold and was all safe, and that the resp. would get it on arriving at the Mauritius. On the arrival of the vessel there, however, it was not to be found. The resp. on his arrival there informed the apps. of the loss in the Mauritius, Messrs. Ireland, Fraser, & Co., of his loss, and also wrote to the purser of the ship, and subsequently demanded compensation for his loss, but the resp. could obtain no satisfaction from them, or from the apps., beyond an acknowledgement that the package in question must have been lost, and a statement that the apps. were not in case of the loss of passengers' baggage insured.

There was no controversy at the trial of the action as to the facts above stated. The depts. (the depts. called no witnesses, and suggested no want of contributory negligence on the part of the resp. family, or servant.

The Court of Mauritius gave judgment for the resp., whereupon the present appeal was taken to Her Majesty in Council.

Wyll v. Pickford, 8 M. & W. 443; *Hinton v. Dibbin*, 2 Q. B. 646; *Shaw v. York and North Midland Railway Company*, 13 Q. B. 347; *Austin v. Manchester, &c. Railway Company*, 16 Q. B. 600; *Carr v. Lancashire and Yorkshire Railway Company*, 7 Ex. 704; *Wise v. Great Western Railway Company*, 1 H. & N. 63; *Peck v. North Staffordshire Railway Company*, 1 E. B. & E. 957; 1 L. T. Rep. N. S. 407; 8 L. T. Rep. N. S. 768.

The apps., having restricted their liability by means of the printed conditions, were not liable.

The Lord Advocate and Cates (with them Anderson, Q. C. and Coleridge, Q. C.), for the resp., contended that the law of the place of performance, and not of the place of the making of the contract, must govern the question of liability:

S'ory Confli. 270;

8 Burge Com. 755;

Grell v. Levy, 16 C. B., N. S., 73; 9 L. T. Rep. N. S. 721. Even by the law of England the apps. were liable, for common carriers could not, by indorsing printed conditions on the ticket, exempt themselves from the liability inseparable from their contract:

Philips v. Clark, 26 L. J. 168, C. P.;

Lloyd v. General Iron Company, 33 L. J. 269, Ex.; 10 L. T. Rep. N. S. 586;

Riley v. Horne, 5 Bing. 223.

The presumption arising from the loss of goods last seen in the possession of the company is, that the negligence of the company was the cause of the loss:

Reeves v. Palmer, 5 C. B., N. S., 84.

Cur. adv. vult.

LORD JUSTICE TURNER.—This is an appeal against a judgment of the Supreme Court of Mauritius in favour of the resp. who sued the apps. for damages occasioned by their non-delivery at Mauritius of certain articles of baggage. The facts of the case appear to be that the resp., the Chief Justice of the court below, intending to proceed to the Mauritius with his family, took and paid for a ticket for the passage from Southampton to Alexandria, and from Suez to Mauritius, for which he paid one entire sum of 315*l.*; in the body of the ticket the engagement of the apps. was stated to be subject to the conditions and regulations indorsed, and on its face, at the foot of it, the resp. signed his acceptance in the following form—"I hereby accept this ticket, subject to the conditions and regulations indorsed thereon." Numerous regulations both as to the passengers and as to their baggage were indorsed, and at the close of all was a notice commencing thus, "All parties are requested to take notice," and containing among other things the following clause, "that the company do not hold themselves liable for damage to or loss or detention of passengers' baggage." By the ticket it appeared that the voyage from Southampton to Alexandria was to be on board the *Ceylon*, and from Suez to Mauritius on board the *Norna*; nothing, however, turns on this nor on the land carriage between Alexandria and Suez, although in the argument for the resp. some reliance was placed on the fact that the apps. during this last transit took exclusive possession and charge of the passengers' baggage, with some trifling exceptions of articles required for immediate personal use. At Suez the *Norna* lying a little distance out at sea, in consequence of the shallowness of the water, the passengers were conveyed to her in a small steamboat, the baggage in another vessel. It was on board this small steamer that, according to the evidence, the parcel in question was last seen. It consisted of cloaks, an overcoat and plaids—articles which probably had been retained for personal use. When last seen,

Wyll v. Pickford, 8 M. & W. 443; *Hinton v. Dibbin*, 2 Q. B. 646; *Shaw v. York and North Midland Railway Company*, 13 Q. B. 347; *Austin v. Manchester, &c. Railway Company*, 16 Q. B. 600; *Carr v. Lancashire and Yorkshire Railway Company*, 7 Ex. 704; *Wise v. Great Western Railway Company*, 1 H. & N. 63; *Peck v. North Staffordshire Railway Company*, 1 E. B. & E. 957; 1 L. T. Rep. N. S. 407; 8 L. T. Rep. N. S. 768.

The law of England the carrier could, at common law, be held strictly liable by express contract:

[Priv. Co.]

THE PENINSULAR & C. STEAM COMPANY v. SHAND.

[Priv. Co.]

however, it was in the possession and custody of one of the servants of the apps. The resp.'s female servant would have herself taken it on board the *Norna*, but the servant of the apps. told her not to do so, for that he would take charge of it. Whether it reached the *Norna* is uncertain. It was missed by the resp. when on board that vessel, and on the arrival at Mauritius it was not forthcoming. Upon these facts the court below held that the law by which the case was to be tried was the French law, which prevails generally at Mauritius, and that by that law the apps. were liable. In the argument before their Lordships the latter proposition was not seriously disputed, but it was contended that the court below should have tried the case by the rules of English law, and that according to those rules the apps. were protected under the circumstances of the case by the terms of their contract with the resp. On his part, however, it was argued that even if the court below were wrong as to the rule it had governed itself by, yet the judgment was right even upon the principles of English law. The case was ably and learnedly argued, and a very large number of authorities were cited for the resp.; the conclusion, however, at which their Lordships have arrived is, that the apps. are right in both of their propositions, and consequently that the judgment below cannot be supported. In stating the grounds upon which their Lordships have arrived at this conclusion, it will not be necessary to review or distinguish between all the authorities cited in the argument; every one who is but moderately familiar with the text-books and decisions must know how easy it is to produce authorities on either side, when the question is by what law to interpret a contract in one country, and to be performed, wholly or partly, in another; but if these be carefully examined, it will be found, after all, that the same general principles have, for the most part, prevailed throughout, and that, where the conclusions vary, they do so from distinctions more or less minute in the facts. The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation and interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognised comity of nations. Their Lordships are speaking of the general rule; there are, no doubt, exceptions and limitations on its applicability, but the present case is not affected by these, and seems perfectly clear as to the actual intention of the contracting parties. This is a contract made between British subjects in England, substantially for safe carriage from Southampton to Mauritius. The performance is to commence in an English vessel, in an English port; to be continued in vessels which for this purpose carry their country with them, to be fully completed in Mauritius; but liable to breach, partial or entire, in several other countries in which the vessels might be in the course of the voyage. Into this contract, which the apps. frame and issue, they have introduced for their own protection a stipulation, professing in its terms to limit the liability which, according to the English law, the contract would otherwise have cast upon them. When they tendered this contract to the resp., and required his signature to it, what must it be presumed that he understood to be their intention

as to this stipulation? What would any reasonable man have understood that they intended? Was it to secure to themselves some real protection against responsibility for accidental losses of luggage and for damage to it; or to stipulate for something to which, however clearly expressed, the law would allow no validity? This question leaves untouched, it will be observed, the extent of the contemplated protection; it asks, in effect, Was it intended that the stipulation in case of an alleged breach of contract should be construed by the rules of the English law, which would give some effect to it? or by those of the French or any other law, according to which it would have none, but be treated as a merely fruitless attempt to evade a responsibility, inseparably fixed upon the apps. as carriers? The question appears to their Lordships to admit of one answer only; but if they take the resp. so to have understood the intention of the apps., they must take him to have adopted the same intention: it would be to impute want of good faith on his part to suppose that with that knowledge he yet intended to enter into a contract wholly different in so important an article; he could not have done this if the intention had been expressed, and there is no difference as to effect between that which is expressed in terms and that which is implied and clearly understood. The actual intention of the parties therefore must be taken clearly to have been to treat this as an English contract, to be interpreted according to the rules of English law; and as there is no rule of general law or policy setting up a contrary presumption, their Lordships will hold that the court below was wrong in not governing itself according to those rules. It is a satisfaction to their Lordships to find that in the year 1864 the Cour de Cassation in France pronounced a judgment to the same effect in a case under precisely the same circumstances, which arose between the apps. and a French officer who was returning with his baggage from Hong Kong in one of their ships, the *Alma*, and who lost his baggage in the wreck of that vessel in the Red Sea. The same question arose as here on the effect to be given to the stipulation in the ticket; two inferior courts, those of Marseilles and Aix, decided it in favour of the plt. on the provisions of the French law; the Supreme Court reversed these decisions, and held that the contract having been made at Hong Kong, an English possession, and with an English company, was to receive its interpretation and effect according to English law. Still, as has been already intimated, there remains the question what, according to English law, is the extent of the limitation imposed by the stipulation in the ticket on the responsibility of the apps. This is next to be considered. The case depends on the common law; it is not within either the Carriers Act of 11 Geo. 4 & 1 Will. 4, c. 68, or the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31. It seems now incontestible that at common law it is open to carriers to limit their common law liability by special agreement with the consignors of goods; and this, according to some decisions, even to the extent of relieving themselves from the consequences of their own negligence. The contract here is that the apps. shall not be responsible "for damage to, or loss or detention of passengers' luggage," and the question is, what is the meaning to be given to the word "loss?" Nothing can be more general than the words used by the parties. They do not enter into any distinctions as to how the damage, loss, or detention may have been occasioned, whether by pure accident, or through the negligence, or even misconduct, of the apps. But the facts of this case make it unnecessary to consider whether, reasonably understood, they express an intention to protect the apps. against answering for gross negligence or

disconduct. Upon this their Lordships' opinion whatever. The missing baggage in its transit from the shore at Suez to it, in which it should have been conveyed thus; it was then in the keeping of the one of their servants. Their Lordships' circumstance that this servant insisted on his keeping, and refused it to the resp.'s raises no inference against the apps. Ordinarily, it is a regulation prudent and consistent that the company's servants, and not the passengers, should have throughout the of the baggage on board. It does not say anything was done but in obedience to regulation; at all events no inference of want of honesty is raised by this circumstance. Whether this, or when or where, the baggage on was lost, there is no evidence to show. Difficult to say what loss would be protected or not, or what meaning could be reason-able to the word "loss," which would exclude a non-arrival of the baggage as this. A contract to be construed on the general basis on which the construction of contracts is determined. It would be a strange construction, and against common sense, when the app. used the simple word "loss," to hold it intended to limit its meaning to such cases as those in which the carriers should be able to clear them from all blame whatever. We must see that this at least is not the construction which the parties have entered, yet this is the contention for the resp. Their Lordships have no doubt, on the whole, that the loss falls within the true meaning of the stipulation that the apps. are thereby protected from liability for it. They will, therefore, recommend to Her Majesty that the judgment be reversed, with the costs in the court of this appeal.

Judgment reversed.

attorneys, *Macleod, Stenning, and Watney.*
attorneys, *Cates and Elgood.*

COURT OF COMMON PLEAS.

led by W. MAYN and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

June 20 and July 10, 1865.

CITY OF DUBLIN STEAM-PACKET COMPANY v.
THOMPSON.

shipping—Register tonnage—Ships requiring propelling power—Allowance for engine-room—Power of Commissioners of Customs to frame new tonnage Rules ultra vires—Merchant Shipping Act 7 & 18 Vict. c. 104), ss. 23, 29.

The Merchant Shipping Act 1854 enacts that, relating to the register tonnage of ships requiring propelling power, allowance shall be made for engine-room, and it divides such ships into two classes, prescribing certain allowances for each class and laying down rules for the measurement of the engine-room. Sect. 29 entitles the Commissioners of Customs, with the sanction of the Treasury, from time to time to alter the "tonnage rules" prescribed by the Act. The Commissioners of Customs did, in fact, with the sanction of the Treasury, in 1860, issue new rules, which abolished the distinction between classes of vessels, and laid down new uniform rules for the measurement of the engine-room in all

ships, and abolished the distinction between the classes of vessels, or the allowances to be made to each class, but only to alter the tonnage rules respecting the mode of measuring the space actually occupied by the engine-room.

Special case stated by consent without pleadings. The plts. are a company trading between England and Ireland, and are possessed of many steam-vessels of large tonnage, which are used by them in their trade of carrying passengers and goods to and from England and Ireland.

The deft. is one of the surveyors of customs at the port of Liverpool, and represents the Commissioners of Customs, with whom the present question has arisen.

The question in dispute arises upon the construction of certain provisions of the Merchant Shipping Act 1854, which regulate the mode of ascertaining the register tonnage of steamships, and as to the power of commissioners of customs to refuse the allowance of propelling power, which, as the plts. insist, is provided for by the Act of Parliament as hereinafter mentioned.

By the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) s. 23, it is enacted as follows:

In every ship propelled by steam or other power requiring engine room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship ascertained as aforesaid, and the remainder shall be deemed to be the registered tonnage of such ship, and such deduction shall be estimated as follows (that is to say):

(a) As regards ships propelled by paddle-wheels, in which the tonnage of the space solely occupied by and necessary for the proper working of the boilers and machinery is above 20 per cent. and under 30 per cent. of the gross tonnage of the ship, such deduction shall be thirty-seven one-hundredths of such gross tonnage; and in ships propelled by screws, in which the tonnage of such space is above 13 per cent. and under 20 per cent. of such gross tonnage, such deductions shall be thirty-two one-hundredths of such gross tonnage.

(b) As regards all other ships, the deductions shall, if the commissioners of customs and the owner both agree thereto, be estimated in the same manner; but either they or he may, in their or his discretion, require the space to be measured and the deductions estimated accordingly, and whenever such measurement is so required, the deduction shall consist of the tonnage of the space actually occupied by, or required to be inclosed for the proper working of the boilers and machinery, with the addition in the case of ships propelled by paddle-wheels of one-half, and in the case of ships propelled by screws of three-fourths of the tonnage of such space, and the measurement and use of such space shall be governed by the following rules (that is to say):

(1) Measure the mean depth of the space from its crown to the ceiling at the timber strake; measure also three or, if necessary, more than three breadths of this space at the middle of its depth, taking one of such measurements at each end and another at the middle of the length; take the mean of such breadths, measure also the mean length of the space between the foremost and aftermost bulkheads or limits of its length, excluding such parts (if any) as are not actually occupied or required for the proper working of the machinery; multiply together these three dimensions of length, breadth, and depth, and the product will be the cubical contents of the space below the crown; then find the cubical contents of the space or spaces (if any) above the crown aforesaid, which are framed in for the machinery or for the admission of light and air, by multiplying together the length, depth, and breadth thereof, and add such contents to the cubical contents of the space below the crown; divide the sum by 100, and the result shall be deemed to be the tonnage of the said space.

(2) If in any ship in which the space aforesaid is to be measured the engines and boilers are fitted in separate compartments, the contents of each shall be measured severally in like manner according to the above rules, and the sum of their several results shall be deemed to be the tonnage of the said space.

(3) In the case of screw steamers in which the space aforesaid is to be measured, the contents of the shaft-trunk shall be added to and deemed to form part of such space and shall be ascertained by multiplying together the mean length, breadth, and depth of the trunk, and dividing the product by 100.

(4) If, in any ship in which the space aforesaid is to be measured, any alteration be made in the length or capacity of such space, or if any cabins be fitted in such space, such ship shall be deemed to be a ship not registered until remeasured.

that these rules were laid down by the commissioners ultra vires, and that they had no power to abo-

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CITY OF DUBLIN STEAM-PACKET COMPANY v. THOMPSON.

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- (c) If, in any ship in which the space measured is to be measured, any goods or stores are stowed or carried in such space, the master and owners shall each be liable to a penalty not exceeding 100*l*.

By the 29th section of the same Act it is further enacted as follows:

The Commissioners of Customs may, with the sanction of the Treasury, appoint such persons to superintend the survey, and admeasurement of ships as they think fit; and may, with the approval of the Board of Trade, make such regulations for that purpose as may be necessary; and also, with the like approval, make such modifications and alterations as from time to time become necessary in the tonnage rules hereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted.

There are several other sections of the Act which have some bearing on this question, and to which it may be useful to refer, viz., sects. 20, 21, 84, 85, and 87. On the 23rd Oct. 1860 the Commissioners of Customs, with the approval of the Board of Trade, issued the following rules:

In pursuance of the powers granted by the 29th section of the Merchant Shipping Act 1854, the Board, with the approval of the Board of Trade, direct, with a view to the more accurate and uniform application of the principle of granting a certain allowance to steamers for their propelling powers, that, in lieu of the rules set forth in sect. 23 of the Merchant Shipping Act, and in paragraphs 4, 5, 6, 13, and 20 of instructions to measuring surveyors of 1855, the following rules be adopted in future, viz.: (Rule) In every ship propelled by steam or other power requiring engine-room, an allowance of space or tonnage shall be made for the space occupied by the propelling power; and the amount so allowed shall be deducted from the gross tonnage of the ship, and such deduction shall be estimated as follows:

- (1) Measure the mean length of the engine-room between the foremost and aftermost bulkheads, or limits of its length, excluding such parts, if any, as are not actually occupied by or required for the proper working of the machinery; then measure the depth of the ship at the middle point of this length from the ceiling at the timber strake to the upper deck in ships of three decks, and under and to the third deck or deck above the tonnage deck in all other ships; also the inside breadth of the ship, clear of spousing (if any) at the middle of the depth; multiply together these dimensions of length, breadth, and depth for the cubical contents; divide this product by 100, and the quotient shall be deemed to be the tonnage of the engine-room, or allowance to be deducted from the gross tonnage on account of the propelling power.
- (2) In the case of ships having more than three decks, the tonnage of the space or spaces between decks (if any) above the third deck, which are framed in for the machinery, or for the admission of light and air, found by multiplying together the length, breadth, and depth thereof, and dividing the product by 100, shall be added to the tonnage of such space.
- (3) In the case of screw steamers the tonnage of the shaft-trunk shall be deemed to form part of and be added to such space, and shall be ascertained by multiplying together the length, breadth, and depth of the trunk, and dividing the product by 100.
- (4) In any ship in which the machinery may be fitted in separate compartments, the tonnage of each such compartment shall be measured severally in like manner, according to the above rules, and the sum of their results shall be deemed to be the tonnage of the said space.

Ordered, that the proper officers in London, and the collectors and controllers at the outports, do govern themselves accordingly in all future operations for estimating the allowance to steamers for their propelling powers; and with regard to the engine-rooms, or allowance to the steamers already measured, that they be remeasured agreeably to the above modification of the rule on the application of their owners or agents, and on delivery of the original certificate for tonnage.

At the time of the passing of the Merchant Shipping Act 1854, the *plts.* were and still are possessed of (amongst other ships) the paddle-wheel steamer *St. Columba*. Her tonnage space, solely occupied by and necessary for the proper working of the boilers and machinery, was and is above 30 per cent. of her gross tonnage.

After the passing of the said Act the *plts.* applied, in accordance with the provisions thereof, to have the said ship measured, and the vessel was accordingly measured by the proper officer, and a deduction for the space occupied by the propelling power was allowed according to clause (b) of the 23rd section of the Act, including the addition of one-

half the tonnage of the space of the propelling power. Her register tonnage for dues was then ascertained and fixed at 296 tons, and her tonnage was accordingly so entered in the registry of shipping in the port of Dublin.

In 1862 the *plts.* lengthened the said ship *St. Columba* by adding to her length forty feet, and as this increased her tonnage it became necessary, in accordance with the provisions of the Merchant Shipping Act 1854, to have her remeasured, and she was accordingly remeasured by the proper officer for the purpose in the port of Liverpool, where the alterations in her were being made, and without any application being made by the *plts.* The tonnage space solely occupied by the propelling power was then above 30 per cent. of her tonnage, as before mentioned.

On this remeasurement the gross tonnage of the ship was increased by 122 tons. The officers who conducted the measurement measured her according to the directions contained in the new Customs rules of Oct. 23, 1860. They allowed only the exact space occupied by or required to be inclosed for the proper working of the boilers and machinery, and declined to allow the one-half the tonnage of the said space, as directed by the 23rd section of the said Act. By this mode of measurement the tonnage for dues was increased to 456 tons. The *plts.* objected to this mode of measuring and making the allowance for the propelling power, and required to have the allowance made according to their views of the provisions of the Act of Parliament, and insisted that the Commissioners of Customs had no power to refuse such allowance.

The question for the opinion of the court is, whether the additional allowance of one-half the tonnage of the space occupied by the propelling power ought, or not, to have been made by the officers of registry at Liverpool.

Bovill, Q.C. (*Watkin Williams* with him), for the *plts.*, relied on sect. 23 of the Merchant Shipping Act 1854, and contended that by clause (b) of that section in the calculation of the tonnage space of the vessel, the *plts.* ought to have been allowed the additional deduction of one-half the tonnage of the engine and boiler space, and that the Commissioners of Customs had no power by any rules or regulations to repeal or alter the express provision in the statute for such allowance.

The *Solicitor-General* (*Giffard, Q.C.* and *C. Pollock* with him), for the *def.* (and in reality for the Board of Trade), contended that the Commissioners of Customs, with the approval of the Board of Trade, were empowered by the Merchant Shipping Act 1854, s. 29, to alter the rule laid down in sect. 23 of that Act, and that they were justified in altering it, as it had been found to work inaccurately and unequally, and to violate the principle of allowance prescribed by that Act, viz., the space occupied by the propelling power. Their argument is sufficiently detailed in the judgment of the court.

In answer to a question of *Willes, J.*, it was stated that the timber-strake was the space between the keelson and the side of the ship.

Curr. adv. vult.

July 10.—*KEATING, J.* delivered the judgment of the court (*Willes, Byles, and Keating, JJ.*)—In this case a steamship, belonging to the *plts.*, called the *St. Columba* (paddle-wheel), at the passing of the 17 & 18 Vict. c. 104 (the Merchant Shipping Act), had been measured under the provisions of the 23rd section of that statute, and its register tonnage ascertained in the mode pointed out thereby. An increase, however, in the length of the ship in 1862, by augmenting her tonnage rendered a fresh

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cessary, and she was accordingly remeasuring to the directions contained in the Custom rules of 23rd Oct. 1860, framed by the Commissioners of Customs, with the sanction of the Board of Trade, the application of which to her ship increased the register tonnage at which would have resulted from a measurement under the former system. To this the defendant contended that the new rules of the Commissioners of Customs were in direct and contrary to the provisions of the Act of 1860, and the question for the court is, whether they are right in that contention, and whether they are. The 23rd section of the Merchant Shipping Act provides that, in every ship propelled

"an allowance shall be made for the space occupied by the propelling power, and not so allowed shall be deducted from the tonnage of the ship . . . and such deduction shall be estimated as follows: as regards ships propelled by paddle-wheels in which the tonnage is wholly occupied by and necessary for the propulsion of the boilers and machinery is above one-half, and under 30 per cent. of the gross tonnage of the ship, such deduction shall be thirty-two hundredths of such gross tonnage; and in ships propelled by screws in which the tonnage is above 13 per cent. and under 20 per cent. of such gross tonnage, such deduction shall be thirty-two one-hundredths of such gross tonnage."

In all other ships where there is no agreement between the commissioners and the owners, the allowance shall consist of the actual space occupied by the machinery, &c., with the addition of one-half of the tonnage of the paddle-wheels of one-half, and in case of three-fourths of the tonnage of such machinery, the measurement and use of such space shall be governed by the following rules; and the five rules for measuring the space to be allowed. The 29th section of the Act gives the Commissioners, with the sanction of the Board of Trade, to make such modifications in the tonnage rules as may be necessary in "order to the more accurate and uniform application thereof, and in carrying out of the principles of measurement therein adopted." It was contended that the new rules referred to in the Act, and those rules in effect repeal the provisions of the 23rd section of the statute as to all distinctions between the different classes and kinds of steamships therein referred to, as well as the different deductions appropriated to each class, and substitutes a uniform allowance for all classes of steamships together with a new mode of ascertaining measurement such allowance. The Solicitor, for the defendant, contended that the provisions of the statute establishing the distinctions between the different classes of steamships were not enactments properly so called, but were only tonnage rules, the alteration of which by the Commissioners came within the express power conferred upon them by sect. 29, and that, sect. 23 was subdivided into several rules, each was itself a tonnage rule, and so within the power of the Commissioners, and he referred to the mode in which the new rules were designated in the margin of the Act in support of his views. On the other hand, the plaintiff insisted that the tonnage rules contained in sect. 29 of the Act were the same as such in the different sections of the statute, and which regulate the measurement and nothing more; so that the effect of any deductions from the gross tonnage was clearly an enactment than the direction of the deduction should be estimated according to the differences in the classes of vessels defined in the section, whilst the mode of measuring the spaces according to such classification

is expressly governed by the five rules set out at the end of the section, nor could the statements in the margin control or affect the terms of the enactment. We think this the correct view of the statute, and that it was not the intention of the Legislature to give to the commissioners the powers contended for by the defendant. Whether the new rules so framed would or would not be beneficial to the mercantile marine of the country, is a question which, although mooted at the bar, we do not inquire into. The rules themselves being, in our opinion, *ultra vires*, our judgment will be for the plaintiffs.

Judgment for the plts.

Attorney for the plts., T. Browning.

Attorney for the deft., The Solicitor for the Customs.

June 24 and 25, 1865.

TAMVACO v. SIMPSON.

Ship and shipping—Charter-party—Freight—Advances on freight—Liens—Court of competent jurisdiction—Estoppel.

A charter-party contained a clause, that freight should be paid "on unloading and right delivery of the cargo, less advances in cash at current rate of exchange; one half of the freight to be advanced by freighter's acceptance at three months on signing bills of lading." The charterer gave his acceptance accordingly, and received from the purchaser of the cargo the agreed price of the cargo, less the amount of freight remaining to be paid to the captain on delivery at Alexandria, the port of discharge. Before the acceptance became due, and before the vessel arrived at Alexandria, the charterer became insolvent, and executed an insolvency deed. The captain, having heard of the insolvency, refused to give up the cargo without payment of the whole freight, which was ultimately guaranteed by persons at Alexandria, at the request of the purchaser of the cargo. The captain sued these persons in the Consular Court of Alexandria, and they, by the authority of the purchaser of the cargo, paid him the whole amount of the freight. The charterer's acceptance came to maturity after the captain had obtained the guarantee for payment of the whole freight, and was dishonoured:

Held, first, that the purchaser of the cargo was entitled to receive it, on payment of half the freight:

Held, secondly, that the proceedings in the Consular Court did not debar him from recovering in this court the amount paid to the captain in excess of what he was entitled to demand.

Special case stated by consent and by order of Willes, J.

The plaintiff is a merchant, residing at Alexandria, in Egypt; the defendant is a shipowner, residing at Sunderland, and is possessed of a vessel called the *Parthian*.

On the 1st Sept. 1863 Messrs. Zizinia and Co., of London, as agents for the plaintiffs, entered into a contract with Mr. De Mattos, also of London, for the purchase of 2000 tons of steam coal. The following is a copy of the written agreement:

Memorandum of agreement between Mr. William Nicholas De Mattos, and Messrs. Zizinia and Co.

Mr. William Nicholas De Mattos agrees to supply Messrs. Zizinia with 2000 tons of best Davidson's West Hartley large steamcoals screened, and with usual certificates, say 10 per cent more or less, the bills of lading for the entire quantity to be delivered to the purchasers by the end of the present month in two or more shipments. Messrs. Zizinia agree to pay on receipt of the documents (bill of lading and policy of insurance), at the rate of thirty-four shillings per ton of twenty hundredweight, deducting the balance of freight payable to the captains at Alexandria, together with a commission of 3 per cent. upon the full thirty-four shillings per ton, said balance to be paid in cash at Alexandria at the current rate of exchange for three months' bill on London.

The coals to be taken from alongside the ship at the buyer's

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risk and expense, at the rate of not less than thirty tons per weather-working day, Sundays excepted. In the event of Mr. De Mattos neglecting to supply tonnage in the specified time, Messrs. Zizinia are at liberty to charter ships for the said quantity at current rates for the seller's account—London, 1st Sept. 1863.

Witness, &c.,

(Signed)

W. N. De Mattos
ZIZINIA and Co.

In pursuance of the aforesaid contract, De Mattos chartered certain vessels for the conveyance of the coals, and amongst others, he entered into the following charter-party of the *Parthian* with the deft.

Charter-party.

London, Oct. 1, 1863.

It is this day mutually agreed between Mr. Simpson, owner of the good ship or vessel called the *Parthian*, A 1, and metalled, master, of the burthen of 284 tons register or thereabouts, now in Havre, or on passage thereto, from Queenstown, and W. N. De Mattos, Esq., of London, merchant, that the said ship, being tight, staunch, and every way fitted for the voyage, shall, with all possible dispatch, after discharging present cargo at Havre, sail and proceed to South Dock, Sunderland, and there load in the customary manner from the factors of the said freighter a full and complete cargo of steam coals, to be loaded in regular turn, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded, shall therewith proceed to Alexandria, or so near thereunto as she may safely get, and there deliver the same, on being paid freight at and after the rate of 30*l*. 5*s*. 6*d*. gratuity per keel of twenty-one tons four hundred weight, taken on board and delivered, in full of all port charges and pilotage, harbour dues on cargo, Dover and Ramsgate dues, and pier and light dues, the act of God, the Queen's enemies, fire, and all and every other damages and accidents of the seas, rivers, and navigation, of what nature and kind soever during the said voyage, always excepted. The cargo to be delivered afloat alongside a railway or other safe wharf, steamer, or floating depot, and to be discharged by the ship over the ship's side as customary, and no part of the cargo to be used during the voyage, or to be retained for ballast. Coals for the ship's use to be provided at the expense of the owners, and the quantity to be stated on bills of lading. The freight to be paid on unloading and right delivery of the cargo, less advances in cash at current rate of exchange, one-half of the freight to be advanced by freighters' acceptance at three months on signing bills of lading. Owner to insure the amount, and deposit with charterer the club policy, and to guarantee the same. On working day per keel and a-half, weather permitting, to be allowed the said merchant (if the ship is not sooner dispatched) for unloading the said ship at the port of discharge, Sundays and holidays excepted; and ten days on demurrage over and above the said lying days, at 6*l*. per day. The ship to be addressed to freighters' agents at port of discharge, paying usual commission of 2 per cent. The brokerage of 5*l*. per cent. upon this charter-party is due to Smith, Sundius, and Co., ship lost or not lost. The ship and her freight are bound to this venture. All claim for average to be settled in London, in conformity with the rules of Lloyd's. Penalty for nonperformance of this agreement, 700*l*.

For Mrs. Simpson, by authority of W. Dawson.

SMITH, SUNDIUS, and Co., as agents.
W. N. DE MATTOS.

In accordance with this charter-party Mr. De Mattos shipped on board the *Parthian* 426 tons 13 cwt of steam coal, being part of the 2000 tons already mentioned. The captain thereupon signed a bill of lading, of which the following is a copy:

Shipped in good order and well conditioned by W. N. De Mattos, in and upon the good ship called the *Parthian*, whereof is master, for this present voyage, W. Simpson, and now riding at anchor in the port of Sunderland, and bound for Alexandria, 131 Newcastle chaldrons or 201 keels, and weighing 426 tons 13 cwt of Davidson's West Hartley large steam coals, which are to be delivered in like good order and condition alongside any craft, steamer, floating depot, wharf, or pier, where the ship can be afloat at the aforesaid port of Alexandria, as agent of the charterer may direct (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted), unto order or his assigns. The ship to be discharged at the rate of not less than 31½ tons per working day (weather permitting), and when required by the freighter's agent, such extra quantity as may be practicable; and if not discharged in the time above specified, demurrage to be paid at the rate of 6*l*. per diem. Freight for the said goods to be paid as per charter-party with average accustomed. In witness whereof the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which bills being accomplished the others to stand void. Dated in Newcastle, 27th Oct. 1863. Three tons of coal for ships use beside above. Weight unknown to W. Simpson.

The freight on the coals so shipped on board the *Parthian* amounted, at the rate of 30*l*. per keel re-

served by the charter-party, to 603*l*. 15*s*., one-half of which sum was 301*l*. 7*s*. 6*d*.

Upon the bill of lading being so signed as aforesaid, Mr. De Mattos, the charterer, gave his acceptance at three months for 301*l*. 7*s*. 6*d*. in favour of the deft. pursuant to the terms of the charter-party.

The said acceptance was dated the 31st Oct. 1863, and became due the 3rd Feb. 1864. Upon its being given the deft.'s agents, Messrs. Smith, Sundius, and Co. indorsed a receipt on the bill of lading, of which the following is a copy:

Received, on account of the within freight, three hundred and one pounds seventeen shillings and sixpence, as per charter-party.—301*l*. 17*s*. 6*d*.

For Mrs. Mary Simpson,
SMITH, SUNDIUS, and Co. as agents.

Mr. De Mattos then made out and delivered to the plt.'s agent an invoice showing what was due for coals shipped by the *Parthian*, of which the following is a copy:

Messrs. Zizinia and Co.,
London, 26th Oct. 1863.

To W. N. De Mattos.

Under contract of 1st Sept. 1863.

	£	s	d	£	s	d
426½ tons of Davidson's West Hartley's large steam coals, shipped at Sunderland per <i>Parthian</i> , Simpson, master, for delivery at Alexandria, at 34 <i>s</i> . per ton	603	15	0	725	6	1
Freight, at 30 <i>l</i> . per keel	3	5	0			
Gratuity	609	0	0			
Loss advance on landing	301	17	6	307	2	6
				418	3	7
Less 3 per cent. on 725 <i>l</i> . 6 <i>s</i> . 1 <i>d</i>				21	15	2
				4396	8	5

Received by cheque,

For W. N. De Mattos,
O. A. SPANG, 31/10/63.

On the 28th Oct. 1863 Mr. De Mattos indorsed the bill of lading in blank and handed it so indorsed to Messrs. Zizinia and Co., the plt.'s agents, who on the 31st Oct. paid to De Mattos the balance of 396*l*. 8*s*. 5*d*., appearing due on the aforesaid invoice. Messrs. Zizinia and Co. afterwards forwarded the bill of lading so indorsed by De Mattos to the plt. at Alexandria. The deft. was not informed, nor had he any knowledge at any time before the commencement of this action of the said contract between the plt.'s agents and Mr. De Mattos of the 1st Sept. 1863, or of the said invoice, or of the payment of the balance appearing due thereon, or of any dealings or transactions between the plt. or his agents and Mr. De Mattos relating to the premises.

The said ship sailed with her said cargo from Sunderland for Alexandria on 4th Nov. 1863, and shortly after she so sailed De Mattos declared himself insolvent, and ultimately on 4th Jan. 1864 a deed of insolvency was executed by him and divers of his creditors, not including either the plt. or the deft., under the 192nd section of the B. A. 1861, but without the written assent or approval of the plt. or the deft. This deed was registered, in accordance with the provisions of the said 192nd section, on the 1st Feb. 1864, and for the purpose of this case it was to be assumed that all the conditions required by that Act to make the deed as valid against all the creditors of the said charterer as if they were parties to and had executed the same, were duly performed at the time of registration. The provisions of the deed are set out in *Strick v. De Mattos*, 3 H. & C. 22; 10 L. T. Rep. N. S. 590, and were to be taken as part of the case.

The *Parthian* sailed for Alexandria and arrived there on the 5th Jan. 1864, on which day the captain of the ship reported her arrival to the plt., and

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stated that he would on the following day (the 6th) be ready to discharge the cargo.

The plt. then, being the holder of the bill of lading as indorsee as aforesaid, took all necessary measures for receiving the cargo, and intimated to the captain that he was prepared to pay the balance of the freight remaining unpaid, after deducting the 301*l*. 17*s*. 6*d*. referred to in the receipt on the bill of lading. On the following day (the 6th) the captain, who by letters received by him on his arrival at Alexandria had learnt that De Mattos had suspended payment, refused to deliver the cargo to the plt. except upon the terms of being paid the full amount of the freight without any deduction, or of having a guarantee for the payment of the same.

The master of the ship thereupon claimed a lien on the cargo for the payment of the full chartered freight, and detained it in exercise of such alleged lien on board the ship until the 20th Jan., the plt. during all that time refusing to make such payment, or procure a guarantee for the payment of the full chartered freight.

Mr. De Mattos' acceptance was not due till the 3rd Feb. 1864, and therefore was not due at the time when the captain refused to deliver the coals to the plt. The acceptance was at this time in the hands of third parties, and was not paid at maturity, but was taken up by the deft. before the commencement of this action.

Upon the 20th Jan. 1864, Messrs. Barker, of Alexandria, at the request of the plt., and to procure delivery of the cargo to the plt., gave the master of the *Parthian* the following guarantee, the master still continuing his refusal to deliver the cargo without being paid the full amount of the freight, or having a guarantee for the payment of the same as aforesaid:

Alexandria, Jan. 20, 1864.

Captain Simpson, of the *Parthian*.

Sir.—In consideration of your agreeing at our request to deliver to Mr. E. Tamvaco the cargo of coals at present on board your ship, we hereby undertake and guarantee that when and so soon as you shall have delivered the said cargo unto the said Mr. E. Tamvaco, or his order, we will, on demand, pay or cause to be paid to you in cash the full amount of freight due and payable to you in respect of the said cargo, without any deduction whatsoever, except commission dues.

(Signed)

BARKER AND CO.

The master of the *Parthian*, after receiving the guarantee, forthwith commenced to deliver the cargo to the plt., and completed such delivery on the 13th Feb. 1864.

Upon the completion of the said delivery, the master of the *Parthian* (Mr. De Mattos' acceptance having been in the meantime discharged at maturity) applied to the plt. for payment of the full chartered freight, and upon plt.'s refusal to pay the same, applied to Messrs. Barker and Co. for payment of the same, in pursuance of the said guarantee. The said Messrs. Barker and Co., however, by the plt.'s instructions, and on his behalf, also refused to the same; whereupon the master of the said ship instituted legal proceedings against the said Messrs. Barker and Co. in Her Majesty's Consular Court for Egypt at Alexandria, which had jurisdiction in the said matter, for the recovery of the sum from the said Messrs. Barker and Co. to him their said guarantee, and the said cause was proceeded with and duly prosecuted, and a day fixed for the trial of the same; but on the day before the last-mentioned day the said Messrs. Barker and Co., on behalf of the said plt., and by his authority, and in discharge of their liability under the said guarantee, viz., on the 7th March 1864, paid master of the *Parthian* the amount agreed to be paid by them under their said guarantee, without making any deduction for the 301*l*. 17*s*. 6*d*., the plt. at the same time protesting against such a pay-

ment being demanded or made, and a copy of such protest was served on the master of the *Parthian*.

Upon receiving the amount so paid by Messrs. Barker and Co. as aforesaid, the master of the *Parthian* gave them the following receipt:

Messrs. Barker and Co. to Capt. Simpson, of the <i>Parthian</i> , as per guarantee on Mr. Tamvaco's behalf.	
To freight on 197.8 keels at 30 <i>l</i> . per keel	£596 5 0
Gratuity as per charter-party	6 5 0
	£601 10 0

[The receipt then set out this amount according to current rate of exchange in the money of the country, and was signed by the master.]

The plt. afterwards, and before the commencement of their action, repaid to Messrs. Barker the amount so paid by them to the master of the *Parthian* as aforesaid.

The questions for the court are: first, whether, under the circumstances before set out, the plt. was, at the time when the captain of the *Parthian* refused to deliver his cargo, entitled to have his cargo delivered on payment of the balance of the freight after deducting the 301*l*. 17*s*. 6*d*.

Second, whether, assuming the plt. to be entitled to recover in respect of the said refusal to deliver, he is entitled to recover anything as damages, but the damages sustained by him by being deprived of the possession of the cargo from the time of the refusal to the time of the cargo being delivered to him.

If the court shall be of opinion upon both points in the affirmative, then the plt. is to be allowed to sign judgment for the sum of 311*l*. 17*s*. 6*d*., with costs. If the court shall be of opinion upon the first point in the affirmative, and upon the second in the negative, then the plt. is to be allowed to sign judgment for 10*l*. with costs. If the court shall be of opinion upon the first point in the negative, than the deft. is to be at liberty to sign judgment as in case of nonsuit with costs.

Mellish, Q. C. (Bidder with him), for the plt., cited *Kirchner v. Venus*, 12 Moo. P. C. Cas. 361; *How v. Kirchner*, 11 Ib. 21; *Gilkison v. Middleton*, 2 C. B., N. S., 134; *Neish v. Graham*, 8 E. & B. 505.

Manisty, Q. C. (Lewes with him) for the deft.

—The advance made by freighter's acceptance on signing bills of lading was a loan to De Mattos, not a part payment of freight, as freight is not earned till the completion of the voyage. The money paid by Barker and Co. was in consequence of a suit in a competent court, and therefore cannot be recovered back in this court.

WILLES, J.—Judgment in this case must be for the plt. for the full amount of his claim. [His Lordship stated the facts of the case.] The words "less advances" in the sentence, "The freight to be paid on unloading and right delivery of cargo less advances in cash at current rate of exchange," are parenthetical, and the words "in cash" are to be taken with the immediately following words, "at current rate of exchange." There is nothing said in the special case of any peculiar construction which the expressions have acquired among ship-owners. The charter-party contemplates advances not in cash, for the freighter's acceptance is expressly mentioned. This construction makes the whole clause sensible, and disposes of the first question; and I need give no opinion on Mr. Manisty's contention, that the advance was nothing but a loan, as to which reference may be made to Byles on Bills, p. 109, 8th edit. The second question is, whether the proceedings in the Consular Court at Alexandria bar the plt.'s right to recover in this court. I think that they do not. The payment, though

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a final settlement between Barker and Co. and the captain, was not a final settlement between them as agents for the plt. and deft. respectively.

ByLES, J. concurred.

Judgment for the plt.

Attorneys: for plt., *Maynard and Son*; for deft., *Hickin and Son*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,
Barrister-at-Law.

Monday, June 26, 1865.

(Present—The Right Hon. Dr. LUSHINGTON, KNIGHT
BRUCE and TURNER, L.J.J.)

THE LAURA.

*Ship—Slave trade—Circumstantial evidence—Suspicion
—Cargo.*

Offences against the laws for the suppression of the slave trade may, like other offences, be established by circumstantial evidence; but such evidence must amount to more than mere suspicion. It is no ground of suspicion that the vessel is laden with a cargo which may or may not be employed in the unlawful trade unless it is found in immediate proximity to the coast of Africa. All the circumstances of each case, and more especially the locality in which the vessel is found, must be taken into consideration.

Comments on the weight to be attributed in such cases to the arrangement of the hatches, and a cargo consisting partly of pine boards and fire bricks.

This was an appeal from a decree of the Vice-Admiralty Court of Antigua, which condemned the *Laura* and her cargo as having been at the time of seizure by H. M. S. *Cadmus* equipped for and engaged in the slave trade. The case was one of circumstantial evidence. The owner Dionissis appealed to Her Majesty in Council. The material facts are set forth in the judgment.

Dr. Deane, Q. C. and V. Lushington for the app.

The *Queen's Advocate* and Dr. Swabey for the resps.

LORD JUSTICE TURNER.—This was an appeal by the owner of the brig *Laura*, and of her cargo, from a decree of the Vice-Admiralty Court at Antigua, bearing date the 7th July 1862, condemning the brig and her cargo as forfeited for breach of the laws for the suppression of the slave trade. This vessel, which was built in the Southern States of North America, was purchased by Nicholas Dionissis, the app., at Havanna, in the month of Oct. 1861. She took on board some cargo at Havanna, and sailed from that port for the island of St. Thomas on the 30th Nov. 1861. She reached St. Thomas on the 1st Jan. 1862, took on board some further cargo there, and sailed from that island for the island of St. Bartholomew on the 20th Jan. 1862. On that same 20th Jan. 1862, she was captured by Her Majesty's ship *Cadmus*, and carried to the island of Antigua, where she was condemned as above mentioned. We shall presently enter into the details of this case, so far as in our judgment they are material to be considered; but before doing so, it may be well to notice some points which are common to all cases of this description, and some considerations which apply only to this particular case. To be in any way concerned in the slave trade is a

highly criminal offence, and the laws for the suppression of the trade are of a very penal character, affecting both the persons and the property of those who venture to embark in so nefarious a traffic. The proof of the infringement of these laws must, therefore, rest upon those who allege that they have been infringed. This is the rule of law which applies universally to cases of criminal offences, and there is no exception to this rule in cases of offences against the laws for the suppression of the slave trade. Offences against these laws may no doubt be established, as offences against other laws may be established, by circumstantial evidence; but the circumstances brought forward to establish the offence must be such as do not end in suspicion merely. They must be such as to satisfy a reasonable mind that the suspicion is well founded, and that the offence has been committed. Again, it must be observed that most, if not all, of the articles of merchandise which are employed for the purposes of the slave trade are also capable of being employed for the purposes of lawful commerce; and that in these cases, therefore, it is not sufficient to consider merely what are the cargoes of the vessels accused of being implicated in the unlawful trade, but all the circumstances of each particular case, and more especially the locality in which the vessels may be found, must be taken into consideration. It is obvious that vessels laden with cargoes capable of being employed either in the unlawful trade or in lawful trade, cannot, when found at a distance from the coast of Africa, where the cargoes, if intended for the unlawful trade, would come into use, be looked upon with the same degree of suspicion as they would justly be subject to if found in immediate proximity to that coast. These are considerations which apply generally to all cases of this description. As to this particular case, in addition to the details to which we shall presently refer, it is to be observed that before this decree was pronounced the case had been investigated, both in the police-court at St. Thomas, and in the Criminal Court at Antigua, where the app. and some of the crew of the vessel were indicted for felony under the Acts on which this case proceeds, and that nothing unfavourable to the app.'s case appears to have been elicited upon the investigation in the police court, and upon the trial in the criminal court the app. and the crew were acquitted. With these preliminary remarks we proceed to consider the details of the case. It will be convenient to consider them under three heads: First, such of them as relate to what passed at Havanna; secondly, such of them as relate to what passed at St. Thomas; and thirdly, such of them as relate more particularly to the special grounds on which the resps.' case is rested, so far as we think it necessary to enter into those grounds. First, then, as to the details of what passed at Havanna. The case, as we collect it from the evidence, stands thus: the app., who is an Ionian by birth, and has been a sailor from a very early period of his life, had for about eighteen years before the year 1861 sailed and traded between North America and the islands in the West Indies and the coast of Mexico, the Caribbean Sea and Central America, as far as Rio Janeiro, and in the course of these years he had made frequent voyages between New Orleans and Cuba, his family for the few last of these years residing at New Orleans. In the latter end of August or beginning of Sept. 1861 he came from Mexico to Havanna, and on his arrival at Havanna found several vessels lying there unemployed and for sale, in consequence, as it would appear, of the war then raging between the Northern and Southern States of North America. He was desirous of purchasing one of these vessels, and after examining several of them determined to

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purchase the vessel which is the subject of this appeal, and is now called the *Laura*, but was then called the *Ida Raynes*. He negotiated for this purchase with a person named Pertusio, who was the agent for the sale of the vessels, and is alleged on the part of the resps. to have been extensively engaged in the slave trade; ultimately he agreed with Pertusio to purchase the vessel for 5500 dollars. On the 17th Oct. 1861 he paid to Pertusio 4500 dollars on account of the purchase-money, and he afterwards paid the balance of the purchase-money. On the 24th Oct. 1861 the vessel was assigned to him by a bill of sale of that date. Pending the negotiation for this purchase, he was desirous of obtaining for the vessel a British certificate of registry, for the purpose, as it would seem, of securing to himself the benefit of a neutral flag, and he accordingly applied to Mr. Crawford, the British consul in Cuba, for this certificate. Mr. Crawford after some demur, on the 25th Oct. 1861, granted him a provisional certificate for the vessel to continue in force until the 25th April 1862, or until the arrival of the vessel at some port where there was a British registrar, whichever should first happen; and in the declaration of ownership appended to this certificate, the app. declared that he was a British subject born at Cerigo, and that he had never taken the oath of allegiance to any foreign State. Having completed the purchase of the vessel he proceeded to obtain a crew for her, and the crew were engaged through the shipping master of the port, according to the custom of the place. On the 18th Nov. 1861 the ship's articles were signed by him and by the crew before the British vice-consul, by whom the articles seem to have been prepared. He also, after he had purchased the vessel, had her thoroughly cleared out, and purchased some cargo for her, consisting of a very large quantity of rum, which he bought of Pertusio, and of some cigars, sugars, and sweets. He sailed from Havana on the 30th Nov. 1861, as we have already stated. Before this time, however, Mr. Crawford, the British consul in Cuba, had become suspicious that the vessel was about to be employed in the slave trade, and he accordingly required security from the app. against the vessel being so employed. The security was in consequence given by the app. and Don Pedro Garvalena, who joined in a bond to the Crown, whereby they became bound in the sum of 25,000 dollars, with a condition for making void the bond if the vessel should not be employed in the illegal traffic of negroes at the coast of Africa, or in the slave trade. Don Pedro Garvalena, it appears, joined as security in this bond at the instance of Pertusio. [The Court, after commenting on Mr. Crawford's suspicion, which arose from the unusual cargo and the antecedents of the master, thus concluded:]

We proceed, then, to consider the special grounds on which the resps. case is rested, so far as we deem it necessary to enter into them. The resps., first, rely upon the construction and fittings of the vessel.

The principal points on which they rest their case in this respect are, that in this vessel there are three hatches: the fore hatch, the main hatch, and a third hatch aft the main hatch, which in these proceedings and in the course of the argument before us has been called the booby hatch; being, as we understand, a hatch or opening in the deck having a cover over it. That, besides these hatches, this vessel has two scuttles, and that there are stringers or beams running fore and aft along the whole length of the sides of the vessel, at the distance of about six feet below the vessel's deck. They say that in ordinary merchant vessels there are not more than two hatches, the fore hatch and the main hatch, and that there are no stringers; that the booby hatch and at least, of the scuttles were not in the vessel when she was built, but have been cut out of the

deck since the vessel was built, and since she was purchased by the app., and that the booby hatch is not constructed as ordinary hatches are and was not made and is not adapted for cargo purposes; and amongst other circumstances tending to cast a suspicion on this booby hatch they point to its cover having been made capable of being opened or shut by means of slides. They insist that the booby hatch and its cover, and the scuttles, have been put into the vessel for the purpose of affording better ventilation for slaves to be lodged in her hull; and that the stringers have been introduced for the purpose of supporting a slave deck intended to be laid on scantlings placed across the vessel, and resting on these stringers. The app., on the other hand, insists that the three hatches, the scuttles, and the stringers, are commonly to be found in merchant vessels built in America, and that the booby hatch was in the vessel when he purchased it, and was made and adapted for cargo purposes. There is a vast mass of evidence bearing more or less directly upon all these points, but without entering into the details of this evidence, it will be sufficient for us to state what, in our opinion, is the result of it. We are of opinion that the evidence establishes, beyond all doubt, that the three hatches and the scuttles are commonly to be found in American-built merchant vessels, and that the booby hatch was capable of being used for cargo purposes. It appears, indeed, that it has, in fact, been so used by the crew of the *Cadmus* in loading or unloading the vessel at Antigua; but we think that the evidence does not satisfactorily prove that this booby hatch was made before the app. purchased the vessel or that it is constructed as hatches are usually constructed. The balance of the evidence on these points seems to us to be in favour of the resps.; but assuming it to be so, and even assuming further that this hatch was constructed as it is for the purpose of better ventilation, we do not think that these circumstances materially affect the question we have here to decide, for we think that the evidence clearly proves that in merchant vessels employed in the ordinary course of trade, and more particularly in such vessels when employed in conveying sugar, which would certainly not be an unusual cargo for vessels trading in the West Indies it is of great importance that the holds of the vessels containing the cargo should be effectually ventilated, and we do not think that the adoption of a mode of ventilation different from that which is ordinarily used would justify the presumption that the purpose of the ventilation was different from its ordinary purpose. The other points as to the construction and fittings of the vessel, on which the resps. relied, are of so trifling a nature that we do not think it necessary to observe upon them. Another point on which the resps. rested their case was the character of the cargo of this vessel. The articles of the cargo mainly relied upon on the part of the resps., as affording evidence that this vessel was intended to be employed in the slave trade, were the scantling and the white pine boards, the fire bricks, and the iron. The scantling and the white pine boards must, it was said, have been intended for laying a slave-deck, suspended on the stringers, at the distance of six feet below the vessel's deck, and the fire-bricks and iron for constructing an additional stove to cook for the slaves. These suggestions appear to us to savour much more of ingenious conjecture than of just inference. They are, we think, displaced by the evidence in the cause. As to the scantlings and white pine boards, the evidence satisfies us that the scantlings were not ordered to measurement, and were not measured. They were shipped as they had been cut from

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forest. There is, besides, abundant evidence that lumber of this description is an ordinary article of trade in the West India Islands; and as to the fire-bricks and iron, independently of the evidence as to the iron having been procured for the purpose of ballasting boats, it cannot surely be supposed that 1000 fire-bricks could have been purchased for the purpose of constructing a stove. We may add as to the resps.' case upon the cargo, that Spurrell, one of their witnesses, enumerates the articles of which the cargoes of vessels employed in the slave trade are generally composed, and that in his enumeration there are contained a variety of articles none of which were found in the cargo of this vessel. A further point on which the resps. rested was the appliances for water contained in the vessel, and the quantity of water which was found in her; but as to the tanks, the principal part of these appliances, it is not even suggested that they were introduced into the vessel after the app. purchased her, and as the vessel does not appear to have been employed in the slave trade before she was purchased by the app., the fact of these tanks being found in her can afford no evidence that she was intended to be employed in that trade; and as to the quantity of water found in the vessel, the evidence, although it shows that the quantity was large, does not in our opinion justly lead to the conclusion that the vessel was destined for the coast of Africa rather than for any other lengthened voyage, to which the difficulty of selling the cargo at the island of St. Bartholomew might lead. The resps. also rested much upon this, that there were found on board this vessel a variety of charts, and amongst others, several charts of the island of Cuba, and one of the coast of Africa, with tracks delineated upon it. This was certainly a matter requiring explanation, and the evidence, as we think, affords a reasonable explanation of it. Charts would of course be required for navigating the vessel, and there is no trace of there having been any on board the vessel when she was purchased by the app. The circumstances under which these charts were procured are stated by the app. to have been, that he could not procure on shore at Havanna charts by which the vessel could be worked, and he therefore desired the mate to procure them from the shipping in the port, and the mate O'Sullivan confirms this statement, and adds, that he procured the charts from the shipping, mentioning the persons from whom he procured them. There is no contradiction to this evidence. The app., indeed, does not appear to have been asked a question on the subject, and the cross-examination of the mate upon it tends to confirm his evidence in chief. If the charts could have been procured on shore at Havanna, the resps. could have proved that fact. They have given no such proof. There was evidently no concealment of these charts. They were lying in the cabin in rolls during the time the vessel was under seizure. There is, besides, abundant evidence to show that vessels commonly carry charts of seas in which they have never been, and to which they have no intention of going. Spurrell, the resps.' witness, states that he has charts of the coast of Africa on board his ship, and several other masters of ships state also that they have such charts on board their ships. Looking, then, to the special grounds on which the resps.' case is rested, we have come to the conclusion that the evidence adduced by them is insufficient to support those grounds; but, then, it was strongly urged on their part that their evidence was, at least, sufficient to wholly discredit the case set up by the app., and, possibly, if the app.'s case had rested on his own testimony only we might have adopted this view, but the app.'s case is so strongly confirmed, at least as to many of the material points, by other and

independent testimony which the resps. have failed to displace, that we cannot see our way to yield to this argument on their part. We observe that the learned judge, from whose decree this appeal is brought has in his very able and elaborate judgment (for, although we differ from the learned judge in his conclusions, his judgment is fully entitled to be characterised as both able and elaborate) adverted to there being some difficulty in decreeing restitution of this vessel to the app., on the ground that he has stated by his claim that he is not and never was a British subject, and that he can therefore have no title to a British ship; but, as the learned judge has himself observed, the record does not properly raise this point, and, besides, this vessel, although undoubtedly she was to be considered as a British ship when she was captured, and therefore liable to condemnation if a sufficient case was proved against her, could not, as we apprehend, be considered to be a British ship after the expiration of the provisional certificate of registration, which had expired before this decree was pronounced. Any difficulty, therefore, which there might have been in decreeing restitution would seem to have been at an end, and certainly this is not an objection to which we should be inclined to give effect, having regard to the circumstances under which the certificate of registration of this vessel was granted. There is one other point on which, before parting with this case, we feel bound to observe. Attempts appear to have been made to induce some of the crew of this vessel to make statements favourable to the case of the resps. We refer particularly to the evidence of Rowley. Such attempts, if they were in fact made, were, in our opinion, unjustifiable; and if they were not in fact made, it is much to be regretted that no contradiction has been given to the testimony of this witness. Upon the whole, the true state of this case has appeared to us to be that the British consul at Havanna, in the first instance, took up suspicions against this vessel, which, so far as appears upon the evidence before us, he had no sufficient grounds for entertaining, and that the vast mass of evidence which we have before us has resulted from an attempt to find grounds for supporting those suspicions, an attempt which has failed; and we feel ourselves bound, therefore, humbly to recommend Her Majesty to reverse this decree and to order restitution of this vessel, with damages and costs both in the court below and of this appeal. Any costs already paid by the app. to be refunded.

Decree reversed with costs.

App.'s proctors, *Rothery and Co.*

Resps.' proctor, *F. H. Dyke.*

Thursday, July 20, 1865.

Present—The Right Hon. KNIGHT BRUCE, L.J.,
Sir J. T. COLERIDGE, and Sir E. V. WILLIAMS.)

THE NORWAY.

Ship—Charter-party—Freight—Deductions—Jettison—Non-assortment of cargo—Waiver of tender—Address commission.

A charter-party guaranteed that the vessel should carry 3000 tons dead-weight of cargo on a draught of twenty-six feet of water:

Hekl, water meant fresh as well as salt water.

A charter-party stipulated that 11,250k kemp senn would be paid for freight on both the outward and homeward voyages, part payment to be by bills, the rest on true and final delivery of cargo at the port of discharge.

A jettison of part of cargo having been made, not owing to

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out of skill in the pilot, and part of goods which were damaged being sold at an intermediate port :

' (1) there ought to be no deduction from the lump sum because part of the goods were not delivered; (2) the master having demanded a larger sum than he is entitled to, and in such a manner as to announce at tender of a smaller sum would be useless, this was waiver of tender; (3) address commission might be deducted from freight; (4) no claim of damages for re-assortment could be sustained, because the master bailee of the goods was not bound to incur a customary liability for the advantage of the goods; (5) proportion of freight forfeited for breach of guarantee as to capacity and draught of vessel might be deducted from freight.

his was an appeal from a decree of the Court of Admiralty in a suit by the plts. Ashburner and Co., grocers of the bill of lading and owners of a cargo of rice shipped on board the *Norway* at Rangoon, against the owners of the vessel, for damage by jettison, detention, and other breaches of contract.

The charter-party was executed in London on 2nd Nov. 1861, between Capt. Major, master of the *Norway*, and De Mattos. It was as follows:—

is this day mutually agreed between Capt. H. R. Major, of good ship or vessel called the *Norway*, A. 1, of the burden 78 tons per register, or thereabouts, now lying in the port of Rangoon, whereof he is at present master, of the one part, W. N. De Mattos, Esq., of London, merchant and broker, of the other part. That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, all convenient speed, &c., consideration whereof, and everything before mentioned, said merchant does hereby promise and agree to load, receive, or cause to be laden and received, in the manner within the time herein mentioned for these purposes, and or cause to be paid, as freight, for the use and hire of said vessel, eleven thousand two hundred and fifty pounds, sum, if ordered to the United Kingdom, Havre, or Bordeaux, the master guaranteeing to carry 3000 tons dead weight, upon a draught of twenty-six feet of water, or to forfeit his lien in proportion to deficiency; the vessel to be loaded at port adding to such a draught of water as the freighter or his agent may, in connection with the pilot commissioners, consider safe to proceed to sea, lighters, if any, to fill up the ship to the flats, to be at freighter's expense, payment whereof to me due, and to be paid as follows, viz.: 2000*l.* to be used on the vessel's clearing at Liverpool, subject to advance only, say 1000*l.* by freighter's acceptance at four days, and 1000*l.* at six months, sufficient cash for ship's expenses, not exceeding 2500*l.*, to be advanced at Calcutta, and the necessary disbursements, if ordered to the rice ports, subject to interest and insurance only, all at current of exchange for six months' bills on London against captain's receipts, such advances to be made on account of chartered freight, and the balance, as follows, one-third in cash, on arrival at port of delivery, and remainder on true and final delivery of the cargo at the port of discharge, by good and approved bill, payable on demand, or cash equal to three months' date from the day, if discharged in the United Kingdom, or in cash, at current rate of exchange, if discharged on the continent, less 3 months' interest, and also to pay for each and every month the vessel is detained beyond the times hereinbefore mentioned demurrage at the rate of thirty pounds sterling per day, to be paid day by day, or as the owner or agent may agree for it otherwise. The master shall sign bills of lading as tendered, without prejudice to this charter-party. The vessel, if ordered from Calcutta to load at the ports, to proceed within 48 hours, wind and weather permitting, after receiving her despatches to sail; the customary charges and towage at the rice ports to be borne by the charterer, as well as the actual costs of ballasting required for ship at Calcutta; the cargo to be taken to and taken from the shore at merchant's risk and expenses; the vessel to be chartered at all ports to freighter's agent, paying one commission only on this charter, not exceeding five per cent., and the true performance hereof the said parties hereto undertake themselves, their respective heirs, executors, assigns, the vessel, her freight and appurtenances, and the said charter cargo to be laden on board the said vessel, each and every other, in the penal sum of twelve thousand pounds, and lawful money of Great Britain, it being agreed for the payment of all freight, dead freight, demurrage, and other charges, the said master or owners shall have an absolute lien and charge on the said cargo or goods laden on board. The brokerage on this charter-party, five per cent., is hereby the ship, on perfecting this agreement, to Pilkington & Co. In witness whereof the said parties have hereunto subscribed their names.

The vessel had in pursuance of the charter-party

gone to Rangoon to load rice. At that time it became necessary to decide as to the draught of water to which the vessel could be safely loaded. She was first loaded at Rangoon to a draught of eighteen feet and then taken down the Irrawaddy river, where she was loaded till she drew twenty-five feet, at which time she had on board 32,600 bags of rice, weighing 2698 tons. The rice was in four parcels, for each of which the master signed a bill of lading describing the bags of rice "to be delivered, &c., at the port of discharge, &c., unto order or to assigns; freight for the said goods payable as per charter-party, with primage and average accustomed." At the place on the Irrawaddy where the vessel was fully loaded she could not carry 3000 tons upon a draught of twenty-six feet.

The lump freight on the cargo was 11,250*l.*

On 19th March 1863 the *Norway* left Hastings, seven miles below Rangoon, drawing twenty-five feet of water, in charge of a pilot, provided at the master's instance and in company with a small steamer. On the 23rd March she took the sands without any misconduct of the pilot. After a few hours she was got off the sands and got clear out to sea; but a few days afterwards she began to leak, in consequence of the injuries received on the sands. About 500 bags of rice were thrown overboard before the vessel reached the Mauritius. The ship was then surveyed, and the certificate recommended cargo to be discharged, but during discharge 1360 bags of rice were damaged and sold. The ship was then repaired, and the cargo reloaded, when the master set sail for England.

On the ship arriving at Liverpool there was a dispute as to the amount of freight due. The plts., the owner and assignee of the bills of lading, offered to pay the undisputed portion at once, and to deposit the disputed portion with a bank to abide a reference. The master, on the other hand, enforced his lien for the whole of the sum claimed, for without going the length of refusing to deliver any part of the cargo until the whole of the sum claimed had been paid, he insisted on retaining in his possession sufficient of the plts.' goods to cover his full demand, and he never relaxed his lien for 7740*l.* 2*s.* 2*d.* The master refused to entertain the idea of a reduction, and withheld from the plts. the papers necessary to show what was the amount of freight and general average due.

Ultimately the whole cargo, amounting to 2377 tons (2209 sound, and 168 damaged) was sold, subject to all faults, and realised the net sum of 20,020*l.* 16*s.* 3*d.*

Dr. Lushington thus concluded his judgment:— On the other hand, I shall hold that the master had a lien upon the cargo for freight and general average, if any. That the freight will be the sum contracted for by the charter-party, 11,251*l.* less the following deductions. 1. The advances. 2. Commissions (if any), interest, and insurance. 3. The proportion of freight forfeited for breach of the guarantee in the charter-party as to the capacity and draught of the vessel. 4. The proportion of freight that would have been payable in respect of the goods jettisoned, and the goods sold at Mauritius, if these goods had been brought to their destination. I shall refer it to the registrar and merchants to take an account thereof, and to ascertain the net freight due on the principles stated in my judgment, taking into consideration the amount which has been paid on account of freight by the plts. during the progress of the cause, and the period at which it was paid. I shall also refer it to the registrar and merchants to ascertain the amount (if any) due from the owners of the cargo in respect of general average. On the other hand I shall hold that the plts., under the provisions of the Admiralty Court Act 1861, is entitled to damages

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in respect of—1. The goods jettisoned. 2. The goods sold at the Mauritius. 3. The non-assortment of the cargo at Liverpool. 4. The loss of interest occasioned by the wrongful withholding of the cargo. I shall direct the registrar, with the assistance of the merchants, to assess these damages, and having done so, to take an account between the parties, and to ascertain the balance due, and to which of them. They will also report to the court, whether any, and if so, what interest is properly due on this balance, and for what period.

The present appeal was brought against that judgment to Her Majesty in Council.

Brett, Q. C. and Cohen, for the apprs., contended that the stipulation as to tonnage amounted to an undertaking that the vessel should carry 3000 tons in salt water only: (*Past v. Dowie*, 33 L. J. 172, Q. B.) The jettison was the result, not of the pilot's negligence, but of the perils of the seas. There can be no deduction from the freight, for it was an entire sum for the whole voyage outward and home, and cannot be apportioned:

The Solvay, 7 L. T. Rep. N. S. 440;

Mayer v. Dresser, 10 L. T. Rep. N. S. 612;

Dakin v. Orley, 10 L. T. Rep. N. S. 268.

The plt. made no tender, and nothing was done by the defts. to waive tender.

Lush, Q. C. and F. Lushington, for the resps., referred to the following authorities as to the negligence of the pilot:

Davis v. Garrett, 4 Moo. & P. 540;

Stordet v. Hall, 4 Bing. 607;

Lloyd v. Iron Screw Navigation Company, 10 L. T. Rep. N. S. 586.

As to deductions from freight:

Bright v. Copeger, 1 Brown, 21.

As to waiver of tender:

Kerford v. Mondel, 28 L. J. 303, Ex.

Curr. adv. vult.

Sir E. V. WILLIAMS.—This is an appeal from a judgment of the High Court of Admiralty in a suit instituted under the 6th section of the Admiralty Court Act 1861 (24 Vict. c. 10), by which it is enacted that "the High Court of Admiralty shall have jurisdiction over any claim of the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of, the owner, master, or crew of the ship, unless it be shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." The plt. sued, under this section, as the assignee of bills of lading. The defts. are the owners of the *Norway*, an American vessel; and plt.'s petition complained (*inter alia*) that the master of the *Norway* wrongfully threw overboard part of the rice comprised in the bills of lading, and wrongfully sold a further part of the rice at the Mauritius. And further, that on the arrival of the ship at Liverpool the master wrongfully demanded to be paid 6500*l.* as freight, and an additional sum of 1000*l.* by way of general average contribution as a condition precedent to the delivery of any part of the cargo, and refused to deliver the cargo on any other terms. The petition contains other complaints as to the master of the *Norway* refusing to discharge at the docks at which he was directed to discharge, and also as to improperly dealing with the cargo in other respects after arrival in Liverpool. But it is unnecessary to do more than state that the petition contained such complaints, because the judge of the Admiralty Court decided that they were ill-founded, and the plt. has not appealed from that decision. The defts.

answer denies many of the allegations of the petition, and justifies the jettison and sale of portions of the rice on the ground that it became, by reason of the perils of the seas, necessary and proper for the preservation of the ship and cargo to throw part of the rice overboard, and to sell another part which had been greatly damaged by salt water. To this part of the answer the plt. replies merely by denying the averments contained in it. The answer concludes by praying that the judge will dismiss the petition with costs, and will decree that the plt. should pay to the defts. the balance of freight and general average due to the defts., and interest thereon. The learned judge below, in a most elaborate, lucid, and able judgment, has gone through all the points arising in the cause which ought to decide the claims of the parties. And we think we cannot do better than to follow his judgment, and state in what respects we agree with him and in what respects we differ from him. The first question is, what is the meaning of a guarantee in the charter-party that the vessel shall carry 3000 tons dead weight upon a draught of twenty-six feet water? And the materiality of this question arises from this, that she could carry the specified quantity on the specified draught in salt water, and could not in fresh. Does the guarantee then apply to salt water only, or to water fresh as well as salt? We think it applies to water fresh as well as salt. We think the learned judge below was right in inferring from the charter that in settling the stipulations as to the capacity and draught of the ship, both parties contemplated that the cargo might be loaded in a river, and that the guarantee meant that the vessel should be capable of carrying 3000 tons on a draught of twenty-six feet during the whole time of taking in, and until and after she reached the open sea. The next question is, whether the jettison of a portion of the cargo, and the sale of the damaged portion of it, have been sufficiently shown to have been the consequence, legally speaking, of negligence or want of skill on the part of the pilot, for which the shipowner is responsible. It was objected on the part of the defts., that even supposing that the grounding of the *Norway* was properly attributable to the misconduct of the pilot, yet that the injury thereby sustained by the vessel was not either the *causa proxima* or *causa efficiens* of the jettison or sale, inasmuch as it appears that the leak thereby occasioned would not, in fact, have rendered the ship unworthy but for the tempestuous weather which occurred some time after the *Norway* had proceeded on her voyage, and, moreover, that the damage to the rice sold, which necessitated the sale of it, would not have happened but for an accident to the steam-engine, which rendered it useless in working the pumps. It is, however, unnecessary, in the view we take of the case, to express any opinion as to this contention, because we have come to the conclusion that there was not sufficient evidence that the grounding of the vessel was occasioned by any misconduct on the part of the pilot. The evidence on which the learned judge in the Court of Admiralty relied as leading to the conclusion that the grounding was caused by negligence or want of skill in the pilot is merely, or mainly, the expression of the opinions of Capt. Ward, Capt. Dicey, and Mr. Duncan, that a pilot of ordinary skill and ordinary prudence might have safely navigated such a vessel to the sea. This testimony does not go further, in our opinion, than to show a reasonable possibility that the grounding may have been caused by want of skill or want of prudence on the part of the pilot. But there is no evidence given, and no suggestion made of any conduct of the pilot which amounted to such want of skill or of care. The ship was of large size and loaded as heavily as she could

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bear. It was necessary, under the circumstances, to let her drop down the river stern foremost, and a steamer of sixty-horse power, which was not powerful enough to tow her down, was made fast to her alongside for the purpose of sheering or canting her so as to keep her in the stream, and the grounding took place while the steamer was thus employed. The master and the mate were not asked whether there was any impropriety in thus navigating her. The witnesses on both sides agree that the tide ran very strong (although there is a conflict of testimony as to the amount of its velocity). No suggestion is made on the cross-examination of the master or the mate of anything done or omitted by the pilot which he ought not to have done or omitted, and the master swears that the steamer could not hold the ship against such a current, and that the navigation appeared to him very difficult in that current with so large a ship. And it seems to us impossible to affirm with reasonable certainty that such a vessel so navigated might not have grounded from some cause which reasonable skill and prudence on the part of the pilot could not prevent. The plt. was bound to prove affirmatively, and not merely by way of conjecture, that the vessel grounded by reason of the pilot's want of skill or want of care, and we can find no such proof in the evidence he has adduced. It may be added that the silence of the petition as to any imputed negligence affords some ground for the deft.'s complaint, that this imputation took them by surprise, so that they were not prepared with the evidence of the pilot. The next question is, whether, in respect of the rice jettisoned and that which was sold, there ought to be a deduction from the lump freight because they were not delivered. We think that there ought to be no deduction. It is obvious that this question stands on a somewhat different footing from that on which it stood when it was decided by the learned judge below, because it was then taken for granted that the jettison and sale, and consequent failure to bring home the goods, were owing to the misconduct of the master. But in the view we take of this part of the case it must be understood that they were owing to the perils of the sea, and that the master was free from blame in the matter. Although the lump sum is called "freight" in the charter and bills of lading, yet we think it is not properly so called, but that it is more properly a sum, in the nature of a rent, to be paid for the use and hire of the ship on the agreed voyages. The charter-party expresses that a sum of 11,250*l.* is to be paid as freight for the "use and hire of the ship," and this lump sum is to cover both the outward and homeward voyages, without any distinction as to how much of it is to be attributed to the outward and how much to the homeward voyage. If this be so, the shipper has had the full consideration for the money agreed to be paid. The ship took out the salt, and received the rice on board, and performed her homeward voyage according to her engagement, and the event that by the act of God it became impossible to carry to the port of destination the rice jettisoned and the rice sold ought not to affect the shipowner's right to receive the full amount of the stipulated payment. It was objected on behalf of the resp., that by the charter-party, the remainder of the lump sum is made payable only "on true and final delivery of the cargo at the said port of discharge." But this does not necessarily mean that the whole cargo originally shipped must be delivered. It may well have been intended merely to fix the time for payment to be the time of the delivery of such cargo as the ship brings with her to the port of discharge. And it should be observed that the "one-third in cash" is made payable "on arrival at the port of

delivery," without any reference to the cargo the ship shall bring with her. It is right to add that we do not mean to express an opinion, that even if the jettison and sale had been attributable to the negligence of the master there ought to have been a deduction. Perhaps in this case the proper remedy of the shipper would have been by a cross-action. But it is not necessary now to decide this point, which does not now arise. The next question is whether the plt. has a well-founded claim for damages against the defts. for the non-delivery of the cargo; and this depends on the question whether the plt. was excused by the conduct of the master from making a tender of the freight for which the cargo was liable. We have felt considerable difficulty on this part of the case. It is clear that the master claimed more than was due to him. But it was conceded that this alone would not dispense with the tender. If, however, the demand of the larger sum was so made that it amounted to an announcement by the master that it was useless to tender any smaller sum, for that if tendered it would be refused, that would amount to a dispensation with any tender, generally speaking. And in the present case the Judge of the Court of Admiralty having come to the conclusion of fact, that the demand was made under such circumstances that it did amount to such an announcement, we see no reason for dissenting from the conclusion he has so drawn. But our difficulty is, that in this case there is positive evidence, in our opinion, that the plt. had resolved not to tender the amount unquestionably due; for his proposal was to pay a certain amount of the freight claimed, and to deposit the residue with a banker, as being a disputed portion. Now this residue was an amount to cover the whole of the alleged short delivery of 300 tons at Rangoon, where 2700 tons had been shipped instead of 3000; whereas, the learned judge below was of opinion that the plt. had no claim for deduction in respect of even so much as 100 tons, and against this part of the judgment there is no appeal. Consequently, it appears that the plt. meant that his tender of money to the master should not cover a portion of the claim which has turned out to be due. However, we are not prepared to hold that this varies the ordinary rule which we have stated as to dispensing with the tender altogether by announcing that it will be useless to tender anything less than the wrongfully large amount insisted upon. That the sum insisted upon in this case was wrongfully large, we think is plain; for without entering into the question whether the plt. was wrong in claiming the full lump sum, the claim of 1000*l.* for general average was altogether unfounded, as will appear when the estimate on which this claim is based is narrowly examined. The amounts which according to the master's estimate formed the subject of general average were: for expenses incurred by him at the Mauritius, 1530*l.*; for loss on the cargo jettisoned and sold, 1200*l.*; making a total loss, as the subject of general average, of 2730*l.* This amount had consequently to be apportioned between the ship, freight, and cargo. Then the master values the ship at 10,000*l.*, and the freight he takes at 7000*l.* then due. The cargo he estimates at 10,000*l.*, which seems reasonable, for although the cargo sold for 20,000*l.*, yet deducting the freight and the landing charges, and assorting charges, &c., the balance would probably not be much more than 10,000*l.* Assuming, therefore, the values to be correct, there is a total of 27,000*l.*, on which has to be apportioned the total of the losses, forming the subject of general average, viz., 2730*l.* By the rule of three this will give the proportions payable to the ship, freight, and cargo as follows: ship, 1011*l.*; freight, 708*l.*; cargo, 1011*l.*;

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total, 2730*l*. In other words, the owner of the ship, who is also the owner of the freight, has to pay as his proportion towards general average: for the ship, 1011*l*.; for the freight, 708*l*.; total, 1719*l*. But his losses, which form the subject of general average, are only 1530*l*., so that the amount payable by the owner of the ship and freight as his contribution to general average, is the difference between these two sums, or 189*l*. On the other hand, the owner of the cargo has to pay as his proportion 1011*l*., but his losses have been 1200*l*., so that he has to receive 189*l*. to make up the losses on account of general average sustained by him. The general average account would then be balanced by the owner of the ship paying to the owner of the cargo the sum of 189*l*. If this be so, then upon the master's own estimate of general average there was nothing due to him by the owner of the cargo on account of general average, but, on the contrary, he owed the owner of the cargo a sum of 189*l*. on this account. Being then of opinion that the peremptory claim for general average brings the case within the rule as to dispensation with the tender, it is unnecessary to consider the other ground on which the judge below came to the conclusion that the conduct of the master had exempted the plt. from the obligation of making a tender. It remains to be considered whether the plt. has a right to deduct "address commission" from the freight. The contest in the court below appears to have been confined to the question whether, by custom, the holder of a bill of lading comprising the whole of the cargo has a right to deduct the address commission from the freight, and the learned judge referred this question to the registrar and merchants. But in the argument before us the contention was that, assuming the custom to be so, the address commission was never earned, inasmuch as Bushby and Co., to whom the ship was addressed as the agents of the shipper, refused to accept the ship as agents, and never acted for the ship at all; but that Taylor and Co. acted as agents of the ship for the debts, who will have to pay them for so doing. Under these circumstances, we think the reference to the registrar and merchants ought to be enlarged by leaving it to them to inquire whether the plt., by his agents, so acted on the ship's behalf as to entitle him to the address commission. The last question to be considered is, whether the claim for damages for non-assortment can be supported? An objection to this claim was taken on behalf of the apps., that there is no mention of it in the petition. The answer made to this objection is, that this cause of complaint did not arise till after the petition was filed—an answer by no means satisfactory. But upon the merits of this question we think the plt. fails. We do not understand why he did not avail himself of the power conferred by the statute 25 & 26 Vict. c. 63, s. 67, to enter and land the goods himself. If he does not, but allows the master to do so, is the master bound to take steps to have the goods assorted, if the owner of the goods requires him so to do? If the master were to give orders for it, he would, we apprehend, render himself liable for the expenses of the assortment. No doubt the law is that such a bailee is bound to take as good care of the cargo as a prudent owner would have taken; but we have never heard of any case where the bailee was held to be bound to incur a pecuniary liability to procure an advantage for the subject of the bailment. His duty, we think, does not go beyond safe custody and protection from injury or damage. We therefore think that this claim cannot be sustained. According to our opinion on the various points arising in this case, the freight due to the owners of the Norway is the sum contracted for by the charter, less

the following deductions:—first, the advances; secondly, address commission (if found in favour of the plt. by the registrar and merchants); thirdly, the proportion of freight forfeited for breach of the guarantee in the charter-party as to the capacity and draught of the vessel. It should then be referred to the registrar and merchants to take an account and ascertain the net payment due on the principles we have stated, taking into account the amount which has been paid on account of freight by the plt. during the progress of the cause. On the other hand, in our opinion, the plt. under the provisions of the Admiralty Court Act 1861, is entitled to be indemnified for the loss of interest in respect of the wrongful withholding of the cargo, and to the claim for insurance and interest, but to nothing more. Therefore the registrar, with the assistance of the merchants, will have to ascertain the balance due, and to report to the court whether any interest, and if so what, is properly due on such balance; and we shall humbly recommend Her Majesty that judgment shall be given for the balance and interest thus ascertained. And that there shall be no costs on either side, either in the Court of Admiralty or here.

*Decree varied.*App's proctor, *Pritchard and Son.*Resp's proctor, *J. F. Elmslie.***V. C. WOOD'S COURT.**Reported by W. H. BENNET and R. T. BOULT, Esqrs.,
Barristers-at-Law.

May 17, 18, and 27, and June 16, 1865.

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McLELLAN v. GUMM AND OTHERS.

Mortgage—Priorities—Ship—Notice—American law—Registration.

A., a British merchant, purchased of an American in London, an American ship under a regular power of attorney, for sale from the owners in America. He was not made acquainted with any charges or incumbrances affecting the ship at the time of his purchase, nor did the certificate of registration, or any of the ship's papers, bear upon them any intimation of any mortgage which had been effected in America upon the ship. It was alleged that such was the almost universal practice in America, although not absolutely required by American law.

*B., a citizen of America, had a mortgage for 6000*l*. on the ship, and which was duly registered and recorded in the proper offices at Boston and Charleston.*

The captain of the ship, who navigated her to England, had also a mortgage for a lesser sum on the ship, duly registered. He had formerly held a power of attorney for sale of the ship in London, which not having taken place, this power was revoked by the one under which the sale to A. was completed:

*Held, upon the correspondence and evidence, that A. had the first charge for the 6000*l*. on the ship, the purchaser having constructive notice of the mortgage:*

Held also, that that which furnishes the title to a ship in America will furnish the title to the ship in this country.

These were two causes which came on for hearing together, the one instituted by Robert Camblet Hooper, an American citizen, as first mortgagee on an American ship the *Edward Everett*, against Mr. Charles Gumm and others interested in the ship; the other by Mr. McLellan, claiming to have a second mortgagee on the said ship, against the said Mr.

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Gumm, and the other parties interested. The first bill prayed that, the plt. might be declared entitled under a mortgage-deed of the 9th May 1860, to a first charge on said ship for the principal sum of 500*l.* sterling and interest secured thereby; for a sale of the ship (if necessary) and payment of his demand; and for an injunction to restrain the deft. Charles Gumm from dispatching her out of the docks at London, in which it was then alleged she was; from transferring or mortgaging same; from causing her to be registered as a British ship; and for the necessary accounts.

The general circumstances attending both cases were as follows. It appeared that on the 9th May 1860 Chas. F. Gardiner, a citizen of the United States, of Boston in Massachusetts, being the owner of the then newly-built ship, the *Edward Everett*, mortgaged it to the first plt. Hooper as a security for the loan of 25,000 dollars. On the 31st May 1860 Gardiner executed a second mortgage of the ship to McLellan, to secure a sum of 10,000 dollars; both of the mortgages being recorded in the office of the collector of customs at Boston, pursuant to the forms prescribed by American law. The ship arrived in England in June 1860; McLellan, who bought her over as master, holding a power of attorney from Gardiner to sell the ship and hold the proceeds for the mortgagees. No sale, however, was then effected, and the *Edward Everett* returned to America. In Jan. 1861 Charles F. Gardiner revoked the power of attorney given to McLellan, and executed another power of attorney, authorising his brother Henry D. Gardiner to sell the ship. On the 30th of Jan 1861 the deft. Gumm, who carried on business in London as a merchant in the American shipping trade, and had been engaged in several business transactions with the Gardiners and McLellan, purchased the ship for 10,000*l.*, without, as he alleged, any notice of the mortgages thereon. The Gardiners having become insolvent, the mortgage-debts of Hooper and of McLellan remained unsatisfied, and the main question in the causes was, whether the deft. Gumm, as a purchaser for valuable consideration without notice, was entitled, notwithstanding the existence of the respective plt.s' mortgages, to hold the ship; the contention of the respective plt.s. being, that the deft. Gumm was put upon inquiry, and could only, according to American law (which, it was contended, must govern the case), purchase subject to the mortgages, and that no title could be given to the ship until those mortgages were discharged.

The principal deft., Gumm, alleged that he paid the purchase-money for the ship to Henry D. Gardner, and possession was given; that no mention was made in the certificate, or any other of the papers of the ship, of her being subject to any mortgage or encumbrance, and that he had no notice whatever thereof; that the ship had been registered and rolled at Boston and Charleston in the sole name of Henry D. Gardiner; that the ship was sold and transferred to him by a clean bill of sale, under a power of attorney from Charles F. Gardiner to the said H. D. Gardiner, and submitted that he had complete title to the ship; that on the 29th August 1861 he had registered her as a British ship in the port of London, under the name of *Forest Rights*, conceding that she was now a British ship, and subject to British law; that by the law of America the rights of purchasers and other persons interested in American ships were not affected by anything that appears on the registry.

considerable body of evidence was entered into, oral and documentary, and particularly the opinions of eminent American lawyers taken upon the effect of the law of America as regarded charges on shipping.

counsel are fully set forth and alluded in the V. C.'s judgment.

*Rolt, Q.C., Sir H. Cairns, Q.C., E. K. Karlslake,
and Kekewich, for the plts.*

Lush, Q.C (common law bar), *Giffard*, Q.C., *Dickinson*, and *Druce* for the defts.

Rolt in reply.

June. 14.—The VICE-CHANCELLOR took time to consider his judgment, and on this day said:—In these two causes the bills are respectively filed by two mortgagees of an American vessel called the *Edward Everett*, each of them being duly registered; Mr. Hooper, as the first mortgagee, for a considerable sum, and Mr. McLellan for a smaller amount; the owners of the ship being Charles and Henry Gardiner, the ship itself being registered in America in the name of Charles Gardiner, on behalf of himself and his copartner. The question that arises in this case is this: how far Mr. Gumm, who appears to have purchased this ship from Henry Gardiner, under a power of attorney, with which Mr. Henry Gardiner was furnished, can now hold the ship discharged of either or both those respective mortgages. There are some points in the case which I may clear away at once, the real difficulty arising upon the facts, as given in evidence, which has occasioned most anxious consideration on the part of the court. The law of the case has not been much disputed on the part of the *plt. Hooper*. Regard being had to the American law with reference to vessels of this description, it was impossible for Mr. Gumm to say that Mr. Hooper is not, to the extent of his mortgage, the owner of the vessel, or that Mr. McLellan is not to the extent of his mortgage the owner of the vessel, if there were no other circumstances which entitled Mr. Gumm to say, as against Hooper and McLellan, that the right which they so had they had deprived themselves of by their conduct. That clears the case at once of a point which has from time to time occasioned considerable discussion; but it is now so far recognised, that that which is property in a ship, or any other description of property that is to be dealt with according to foreign law—that which is property in a ship, and that which furnishes the title to the ship in America, will furnish the title to the ship in this country. Mr. Hooper will, therefore, be entitled to sue at law in trover for this vessel, and become the master of it; at all events, to the extent of his mortgage, and would have the power of dealing with this vessel. In the course of the argument for the *deflt.* this question was raised, that Mr. Gumm was a purchaser without notice, and that although it must be admitted that his right was only an equitable right, still his right was to be protected in this court. I apprehend with reference to the question of mortgage, that is disposed of by the case of *Collier v. Finch*, where the question was a good deal considered, how far the right of a purchaser without notice, having only an equitable title, could be set up in the case of a person having a complete legal title, and who therefore had it in his power to make himself owner of the property, is only at law owner in the sense that he can only have the ship or the value of it in trover; how far he can come into equity to prevail against another having an equal equity when he comes merely to have the accounts taken and adjusted, and instead of bringing his action of trover for the entire ship, merely to have the accounts settled. That was the view which the M. R. took in *Collier v. Finch*, which was confirmed by Lord Cranworth in the H. of L., as reported in 5 H. of L. Cas. It appears to me that that part of the case is out of my consideration, and that it would be unnecessary to

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me in this respect to consider whether Mr. Gumm had, or had not, notice of these several charges. I come now to what is really the substance of the case. The ship has been sold under a power of attorney vested in Henry Gardiner by Charles Gardiner, as his copartner, in whose name the ship was registered in America, and under that power of attorney, the ship having been sold, of course it would not be in the power of the mortgagor to maintain a title, unless his mortgagees have in some way or other adopted the agency of Henry Gardiner. I think the case cannot be put as high as the *plt.* sought to put it in his argument. He contended that, whether Hooper and McLellan had or had not notice of the power of attorney with which Henry Gardiner was furnished; whether they have or have not concurred in his being sent to this country armed with that power, still it would be the duty of those who purchased the ship to ascertain by reference to American law that the title was clear, or at all events to make themselves owners of the mortgage by taking proceedings that the money should be so placed as not to be in the control of Mr. Henry Gardiner, but to be placed *in medio* for the purpose of answering the mortgage-debts, inasmuch as it is said they could not acquire, were they in America, a complete title to the ship without displacing the mortgage, and without clearing that off the register, and that could not be cleared without the concurrence of the two mortgagees. But it appears to me that upon the whole of the transaction, as the *plt.* Hooper was aware of the power being conferred on Mr. Henry Gardiner, and had allowed him to come to this country armed with the power for the purposes of the sale, regard being had to the whole of the conduct of Mr. Hooper in the case of sales of ships which were built by the Gardiners, it would be impossible for him to say that he had not authorised Gardiner to deal with it, and so dealing with it, receive the money. It becomes therefore necessary to ascertain how far he was or was not aware of Henry Gardiner having been armed with this authority. The reason I should have held him to have been bound, if he were proved to have known that Henry Gardiner was so armed, is this: he had on previous occasions undoubtedly—he does not dispute it—authorised Henry Gardiner to sell, and to give what is called “a clean” bill of sale, and he had done it in a very marked manner. There had been a ship called the *Leaping Water*, built for the purposes of sale by the Gardiners, in the same way as the *Edward Everett*, and with regard to that ship, Mr. Hooper thought it right to take the precaution of indorsing on the certificate of register the certificate of his mortgage, a precaution not otherwise necessary, according to American law, but one which would of course facilitate his object of having complete security, and preventing any misdealings with the ship at any further epoch. That had been found inconvenient with reference to the sale, and he seems undoubtedly to have been engaged with the Gardiners in the ship, advancing them money for the purpose, and looking to the sale of the ship as the mode of securing his money; and he had on a second occasion been remonstrated with by Mr. Henry Gardiner in consequence of the difficulties he had with the mortgage not having been entered upon the ship; he had agreed to let him have two ships which were to be sold in connection with Mr. Henry Gardiner, treating Mr. H. Gardiner as authorised to sell the ship, and as his agent throughout. In this particular case I have an exact analogy as regards the power first vested in Mr. McLellan. Hooper sends out McLellan with a power not executed by Mr. Gardiner, but executed by the mortgagor, and furnished with the declaration by which McLellan authorised the Gardiners

to dispose of the ship, and instructed them to dispose of the money in favour of the mortgage. He sends him out with the power executed solely by the mortgagees, and Mr. Hooper admits, as far as McLellan is concerned, that he intends McLellan to sell absolutely freed and discharged from his mortgage, and intends McLellan to receive the money. I think, therefore, it having been proved that Henry Gardiner had with the knowledge of Hooper been furnished with this power, the case would have been one in which Mr. Gumm's right must have prevailed against the mortgagees. Now, unfortunately, this part of the case is involved in considerable contradiction of evidence. On the whole, upon that part of the case, I do not think that Mr. Gumm was fixed with positive notice of Hooper's mortgage. This notice is not of importance with reference to the claim of the purchase without notice, but it is important to show whether Mr. Gumm had or not such direct notice as would entitle Mr. Hooper to say, “Whatever authority I may be supposed to have given to Mr. Gumm, you must have known he had no authority for this purpose, because he knows of my mortgage.” That I think cannot be said. How would it stand assuming that Mr. Hooper had no knowledge of Mr. Gardiner's authority? It would stand thus: in the year preceding the sale McLellan is furnished with authority as attorney to sell, which is signed by the mortgagor. At the same time Charles Gardiner, on behalf of himself and his partner, signs an authority to McLellan to pay 6000*l.* to Messrs. Barings to the account of Mr. Hooper, the present *plt.*; therefore, Hooper had this security—he had a man in whom he had confidence, McLellan. McLellan had a mortgage of his own, which might give him additional confidence in the matter that McLellan would do what was right; then McLellan, although furnished with a power by the mortgagor alone, went out with the sanction of the mortgagee Hooper, but coupled with this, that the mortgagor had parted with all authority over the money to this extent, that McLellan would receive it and not they, and that McLellan was positively instructed to pay off the *plt.*'s mortgage. That would give security for Hooper, provided McLellan acted honestly, and he had a right to trust McLellan obeying those instructions which were so sent out. Then what took place afterwards is this:—I pass over the attempts to sell in the year 1860, which failed. Then McLellan comes back to America in 1861, Henry Gardiner being absent. The reason of McLellan being trusted, as in a great measure he says he was, was because of Gardiner's absence. Henry Gardiner might have been trusted had he been on the spot; he was absent in Australia. McLellan therefore came over and remained in England. After Henry Gardiner had arrived in England, and he being then superseded in 1860, there is no attempt to supersede McLellan, no attempt to revoke those instructions which McLellan had, and he alone, but only when the matter came to be dealt with afterwards, it was thought right to send him on to England furnished with the same powers as he had before without their being revoked. He sails about the middle of Jan. 1861, and then this remarkable correspondence takes place, just before the starting of McLellan. He seems to have had some misgivings as to his own security, and whatever confidence Hooper had in the Gardiners, McLellan does not seem to have participated to the same extent. He writes thus to New York to Hooper:—“I have learned since being here that the ship could only be sold by accepting, say 50,000 *dols.* It is now decided that I take her to London as before. The ship is nearly loaded now, and I expect will be ready for sea next Thursday. I will be much

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obliged to you." This part of the letter shows a little distrust. "I will be much obliged to you if you will see that all my papers are as they should be, including insurance, &c., and interest on the note which is with you inclosed in mortgage." This is remarkable, that that letter did not authorise McLellan. He seems to have been a man of simple mind. A good sailor, I dare say, but not so much a man of business, because he seems puzzled with this observation, and says, "You have a letter advising you to pay the money to Baring's. I have no letter authorising me to take so much of the proceeds as you have, and my power of attorney most likely will be void this time I shall be pleased to hear from you before leaving here." That letter is answered by Mr. Hooper from Boston, thus, in a letter of the 9th Jan. 1861: "Dear Sir,—I have just received your favour of the 7th inst., and am pleased to receive it. I shall keep its contents, and your having written me entirely private. If the ship is sold in England, you will execute the sale, as you have the power of attorney to sell, but when you do so you must receive 8000*l*., and the same must be placed, or rather 6000*l*. of the amount, to my credit, and I will write to you at London, whether to place it at Messrs. Geo. Peabody and Co., or Messrs. Baring Brothers and Co. Your 2000*l*. you can also have placed to my credit, if you wish, and I will draw for it, and hold the proceeds subject to your order, but do as you please entirely. I sincerely hope the ship will be sold in London." Now, of course, a man cannot make evidence for himself. This is in one sense not evidence for the *plt.*, but as part of the *res gesta*. I think it may fairly be taken into consideration, and that I may fairly read this as showing the views of the parties at the time of the transaction taking place before Henry Gardiner had the power of attorney. It appears clearly that McLellan had some little misgivings about the mortgages; that he was anxious about his 2000*l*., as he has no authority for dealing with that money as he supposes, and Mr. Hooper, who was a man of business, and does not seem to care about it, says: "They cannot get on without you; you are the man to sell; you must take all the money; and when you take the 6000*l*., take it as I direct you, pay it all to Barings, and then your own 2000*l*. you may either pay to my account or pay it to your own; look after yourself." That of course was a very natural and reasonable mode of dealing with it. There is another letter of the 11th Jan. which comes in answer to that just read, in which McLellan says: "Dear Sir,—Your favour of the 9th is received. You say that I have a power of attorney to sell, &c., which is true: but I have been under the impression that Capt. H. D. Gardiner, who goes out to England, might have possibly a like power of later date than mine. Address to the care of Charles Gumm, Change-alley, London. I hope, as you do, that the ship will be sold this time in London, and I think she will, as Capt. Gardiner says we will sell her sure this time. The register has not been changed at all since first made in Boston." In this state of things there is this strongly pressed upon me, as evidence of the *plt.*'s having knowledge of the subsequent power of attorney given to Henry Gardiner revoking the power to McLellan. [The V. C. here went into a comparison of the personal evidence given by several of the witnesses, and the amount of interest which they had in the result of the suit, and continued:] Let us look, however, to the documents, for they are safer things to trust to than anything else. The letter of McLellan's of the 11th Jan. was not answered by Hooper till the 12th Feb. It is written in Boston and sent to McLellan in London: "Dear Sir,—Your favour of the 11th Jan. was duly received, and I have nothing to add to what I wrote

you on the 9th ult., to which please refer. . . . If the ship is sold in London, you will have 6000*l*. to place to my credit with Messrs. Geo. Peabody and Co., or Messrs. Baring Brothers and Co., as may be preferred by Capt. Gardiner." I pause here for a moment, because it is pressed upon me by the *deft.*, that the words "as may be preferred by Capt. Gardiner" indicated a notion that Capt. Gardiner was the person to deal with it and to sell. On the contrary, it appears to me to be exactly consonant with what actually takes place. Mr. McLellan had the power of sale, and Mr. McLellan was to pay, by order of Mr. Gardiner, to Barings, the 6000*l*. Mr. Hooper seems to prefer Messrs. Peabody, and therefore writes as he did. The Gardiners had a right to say it must go to Barings, and their instructions are to pay it to the account of Mr. Hooper, at Barings. It is perfectly consistent with the general power and instructions that Mr. Hooper should write this letter on the 12th Feb. and say, "Pay the 6000*l*. either to Peabody or Barings, as Capt. Gardiner may prefer." [The V. C., having gone through other parts of the documentary evidence, said:] I think therefore that, regard being had to all the documents, it is impossible to think that Mr. Hooper was aware for one moment that the authority had been revoked, and that Mr. Henry Gardiner had been substituted, and if so the claim must prevail, subject to one single word upon the *deft.* Mr. Gumm's position, in which he says, "If you had only written me in time when you did know that something was going on wrong, I should have ceased to make advances, and should have ceased to have put myself in the position I am now placed in;" but upon the whole I think, as regards Mr. Hooper's case, he is entitled to the relief which he asked." As regards Mr. McLellan, his case rests upon different grounds; but after a full consideration of the whole of the evidence in his case [which the V. C. referred to at length], I am compelled with great reluctance to dismiss his bill without costs. As to Mr. Hooper's bill, the decree will be, a declaration that (according to the first part of the prayer of his bill) he is entitled to a charge on the ship *Edward Everett*, as against the *defts.* for the principal money and interest secured by the deed of the 9th May 1860; and take an account of what is due for principal and interest on such charge; and then, in default of payment within a month from the date of the chief clerk's certificate, a sale of the ship; and in the meantime the *deft.* Gumm, his servants and agents, to be restrained from dealing with the said ship, or from transferring or mortgaging her. The mortgagee's costs to be added to the amount of the security. There will be separate decrees in the two causes.

Decrees accordingly.

Solicitors, *Freshfields and Newman; Cotterill and Sons.*

ADMIRALTY COURT.

Reported by ROBERT A. FRITCHARD, D.C.L., Barrister-at-Law.

May 18, 23, and 30, and June 20, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE VICTOR.

Possession—Repairs—Sale.

The necessity which gives the master an implied authority to sell his vessel abroad must be created by, and depend upon, the particular circumstances of each case.

*The vessel was at the Cape of Good Hope, and in need of extensive repairs. The master had no credit, and the ship's agents there had a claim of 300*l*. against her, and threatened arrest. The master was unable to repair the ship, even temporarily, so as to bring her to*

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ADM.]

England, and the necessary delay of three months to enable the master to communicate with the owner in England would have been prejudicial to the vessel. The master therefore sold her at the Cape:

Held, that, under the circumstances, an adequate necessity existed for the sale, and that therefore the transfer was valid.

In 1862 the schooner *Victor*, belonging to her master, Jarvis, was lying in Table Bay in need of repairs, and the master, having no means of repairing her, left her there and came to England, where he sold the vessel for 150*l.* to his brother, the plt. William Jarvis, a wine-merchant in the Minorics, who immediately caused himself to be registered as sole owner, appointed his brother as master, and sent him back to the Cape with instructions to employ the vessel in the coasting trade there. On arrival at the Cape the master sold the vessel for 135*l.*, at public auction, to the deft. Capt. Hawksley, who brought her to this country, and the present suit was then instituted by the plt. William Jarvis, to obtain possession of the vessel notwithstanding the sale at the Cape.

Deane, Q. C. and V. Lushington for plt.

Brett, Q. C. and A. Cohen for deft.

DR. LUSHINGTON.—In this case Mr. W. Jarvis, of the Minorics, seeks to recover possession of the vessel *Victor* from Mr. Hawksley, of Peckham, who was actually in possession of the vessel when she was arrested by process from the court. Mr. W. Jarvis claims to be owner by a purchase from his brother, Thomas R. Jarvis, whom I shall hereafter call Capt. Jarvis, and that purchase took place on the 5th Feb. 1863 for 150*l.*, whilst the vessel was at the Cape. Mr. Jarvis alleges that he sent his brother (Capt. Jarvis) to the Cape to take possession and navigate her as master according to his directions, and that Capt. Jarvis, without necessity, sold the vessel to the deft. Of course this last statement, that the ship was sold without necessity, is denied by the deft., but he also raises what I may call a preliminary defence in the following terms: "The purchase of the schooner *Victor*, alleged to have been made by the plt., was not such an absolute and *bonâ fide* purchase by the plt. as to give him a good title to the schooner as against the deft." It is clear, then, that there are two questions: first, the title of the plt. to maintain the action; second, the validity of the sale to the deft. at the Cape of Good Hope. I must consider the right of the plt. to sue as the first question to be disposed of, for if I decide it against the plt., there is an end of the case. There is, I think, some obscurity as to the terms in which the deft. states the defect of the plt.'s title. I perfectly understand that the title of the plt. may be denied altogether; but I do not understand how this can be; if I dare use the expression, a mitigated title, not absolute, not *bonâ fide*, not altogether bad, but only bad as relates to the present deft. I consider that I have no means of deciding this point, but by proceeding straightforward to the question—Did Mr. W. Jarvis really and *bonâ fide* purchase this vessel, or is the alleged sale from his brother to him an empty form, or only a security for the debt Capt. Jarvis owed to W. Jarvis, or was it collusive? Capt. Jarvis is dead; we must not look, then, for other testimony. What was the probability of the case, looking to all the facts, the undisputed facts? I am of opinion that it was probable that Capt. Jarvis should wish to sell the vessel. The vessel had lain at the Cape from Oct. 1862, unemployed, in a state of great disrepair, producing no return, but entailing great expense. She was lying in Table Bay, without any protection, if not in danger, respecting which there is a conflict of

evidence, and a certain degree of deterioration must have taken place. The owner (Capt. Jarvis) was considerably in debt to Searight and Co., merchants, at the Cape. Whether or no there was a lien on the vessel is another consideration. Capt. Jarvis, it is clear from the evidence, had no means to repair her, no credit with Searight and Co., who were his agents. I have no evidence why he did not proceed to sell at the Cape, and to liquidate Searight's demand, and I must not act upon conjecture. I have also no direct evidence why he came from the Cape to England; but I think that all the correspondence, and all the *res gestæ*, show that he was in difficulty and embarrassment. It seems to me, then, quite consistent with probability that Capt. Jarvis should be willing to sell the ship, nor do I see any improbability in the plt. Mr. W. Jarvis being the purchaser. Who, except a brother, would purchase a ship in the condition this was, which had been lying at Table Bay from Oct. 1863? Capt. Jarvis was in embarrassment—indeed, without such a sale his prospects were absolutely desperate; and, moreover, his embarrassment, as his brother believed, had been brought about by his own extravagance and improvidence. Then, were the terms of the purchase so extortionate as would justify the court in holding the sale void on that account? It might be difficult to say what was the value of a ship in this predicament. The price was 150*l.* Five months later she sold at auction for 135*l.* This fact alone, I think, would rebut any supposition that the price was so much below the value as to savour of extortion. Moreover, it must have been rather a bold experiment to purchase a ship known to be out of repair, lying exposed at Table Bay. In truth, if by the law of the Cape Messrs. Searight could have arrested and sold her for their debt, the ship was of no value at all. I certainly cannot hold that this transfer from Capt. Jarvis to his brother was void on account of the small amount of the price. Then, as to the payment of the consideration. It is said that no money was paid down, which I believe to be the truth. The consideration on behalf of the plt. is alleged to have been, first, a certain quantity of ale sent to the Cape, the proceeds of which were to become the property of Capt. Jarvis, the value being estimated at 85*l.* 2*s.* 6*d.*; secondly, the cancelling of a debt of 50*l.* due to W. Jarvis for moneys advanced to Capt. Jarvis and his wife; and thirdly, a sum of 15*l.* paid for Capt. Jarvis's passage to the Cape. These sums make up altogether about 150*l.* Upon the whole, I am of opinion that this was a sale by necessity, and that neither by law nor by justice am I bound to deprive the deft. of the property of which he was the *bonâ fide* purchaser. My decree must be in favour of the deft., and necessarily with costs.

Saturday, July 29, 1865.

(Before Dr. LUSHINGTON and TRINITY MASTERS.)

H. M. S. SUPPLY.

Damage—Sailing regulations—Her Majesty's vessels. Though Her Majesty's vessels are exempt from compliance with the new sailing regulations (issued in pursuance of the Merchant Shipping Act Amendment Act 1862), yet, by order of the Board of Admiralty, instructions precisely in accordance with such regulations are issued to persons in charge of Her Majesty's vessels.

This suit on behalf of the master, owners and crew of the late schooner *Bruckenhofne*, of the port of Goole, and on behalf of Messrs. Peto, Brassey and Betts, the owners of her cargo, was instituted in respect of a collision which took place between the schooner

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THE D. JEX.

[ADM.]

and Her Majesty's ship *Supply*, about 2 o'clock a.m. of the 21st April last, both vessels being in the English Channel off the Isle of Wight. The case on behalf of the schooner was, that she was close-hauled on the port tack (heading E.S.E. with the wind from the N.E.), and all three lights of the steamer were observed about three miles off, a little on the port bow. Shortly afterwards the red light was shut out, but soon again became visible, and when the steamer got broad on the schooner's port bow, the steamer's helm was suddenly starboarded, and thereby the vessels were brought into collision, the stem of the steamer striking the schooner on the port bow just before the fore rigging. The schooner sank shortly afterwards.

On behalf of the deft. it was contended that the schooner was first seen from the steamer when distant about a quarter of a mile, and from one and a half to two points on the steamer's starboard bow. The schooner had no lights visible. The helm of the steamer was put hard a-starboard, the engines were stopped and reversed, but the schooner suddenly opened her masts, and the collision took place.

Brett, Q. C. and Pritchard appeared for the plts.

The *Queen's Advocate* and the *Admiralty Advocate* for the deft.

Dr. LUSHINGTON, addressing the Trinity Masters, said:—Gentlemen, there are two questions for our consideration in this case: first, whether the steam-vessel was in any respect to blame; and secondly, whether the schooner to any extent contributed to the collision. As to the first question there can, I think, be little doubt. Notwithstanding the evidence for the defence, it is clear that the schooner had her proper lights duly fixed and burning; and therefore, if due vigilance had been used on board the *Queen's* ship, the lights would have been seen. Again it appears that the steamer, though manned by a crew of fifty-six men, had only one man forward on the look-out, and he was on the bridge, no one being stationed on the fore-castle. The schooner was, I think, seen only at the last moment, when the orders that were given to put the helm hard a-starboard and stop and reverse the engines were too late to avert the collision. As to the second question, whether the schooner also contributed to the accident, it becomes important to consider what were the rules of navigation that should have been observed by both parties. Though it is quite clear that the ordinary sailing rules issued in pursuance of the Act of Parliament are by the terms of the Act not applicable to Her Majesty's vessels, still it is the duty of those who navigate such vessels to take proper precautions for avoiding a collision, and where, as in this case, Her Majesty's vessel—a steamer—is approaching a sailing vessel in such a manner as to involve risk of collision, it is the duty of the steam-vessel to keep clear. But I am of opinion that the schooner was at all events bound by the sailing regulations, and accordingly it was her duty in compliance with those rules to keep her course, and not by any manœuvre on her part to neutralise the operation of the steamer. Is it then the fact that she kept her course? It is stated by all the witnesses for the plt. that she did, and it is not denied by the witnesses for the defence, but it is contended that from the mode in which the collision took place (the blow leading forward), and from the circumstances sworn to by the plts.' witnesses as to the shifting of the lights, it is impossible but that the schooner must have ported. Are then these facts, which are admitted by the plts.' witnesses, such as necessarily contradict their direct testimony to the contrary, and does the direc-

tion of the blow tend to convince you that the schooner's course must have been altered?

The COURT, after deliberation with the Trinity Masters, was of opinion that the *Supply* was solely to blame and decreed accordingly.

The *Queen's Advocate*.—Perhaps it may be useful for me to state that, though those in charge of Her Majesty's vessels are not bound by the ordinary sailing regulations, instructions are issued to them which are precisely in accordance with those regulations.

The COURT.—It appears then that, when a sailing vessel is approaching a steamer within risk of collision, those on board the sailing vessel may expect, though for different reasons, the same course to be adopted by the steamer whether belonging to Her Majesty or otherwise.

THE D. JEX.

Wages—Accounts—Master part owner—Merchant Shipping Act 1854, sect. 191—Admiralty Court Act 1861—24 Vict. c. 10, sect. 10.

In a suit for wages between an owner and the master, who is also a part owner, the court can take no cognisance of a claim by the master to an equitable share in the vessel.

This case raised the question whether, in taking the accounts in a suit for wages between a master and his owner, the court can take cognisance of an equitable claim by the master to a share in the vessel. The suit was originally for wages, and the owners having set up a counter-claim, the accounts were referred in the usual manner to the registrar and merchants, and, pending this reference, the court was, on the 13th inst., moved on behalf of the plt., the master, for leave to amend his claim in respect of an equitable share and interest in the vessel, and so increase the amount of the action. The following are the sections referred to in the title.

Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages; and if, in any proceeding in any Court of Admiralty, or Vice-Admiralty touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due: (Merchant Shipping Act 1854, sect. 191.)

The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship, provided always, that if in any such cause the plt. do not recover fifty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein unless the judge shall certify that the cause was a fit one to be tried in the said court: (Admiralty Court Act 1861, 24 Vict. c. 10.)

V. Lushington for the plt.

Deane, Q. C. for the deft.

Dr. LUSHINGTON.—This was originally a cause of wages, and there was a reference to the registrar and merchants to take accounts. A motion is now made to the court by the plt. for leave to amend his claim by adding a claim in respect of his equitable share and interest in the vessel *D. Jex*, and furthermore, to increase the amount of the action in a decree warrant, and arrest the vessel. This vessel was originally built in New York, in the year 1858. She was owned to the extent of seven-eighths by Josiah Jex, who lived in New York, the remaining

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eighth belonging to Manuel Guide. Guide sailed as master with this vessel, and in the year 1861 it was deemed convenient by Josiah Jex that this vessel should assume a British character, and accordingly he conveyed to his brother John Jex, of Honduras, his seven-eighth share, and, according to the affidavit of Guide, sworn on May 4, Josiah Jex also conveyed the remaining eighth share without Guide having received any consideration therefrom. Such is the statement of the 5th paragraph. The vessel was accordingly registered as a British vessel, and as such came to this country in Nov. 1864. Mr. Josiah Jex caused the master to be deprived of his command. The master then instituted this suit for his wages, and the question is for the court to decide whether it can permit him to sue for the value of his one-eighth share mentioned in his affidavit. On behalf of the plt. reference is made to the 191st section of the Merchant Shipping Act. [His Honour then read the section.] Now what is the meaning of the words "to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding?" It will be observed that it was only in case of a set-off or counter-claim that this power was conferred upon the court. It is true that in this case there has been a counter-claim, but it appears to me that the intention of the Legislature was not to refer to this court the decision of all questions which might exist between the parties on matters entirely foreign either to wages or disbursements. The object of this section was to enable the court to do justice where the owners set up a counter-claim with reference to the ship or her disbursements. All these are matters properly cognisable by the Court of Admiralty; but the wide exposition set up by the plt. might include matters wholly foreign to its jurisdiction and to the decision of which it is unaccustomed. I am of opinion, therefore, that this motion cannot be supported under the 191st section of the Merchant Shipping Act. The 10th section of the Admiralty Court Act 1861 (24 Vict. c. 10) has reference only to disbursements, under which head this cannot be classed. The motion therefore must be rejected, but without costs.

UNITED STATES DISTRICT COURT OF ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate in Admiralty.

SOUTHERN DISTRICT OF NEW YORK.

ZACHARIAH R. JAMES AND OTHERS v. THE SCHOONER SARAH A. BOICE.

Salvage—Embezzlement—Work and labour.

Where a vessel, having been captured by a privateer and plundered, was suffered to go adrift without a crew, and, drifting near the shore, was surrounded by the libellants in small boats and plundered of everything they could, till she grounded on a bar and remained there for some days, the libellants then taking possession of her, and, after she came off the bar and had grounded in the inlet, her owners came, and, with the libellants' assistance, got her off:

Held, that the libellants could not maintain an action of salvage for what they had done;

But, as the owners had offered to pay the libellants for what they had done, the Court allowed them to recover in this action a quantum meruit for work and labour, but without costs.

This was an action for salvage. The libel alleged that, on Aug. 17, 1864, the libellant James discovered the schooner, dismasted and apparently deserted, lying on the bar at the mouth of the inlet at Jones'

Beach, on the south shore of Long Island, whereupon he boarded her, and found her to be the *Sarah A. Boice*, of Great Egg Harbour, N. J., with her hold filled with water, dismasted and abandoned by her master and crew, stripped and dismantled; that accordingly he took possession, and, with the aid of the other libellants, succeeded at great risk and peril in getting her over the bar and into the inlet, and that he kept possession of her till Sept. 12, when she was removed by the owners. It alleged that the vessel was worth about 5000 dollars, and claimed to be allowed salvage as in a case of a derelict.

The answer alleged that about the 11th Aug. the schooner was captured by the privateer *Tallahassee*, about thirty miles south-east from Fire Island; that her officers and crew were taken from her by force, and the schooner was, after being robbed of furniture and stores by the privateer, left adrift, with her masts and rigging standing, and that she was carried by the wind and waves to the mouth of the inlet at Jones' Beach, where she grounded on the bar on Aug. 17; that she remained there till the 23rd Aug., when she worked off on a full tide, and floated into the inlet, where she grounded and remained till she was got off by the claimants; that on Aug. 27 the claimants heard that the libellant James, who was wreckmaster under the statute of the State, was claiming to hold the schooner with the other libellants; that they went there and found she had been greatly plundered by the persons claiming to hold her; that they thereupon took possession of her and got her off themselves. The answer also denied that the vessel was derelict, and averred that the libellants had been exposed to no peril, nor was the vessel in peril while the libellants committed these depredations upon her, and that the conduct of the libellants was not with a fair and honest intent to save the vessel for her owners, but with the design to embezzle the entire property, and appropriate it to themselves.

The evidence showed, that when the libellants fell in with the vessel she was adrift, and partially despoiled of her equipment and lading. It was notorious in the vicinity at the time that the vessel had been brought to that condition by capture by the *Tallahassee*, which subsequently landed her master and crew on the south side of Long Island.

As soon as the vessel was discovered thus abandoned, she was surrounded by numerous boats and small craft (many of them managed by some of the libellants), which eagerly purloined every article that could be torn away from her stealthily or by violence, which was openly appropriated to the use of the plunderers. Within a day or two after her abandonment, most if not all of the libellants fell in with her, and without proffering her any relief by salvage, became engaged in thus plundering her. They not only plundered her, but cut away and detached valuable parts of her fixtures and equipment, and embezzled everything that they could remove. The weather remained calm for several days, while the vessel drifted, till on Aug. 16th or 17th she drifted on the bar, and was there boarded by the libellants, or some of them, with the purpose of holding her as a wreck under the State law.

The captain of the vessel, as soon as he was released, gave information to her owners of her seizure and position, and they took immediate means, by employing a steam-tug, and in other ways, to reclaim her. On the 27th Aug. they appeared on the scene and demanded the restoration of the vessel. They, however, expressed themselves as willing to pay the libellants, as for work and labour, for what they had done in getting the vessel off the bar and into the inlet, up to the time when the surrender was demanded, and even continued the services of James and some others during the getting the vessel off the beach.

COURT.—The libel is only for salvage, and in it as such, it must be supported by the motives and proceedings of the libellants were in all respects lawful, in good conduct and meritorious. The maritime code in relation to the allowance of compensation for services is based upon principles of universal justice and integrity. The law takes under its own protection administration property rescued from the aid of strangers, and compels it to reward by a reasonable reward for an honest service save it from peril; but it shows no favour or favour to plunderers. A seizure of property for culpable plunder cannot be lawful salvage. When the libellants were in with the schooner in a helpless and apparently abandoned and derelict, instead of coaching her with the manifestation of sympathy to afford her relief, the whole purpose was to embezzle, confiscate, and appropriate the ruins of the vessel and her effects, evidence is furnished that one individual multitude which flocked around the wreck for the slightest purpose to save her for the late proprietors. The presumption is most that all the libellants, who engaged in that depredation and plunder, were well aware that was not then a derelict, but that her owners across the bay, in an adjacent state, and out of eyesight, and had been the victims of predatory seizure of their property. It is in no sense with the semblance of an honest and fair purpose to save and restore to its owners a vessel discovered as this one was libellants, to have thereafter followed its course from day to day, as it floated on a smooth sea in calm weather, making prey of anything that could be picked from it, till the vessel grounded. It is suspiciously late for them then to assume the position of rightful salvors in possession of the wreck, and claim to be entitled to invoke the authority and confirm to them such a privileged rule of pleading, therefore, the action is dismissible, because there is no proof under the libel which sustains the only error and claimed by the libellants; but as they are on demanding that the vessel should be sold up to them by the libellants averred a duty to compensate them for the value of the services rendered by them, as work and labour, when the surrender was demanded and to continue the services of James and some of the libellants, the court sees no objection considering the case as so opened in its legal character that assent as to permit an account to be taken as a reference as to a quantum meruit allow the libellants for such work and labour. The respondents elected to put the cause to trial on the single issue of the pleadings upon the decree of the court would logically and have been in their favour. But having decided, on their part, that James and some of the libellants had rendered services to the vessel and after the respondents claimed her surrender themselves as owners, and having called for the value of these services, with an offer to pay charges in that respect, which were just, and acquiesced in making a reasonable compensation to them; and being persuaded that it is just to the court to regard the proceedings of the libellants, after the vessel grounded on the in aid of her reaching that point, to have work and labour for the benefit of the owners, the court considered it equitable to allow such an amount as may be reported by a commissioner as just and therefore, but without costs, except that of the reference shall be taxed half and each party.

Order accordingly.

MARITIME LAW REPORTS.

CALCUTTA APPELLATE COURT.

Tuesday, April 25, 1865.

(Before Sir BARNES PEACOCK, C. J. and MACPHERSON, J.)

PASSMORE v. THE CALCUTTA DOCKING COMPANY (LIMITED).

In the case of a ship requiring repairs abroad, where the captain received a letter of credit from his owners for an amount more than sufficient to cover the necessary repairs, obtained the execution of the repairs on the faith of such letter, and subsequently expended the proceeds of the letter of credit in such a manner as to leave insufficient to satisfy the claim for repairs executed on the faith of the letter of credit:

Held (confirming the judgment of the court below), that the captain was personally responsible to the shipwright for the deficiency, and must stand committed to prison in default.

Sir BARNES PEACOCK, C. J., in delivering the judgment of the court in this case, said:—This was an appeal from an order made in the suit of the *Calcutta Docking Company v. Passmore*, on the 7th April, by Mr. Justice Norman, committing Capt. Passmore to prison in execution of a decree pronounced on the 30th March. The ground of appeal was, that the deft., having been arrested in execution of the decree, which was a decree for money, did, on being brought before the court and on application by the plts. for his committal to prison, make an application in writing, verified under the provisions of Act viii. 1856, s. 273, and Act xxiii. 1861, s. 8; and that the judge did thereupon, without further inquiry, refuse to make an order for his discharge, and committed him to prison. In the original case the question was, whether the app., Capt. Passmore—having received a letter of credit from England for the repairs of his ship, and afterwards shown it to Capt. Millard, the superintendent of the docking company, on the faith of which letter of credit the ship had been repaired by the company—was justified in expending the proceeds in other ways. The action was against Capt. Passmore for the amount due for the ship's repairs, and the deft., as before stated, had been committed to prison in execution. The Court saw no ground for interfering with the judge's decision. No doubt the deft. was placed in great difficulties; and if he had acted in good faith, and given up all his property, it would have been different; but it appears that, unfortunately, the deft. has not acted with good faith, and has thrown obstacles in the way of the company's recovering for the repairs done. It appears that after the cyclone, the deft. having some difficulty in getting the repairs done, advertised for tenders for the repairs; Capt. Millard having previously been on board the ship, and made a rough estimate of the repairs for the deft.'s information. The repairs were not then undertaken, and very probably the deft. could not get them done for want of means of payment. Be that as it may, Capt. Millard did not undertake the repairs till the letter of credit was shown him. There was an interview, at which the letter of credit was shown to Capt. Millard. Afterwards he sent in an estimate for the repairs at 10,000rs., which was approved of; and if the deft. had then, through misfortune, been obliged to expend some portion of the proceeds of the letter of credit, and had left a fair sum for repairs, the case would have been different. But, having pointedly shown to Capt. Millard the letter of credit, and having assured him, and led him to expect payment when

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the repairs were done, by the means afforded by the letter of credit, it appears, when they were completed, instead of 10,000rs. estimated for the repairs, only 2490rs., according to the account made out by Mr. Stewart, and signed by the deft., are available for the payment. It was an act of bad faith on the deft. thus lending himself to Mr. Stewart. On the 28th March an action was brought, and an attachment against Mr. Stewart granted for the proceeds of the letter of credit in his hands, on which occasion Mr. Stewart and the deft. were examined in court. The clear proceeds of the credit were 22,000rs. Let us see what are the charges which reduce it to 2490rs. The deft. in the cross-examination says he cannot swear whether he signed the account made up by Mr. Stewart before or after he went into court, on the day the attachment was granted; but it is clear it must have been made during the progress of that investigation, and after he had been examined in court. He says, "I believe it to be correct." Let us see what he allowed. First, a sum paid to Mr. Stewart's brother, Mr. W. C. Stewart, for some charges against the ship. If it was an honest and straight-forward transaction, why was not this entered paid to W. C. Stewart, instead of entered as paid to deft. himself? Again, 60rs. as per receipt; this also was paid to Mr. Stewart's brother. Then there is 3000rs. paid to the deft., and I do not know that there is any objection to that item. Again, though the funds were received for the purpose of repairs, there are certain sums charged for other purposes. These funds were, as between the captain and Stewart, the captain's money, but they were held for the purpose of repairs, and not applicable to other accounts. This money, therefore, in the hands of Stewart was liable for the captain's debt; and the question is, did the deft. put any difficulty in the way of the company when they demanded payment, or did he lend himself to Stewart so as to give him a preference? It appears to me there is no doubt that this is a got-up account by the captain, under the influence of Stewart, and for the purposes of Capt. Millard, who did the repairs trusting to the letter of credit. Then there was a payment to Capt. Millard for copper. This was a separate matter of his own, and it was said that Capt. Millard was doing an injustice to his employers in receiving payment of this amount. I do not see that it was anything of the kind. It was a fair charge, and he had no knowledge or reason to suppose that in taking payment there would not be sufficient to pay the company. There is no foundation for such a charge or imputation against Capt. Millard as was made. Then, as to further charges: some of them are fair, but the butcher's bill is not chargeable. However, if that had stood alone, I should not have thought it sufficient to induce us to detain the deft. Then there is 1646rs. for general average, payable by the ship. How that is made out is not very intelligible on the evidence given. It might easily have been explained by Mr. Stewart, however, who was seen in court to-day; but I pass over that. We now come to one item for the probable amount of Mr. Stewart's commission. What right had the deft. to charge for his commission after showing the letter of credit to the docking company as a means of payment? He had no right at all. Then there is 3100rs. for Walter and Co., for stores which they certainly had not supplied on faith of the letter of credit, for I observe that a portion was supplied between the 10th and 20th Dec., before the letter of credit arrived. Therefore Walter and Co. were satisfied to supply goods without the security of the letter of credit. Besides, they did not give credit to the defts., but to Stewart. Why should this claim then be set up in reduction of the amount

forthcoming to the docking company, if Stewart's, and not the deft.'s credit was pledged? The same may be said of the claim of Atkinson and Co. Mr. Stewart got the money into his hands, but he never brought an action or claim against the deft. for the payments made; but as soon as he found the money going towards payment of the docking company's claim, he got the deft. to sign the account. That was throwing a considerable difficulty in the way of the company, and in effect giving Stewart a preference. It may be that the company should make out hereafter that the settlement of accounts was fraudulent, and for the purpose of giving preference to Stewart; but I express no opinion on that point now. The deft. has, unfortunately, not acted in good faith, but thrown difficulties in the way of a just claim; and though I regret it very much, I must say the decision below was a right decision, and the appeal must be dismissed. As the objection on which this appeal was founded, if brought to the notice of the judge at the time, was certainly not urged upon him as of any importance, the appeal must be dismissed with costs.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Nov. 7, 8, 10, and 14, 1865.

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Vessels—Suretyship—Release of sureties—Delivery of vessel.

R. (trading under the name of R. and Co.) contracted with the A. D. S. Company for the sale and delivery to them of two vessels to be sent by him to the Danube; and he undertook to advance a sum not exceeding 1000l. to furnish them for the voyage. The purchase-money was paid in part, and the remainder was to be secured by a mortgage of the vessels. The pls. were two of the directors of the A. D. S. Company. In order to further the objects of that company, they, in its behalf, and at the request of R., accepted, indorsed, and handed to him certain bills of exchange. R., on his part, gave them a guarantee that they should not be respectively called upon to pay more than a portion of the amount for which they had so become sureties; and not that until a time that was named in the guarantee. No transfer of the vessels from R. to the A. D. S. Company was ever completed, and no mortgage of them was executed to R. R. treated himself as the agent of his own firm of R. and Co. and of the A. D. S. Company in the matter; but instead of sending the vessels from Newcastle-on-Tyne, where they were registered, to the Danube direct, as agreed upon, dealt with them as if he had been the complete owner of them, speculated with them, mortgaged one of them, indorsed over some of the bills of exchange, sent one of the vessels to a port which was far away from the Danube, after having freighted it with contraband of war for the use of the Circassians, and did all those acts without the knowledge of the pls. Upon a suit instituted by the pls. to be relieved from the liabilities incurred by them on behalf of the A. D. S. Company, in respect of the two vessels, it was

Held, that the pls. were entitled to be discharged from their suretyship:

Held, also, that the delivery of a vessel by a vendor to a purchaser means, that the purchaser is to have the control of the vessel, and not necessarily that he is to be put into the manual possession of it. To complete the delivery he must be able to direct where the vessel shall go, what it shall do, what performances it shall be required to undertake; in fact, to have exactly the same power over it as exists with respect to any other chattel which is sold and delivered to a purchaser.

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The pleadings in this suit were of a most voluminous character; the bill alone covering 44 pages, and extending to 139 paragraphs; and the answer of the deft. Rogerson occupying 62 pages, and containing 186 paragraphs.

For the purpose, however, of this report, it will be necessary to state only the following facts:

The plts., Edmund Burke and John Kearns, were two of the directors of the Anglo-Danubian Steam Navigation and Colliery Company (Limited). The defts., John Rogerson and William Scott, were shipowners, carrying on business in the city of London and also at Newcastle-upon-Tyne, under the style of John Rogerson and Co. The deft. John William Lampton was also a director of the Anglo-Danubian Company, and that company were themselves defts. to the suit.

In 1862, Rogerson made a tender to the company for the supply to them of ships for the furtherance of their undertakings. After much negotiation between the parties, it was, on the 2nd June 1863, agreed between Rogerson and the company that the latter should purchase, and that Rogerson, trading as John Rogerson and Co., should sell two steamers, called the *Louise Crawshaw* and the *Chesapeake*, free from incumbrances, upon the following conditions, viz.:

The company will be justified in purchasing two boats and accepting a loan of 5500*l.* on the following terms: namely, to purchase (subject to inspection) the boat called the *Louise Crawshaw* for 5500*l.*, and the *Chesapeake* for 2000*l.*, making together 7500*l.*, to be paid for as follows:—2000*l.* to be paid by Mr. Rogerson on his taking 200*l.* shares in the company, which are to be deemed as fully paid-up shares, and by the company's acceptances for 1000*l.* and 1000*l.* and 750*l.*—in all 2750*l.*—payable at four months after date; and also the company's acceptances for 2000*l.* and 334*l.* and 416*l.*, making in all 2750*l.*, at six months after date; but the payment of all such acceptances to be deemed satisfied, if the board shall so order, by half the amount of such acceptances being paid in cash when due, and the other half by further acceptances of the company, payable at four and six months, as the case may be, according to the tenor of the original acceptances; a due payment of those acceptances to be collaterally secured by a mortgage of the two boats above mentioned, the power of sale not to be exercisable until after default, and after fourteen days' written notice to the company; and so to be secured by a mortgage of the calls already made and unpaid, and hereafter to be made on the shareholders whose names are stated in a list to be furnished to Mr. Rogerson or his solicitors; with liberty, however, for the directors to apply a sum not exceeding 1500*l.* out of such arrears or calls towards the debts and liabilities of the company. Mr. Rogerson also to provide funds as and when required, to the extent of 1000*l.*, for the purpose of dispatching and working the two boats above mentioned; and also for working two other boats, called the *Papin* and the *Belot*, and for working certain coal-fields at a place called Dubra, under arrangements to be made to the mutual satisfaction of Mr. Rogerson and the directors. The directors defer the consideration of the purchase of the boat called the *Harry Clasper*. That the purchase of the two boats called the *Chesapeake* and the *Louise Crawshaw* be carried out, and the payment for the same effected in the manner and upon the terms above mentioned, but subject to legal approval.

That simultaneously with the above arrangements being carried out to the satisfaction of the legal advisers of the company and of Mr. Rogerson, the latter should be empowered, subject to the limit of expenso after mentioned, to get ready, insure, and dispatch to the Danube, for and on behalf of the company, the two boats called the *Louise Crawshaw* and the *Chesapeake*, and also to provide and send out by these boats proper materials for working the colliery, and that he also be empowered to send out for the company, and maintain seven men for working the collieries; he also for the company to pay their wages.

That the company may reimburse Mr. Rogerson for any necessary expenses that he may incur to the satisfaction of the directors for the above purpose to the extent of 1000*l.*, Mr. Rogerson on his part undertaking to provide the necessary sums to that extent, as and when required, it being understood that such reimbursements may be made, if the directors shall desire, by acceptances of the company, to be given from time to time according to the outlay actually made, and proved, and to be paid respectively at four months after date.

A Mr. Lankaski was appointed manager of the boats and collieries mentioned in the agreement. Rogerson then accepted 200 shares in the company, for which he paid them 2000*l.*, and the company paid him a sum on account of the two ships, the *Louise*

Crawshaw and the *Chesapeake*. Neither Rogerson nor his firm advanced the 5500*l.* The transfers of the steamers were not completed.

On the 5th June 1863 Rogerson tendered to the company for acceptance seven bills of exchange, drawn by him, in his own name, on the company, of different amounts, but making together the sum of 5500*l.* Those bills he urgently requested the directors of the company to indorse; and the plts., in reliance upon his assertion that without such acceptance and indorsement the ships could not be sent to the Danube, and confiding in his promise to perform the agreement on his part, accepted, indorsed and handed over the bills to him.

The deft. Rogerson then also wrote to the plts. as follows:

June 5, 1863.

Gentlemen,—In consideration of your agreeing to guarantee the payment of the acceptances of the Anglo-Danubian Steam Navigation Company, drawn for the purpose of paying for the boats, to the extent of two-thirds of the 5500*l.*, that is 3667*l.* I engage that you shall not be called upon to pay under that guarantee, except upon the following dates, viz.:

12 months from the dates of the bills, 1837*l.* 10*l.* 0*l.*

18 months from the dates of the bills, 1837*l.* 10*l.* 0*l.*

you agreeing to indorse new bills to take up those first drawn until you will come to the dates named, that is, twelve and eighteen months respectively, at which date you become owners of two-thirds of the property mortgaged to John Rogerson and Co.

It is further understood that you will accept bills to raise the funds to work the boats and colliery—you being liable in the event of the company not paying to the extent of two-thirds of the amount which is not to exceed 1000*l.*—Yours truly,

JOHN ROGERSON.

No mortgage of the ships or either of them was ever executed by or on behalf of the company. It was alleged that the two vessels had never been sent by Rogerson to the Danube; that he had made use of them for his own purposes; that, in fact, he had mortgaged them unknown to the plts., and had also indorsed some of the bills of exchange to Messrs. Lampton and Co., who had commenced proceedings at law thereon.

The bill in the suit contained the following charge:

That the deft. Rogerson, without the authority or privity of the company and the plts., or either of them, after the date of the said contract of the 2nd June, 1863 caused the *Chesapeake*, or *Louise Crawshaw*, or one of them, to be laden with rifles, muskets, munitions of war, and other freight, for conveyance to some port or ports in the Black Sea or elsewhere; that such freight was taken on board at Newcastle-upon-Tyne, or Falmouth, or some other port in this country, and conveyed by the said steamers or one of them to some port or ports in the Black Sea or elsewhere, other than the Danube. Since the arrival of the *Chesapeake* and the *Louise Crawshaw* at the port of Constantinople, the said steamers have in like manner, without the authority or privity of the company and the plts., or either of them, been used and employed by the said John Rogerson in the conveyance of passengers and goods to and from the port of Constantinople and Trebizond, or elsewhere in the Black Sea other than the Danube, and, instead of dispatching the said steamers to the Danube, as the said John Rogerson had undertaken to do, the said John Rogerson has, in fact, used and employed the said steamers for his own purposes. The plts. charge that a considerable quantity of the arms and munitions of war and other freight was sent by the said John Rogerson as aforesaid as an adventure or speculation on his own account, and that the residue of the said freight was taken by the said John Rogerson for divers other persons. The plts. charge that the whole of such freight was contraband of war, and was shipped by the said John Rogerson with the full knowledge that the same was contraband, and that it was intended for, and that it was in fact supplied to, the Circassians, who were then at war with the Emperor of Russia; and that the said John Rogerson wilfully placed the *Chesapeake* in peril of being seized and confiscated to the use of his Imperial Majesty. The said John Rogerson concealed from the plts. and the company that the *Chesapeake* was laden with such or any freight. The said John Rogerson pretends that he was entitled to take such freight under a stipulation in a tender made by him on the 28th May 1862; but the plts. charge the contrary, and that such stipulation formed no part of the said contract.

The bill then prayed a declaration that the plts. were respectively altogether discharged from liability on the said bills of exchange so indorsed by them as aforesaid; and that the defts., John Rogerson and William Scott, were severally bound, and

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ought to indemnify the plts. against the said actions at law brought by the Messrs. Lambton and Co. against the plts.; and that the said defts. might be decreed to do so, or that they might be decreed specifically to perform the said agreements of the 2nd and 5th June 1863, the plts. being ready and willing, and thereby offering specifically to perform such agreements on their part; for an account of what was due to the plts. from the defts. under the said agreements: for the proper application and payment of the amount found due; and for an injunction to restrain the negotiation of the said bills of exchange, and the further prosecution of the said actions.

The further details of the case will sufficiently appear from the judgment of the M. R. (*infra*).

Southgate, Q. C. and Locock Webb appeared for the plts., and contended that, under all the circumstances of the case, from the non-delivery of the ships to the company, from their not having been duly sent to the Danube as they might and ought to have been, and from the peculiar dealings with them by the deft. Rogerson, unknown to the plts., they were discharged from their liability under the agreements of the 2nd and 5th June 1863, and entitled to the relief they sought by their bill.

Selwyn, Q. C. and A. Marten, for the deft. Rogerson, contended that he had acted as the agent of the plts. and the A. D. S. Company in the transaction. The company was not unaware of his proceedings, and the knowledge of the company must therefore bind the plts. Further, they insisted that when once the ships were dispatched as they were by him from Newcastle, they were duly delivered to the plts. and their company, subject to his showing that he had expended the 1000*l.* agreed upon. No time was fixed within which the vessels were to be delivered. The real question in the case was, what was the construction of the agreement? They insisted that Rogerson had not forfeited his right under it, by transmitting the cargo of arms, &c., or by his other acts. What he did he did at his peril, but that did not affect his position as regarded the plts. Their remedy was at law, for a breach (if any) of the agreements.

Ffooks appeared for the defts., the Anglo-Danubian Company and Couchman.

Southgate, Q. C. was not called on to reply.

Nov. 14.—THE MASTER of the ROLLS.—I have read the evidence in this case, and I think that the plts. are entitled to a decree. The first question to be considered is, what is the contract between the parties? There was a great deal of preliminary discussion with respect to the Anglo-Danubian Company purchasing the steamers from Mr. Rogerson: but I am of opinion that that did not form the contract. I think the contract is to be found in the resolutions of the 2nd June 1863, which were entered in the books of the company when Mr. Rogerson was present. It is necessary for me to refer to those resolutions in order to explain what I have to say on the subject. [The M. R. then read the whole of the contract as above set forth, and continued:] Now, the first thing to be observed upon that contract is, the nature of the proposed mortgage, and that is a material question in the case. The mortgage was to be a mortgage on the ships of the company; but the mortgage was not to be enforced, and no sale was to take place until after default. By that was meant default in the payment of the acceptances, and therefore the mortgage could not have been exercised strictly until the four months had expired, when the first acceptance became due, and then there would have to be paid

one half at least, and fresh acceptances given for the remaining half, if the Anglo-Danubian Company so thought fit. Besides, it was not to be exercisable until after default, and after fourteen days' written notice to the company. Those were the conditions upon which alone the mortgage was to be enforced. There was also to be a mortgage of the unpaid calls of the shareholders, of which a list was to be furnished, subject to the company being entitled, in the first instance, to take out 1500*l.* for the payment of any sums of money which they might consider it desirable should be applied towards the affairs of the company. There was a subsequent resolution that a Mr. Lankaski, who it appears was a partner in the firm of Rogerson and Co., in Servia (at least so I infer from the fact of their calling him "our Mr. Lankaski"), was to be manager of the business at Dobra, near Belgrade, at the weekly salary of 3*l.*, in addition to his reasonable and necessary expenses. Mr. Lankaski was to act in accordance with written instructions, to be furnished to him by the secretary of the company. Now, that was the original contract. The only variation that was made in it was this, that the 1000*l.* to be laid out was not to be "to the satisfaction of the directors," but at the mere absolute control of Mr. Rogerson—that he was to employ it as he thought fit. That was ultimately, and in fact, the contract which was entered into. Now, in the first place, it is quite clear, in my opinion, that that was a contract with the Anglo-Danubian Steam Navigation Company; and that it was not a contract with any individuals whatever. It is true that Mr. Burke and Mr. Kearns were, so to say, substantially that company, and could make it do as they pleased. But the contract was made with the company, and not with those gentlemen individually. It is observable also with respect to the 1000*l.* which was to be laid out, that it was not like a trust which Mr. Rogerson was obliged to perform; it was optional on his part, and he was not to lay it out unless he thought fit. The next thing to consider is, the transaction which has given rise to this suit; in fact, by which the plts., Mr. Burke and Mr. Kearns, became liable for the due performance of the contract by the company; that is to say, that to the extent of two-thirds, the acceptances of the company should be duly honoured. That took place upon the 11th June 1863. It took place nine days after the resolutions were come to, and on the same day (which is very material) a letter of instructions was given to Mr. Rogerson, directing him to send the steamers to the Danube at once. It is important to observe that Mr. Rogerson told the plts. that he could not send out the ships unless they would give their guarantee that the bills should be paid, at all events to the extent of the two-thirds. I think that was reasonable enough on the part of the deft. He thought that the company had no very large amount of funds. It was a limited company, and it was perfectly intelligible that he did not like to send the ships out without some reasonable certainty that the bills of the company would be duly honoured; and accordingly the guarantee which he required, and they consented to give, was as follows: [The M. R. read the guarantee as above stated, and continued thus:] That sum of 1000*l.* was the money to be expended in sending the ships out. I am not sure that this is a very remarkable circumstance, although it was a great deal relied upon in the course of the arguments, viz., that no note was made at the time on the register of the ships, of the ownership of them. I am clearly of opinion that the plts. expected it to be made; I am also quite satisfied that a bill of sale, executed by a Mr. Wraith, was produced to the office at the time, and that they believed it to be effectual to enable them to get a transfer duly made. In point of fact, however, Mr.

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Wraith at that time had no ownership in the ships at all. It is quite true that Mr. Rogerson was the real owner, though they were not registered in his name. They were registered in the name of the Tyne Ferry Company, and though Mr. Rogerson probably was the principal manager of the Tyne Ferry Company, and could have got the ships transferred whenever he pleased, he did not think fit to do so. I do not ground my judgment upon this, that the plts. were induced, either by misrepresentation on the part of Mr. Rogerson, or any expectation on their own part, that the transfer of the ships would take place immediately, to indorse the bills of exchange. It is, however, important to observe, that what then took place was this: upon the plain construction of the contract, the vessels were, in my opinion, to be delivered immediately to the Anglo-Danubian Steam Navigation Company; and the mortgage was to be enforced, only provided the bills were not paid. Accordingly the first and really important question is this, whether the ships were in fact delivered to the company at all? I omit for the present all consideration of the question, whether the ships were to be delivered in the Danube or in the Tyne. I am of opinion, upon the evidence, that they were never delivered to the company anywhere; that no delivery of any sort took place at any place whatever; but that they remained constantly in the possession of Mr. Rogerson, the vendor. The way in which it was put by Mr. Rogerson, or by his counsel in their arguments, was this: He contended that he represents two characters. He says, it is true that he was the vendor, but he was also the agent of the company, and after the contract was entered into no transfer took place on the registry; for that his position was only that of an agent of the company, and he was thereupon entitled to consider the ships duly delivered to him as such agent. It was urged very strongly before me, that if A. B., a stranger, had been the agent of the company, and Mr. Rogerson had transferred the ships to him, that would have been a delivery of them to the company, because it was a delivery to the agent of the company. It was also strongly urged, and with great truth, that those two characters might be filled by the same person. But the question whether there was such a delivery, is the question to be determined by the evidence in the case. In the first place, it is to be considered what is meant by delivering a vessel to the purchaser? It means that he must have the control over the vessel, and not necessarily that he is to be put into the manual possession of it. To complete the delivery, he must be able to direct where the vessel shall go, what it shall do, what performances it shall be required to undertake; in fact, to have exactly the same control over it as exists with respect to any other chattel which is sold and delivered to a purchaser. If, for instance, I buy a carriage, the delivery of that takes place when it is sent to my stables, or to the care of any other person whom I may authorise to take it, and who may use it as he pleases. But the important thing to consider in this case is this. Undoubtedly these vessels might have been so delivered to Mr. Rogerson, and if Mr. Rogerson had treated himself as the mere agent of the company from that time, and had in fact treated the company solely as the owners, then I think it might have been justly said that there was a delivery to the company at that time. I am of opinion, however, upon the evidence, that Mr. Rogerson had the sole and unquestionable control of the vessels. He did exactly what he pleased with them, and not as the agent of the company, from the time when the resolutions were entered into down to the time when the vessels were ultimately sold at Constantinople. But what is the duty of an agent? The duty of an agent is take the instructions of his prin-

cipal, and the instructions of the principal in this case were to send the ships to the Danube. Consider first the case of the *Chesapeake*, and see what took place as to that vessel. The voyage to the Danube would have been one of less expense and of less duration than vessels usually incur in performing it. The vessels were sent to Trebizond. The distance from the Bosphorus to Trebizond is nearly double that from the Bosphorus to the mouth of the Danube. I do not know whether it is proved in the case or not, but that is a geographical fact which the court is bound to know, and one as to which anybody may satisfy himself by inspecting an ordinary map of the Black Sea. The fact is, Trebizond is at least 400 miles (and therefore 800 there and back) out of the way of the direct passage to the Bosphorus from the mouth of the Danube. How is his conduct in this respect explained, and how does Mr. Rogerson justify it? He alleges that he told the plts. that he intended to send out certain goods in their vessel upon freight at 4l. per ton for his own profit, as a speculation, and that this was assented to by them. I will assume for the present that that was so, and then consider the result of it. It is proper to observe that, with respect to sending out any goods, the plts. ought to have had the express assent of the owners of the vessels for such an use of them, and to have had explained to them exactly what it was that was intended to be done. Assuming, however, that that was so, according to the evidence part of the goods was actually shipped on board the *Chesapeake* before the contract was entered into. The papers in the suit are very voluminous, but I think from my perusal of them that this is plain: that the only communication or conversation which refers to the taking of the goods mentions it with respect to the discharge of those goods in their way to the Danube, and that they were not to go out of their way. That it would have been justifiable, under the contract, to have discharged goods at Vigo, Gibraltar, or Malta, or possibly at Athens, where the vessels might touch, or at Constantinople; but it would not have been right to have gone to Trebizond to deliver any goods there. That, in short, it would not have been justifiable to have gone out of the regular course to deliver the goods at another place; and, as I have observed, Trebizond is 400 miles out of the way, and to make that deviation would have required the express assent and sanction of the company. But that sanction is nowhere alleged to have been given; which is the more striking because it is wholly inconsistent with that which is the great object of the Anglo-Danubian Company; that object was, that the vessels should arrive at the Danube at the very earliest time at which they could get there. It was a very serious injury to them that there was any delay in the arrival of the vessels. Besides that, there is another consideration in this case, which is a matter of very considerable importance—the character of the goods which were sent out was of a very dangerous description; amongst them was a ton of gunpowder, and all the rest were munitions of war. They were intended for the purpose of being supplied to the Circassians in their struggle against the Russian empire. That, in my opinion, is clearly established. They were, in fact, contraband of war. The whole of the goods that were sent out were—it does not matter whether they were six or eight tons, or what the amount of the tonnage was; but it is quite clear that they were a cargo of great value to the Circassians, and that there was considerable difficulty in getting them in Circassia. This, too, is quite clear, that the vessel incurred very serious risks; because, if any Russian vessel of war had found it, it would have been taken, without a doubt, and condemned. I am of opinion, upon the evidence,

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[ROLLS.]

that not only was this known to all the persons, but that it was known at Constantinople. When they got to Trebizond they could not get any fuel, and it was only by some of the boats of the country (which they call caïques) coming out, that the ship was unloaded into one of them. Thereupon, being discharged of her cargo, she goes back to Trebizond by means of the interposition of the English consul. It was only upon the master of the ship giving his positive undertaking that the fuel would merely be used to take him back to Constantinople, that he was able to move from Trebizond at all. It is true he did not strictly perform his contract with the English consul, because, no sooner was he supplied with coal, which he purchased, than he went out to sea, taking the caïque in tow, and, after towing her for nine or ten hours, he left her in the middle of the night, as near the coast of Circassia as he could, where, it is to be inferred, the goods arrived. The vessel itself arrived safely; that is to say, though it incurred risk, it met with no accident. But I am of opinion that this part of the transaction alone is sufficient to discharge the sureties, and that it is not necessary to go a step beyond this for the purpose of releasing them. They wanted the vessel to be sent out immediately to the Danube. The *Chesapeake* arrived at Constantinople on the 23rd Aug. 1863. She spent a month, all but four days, in her excursion to Trebizond, and she returned on the 18th Sept. to Constantinople; and in much less time she might easily have gone to the mouth of the Danube. As to this transaction, independently of the risk incurred by the vessel being likely to be seized, the mere delay in going out of her route and employing herself for a totally different purpose is, in my opinion, sufficient to discharge the sureties from their contract. But the case does not rest there. This is to be seen throughout: that Mr. Rogerson disregarded the directions and instructions of the company, whose agent he professed himself to have been, and says that he now is. He says now that he would have taken the *Chesapeake* to the Danube if the plts. or the Anglo-Danubian Company had provided him with the necessary funds for that purpose. But there is this manifest observation which occurs upon that, that a much smaller sum would have taken this vessel to the Danube than was spent in taking her to Trebizond, and much less than was spent in taking her there and back again. As I understand from his account, what he seeks to be entitled to have paid to him is that which he contends the company must pay, namely, all the extra expense that was occasioned by the voyage from Constantinople to Trebizond and back again, solely occasioned on account of his own speculation, which was not communicated to them. He alleges it was merely because this was not paid and further funds supplied, that the *Chesapeake* did not go to the Danube at all. The evidence shows me clearly not only that Mr. Rogerson did not act as the agent of the company, but that he did not consider himself such agent, and that he never intended it to be thought that he was the agent of the company, or to relinquish his own control over the vessels until the bills which he received had been duly proved. No doubt he treated the company as the purchasers of the vessels, and he treated himself as the mortgagee of them; but he determined not to quit possession of the vessels until he was fully paid, although the delivery of the vessels to the company so as to put them under the control of the company was, in my opinion, an essential part of the contract, and was so considered on both sides. I have already stated that I am not at all clear that the transfer in the registry was necessary for the purpose of completing the contract. It was stated with some truth that this could have been done at any time, and that the contract

was sufficient; but assuming this to be so, exactly the same thing might be said of the mortgagee of the vessels, viz., that Rogerson was just as much a mortgagee of the vessels under the contract as the company were owners of the vessels under it. His mortgage, however, was to be this, that he was not to exercise the power of sale until after default in payment of the bills. How then does he act? He acts as the owner of the vessels, and whether as mortgagee in possession, or as any other owner, is not material, if he never acted as agent of the Anglo-Danubian Company, or as if they had anything to do with the vessels except to give him money for the purpose of working them. The truth of this is shown from various letters which have been proved in the suit, and which were written to Mr. Lankaski. I will refer to one or two of them. First, there is a letter written from Newcastle, and subscribed, "Yours faithfully, John Rogerson and Company, signed F. Cann" (who is, I assume, a confidential person entitled to use the name of Rogerson and Co.) The letter is dated the 27th June 1863, therefore it was twenty-five days after the contract was entered into; and very little more than a fortnight (sixteen days) after the arrangement with the plts. as to their giving the guarantee. It is written to Lankaski, or Messrs. Heald, Mathern and Co., Constantinople (they being the correspondents there of Rogerson and Co.) This is the letter: "We are in receipt of your letters of the 4th, 10th, and 16th June. That to Mr. Holmes we did not send to him, as it was not encouraging." I omit reading the whole of the considerations mentioned in the letter, because it would be interminable for me to go through the detail of all the circumstances of the case. I do not think Mr. Rogerson's withholding the letter of Mr. Holmes respecting the prospects of the company in Servia can have anything at all to do with the question I am now considering. I think he ought to have communicated it to them; but, whether he did so or not, I do not think that can affect the question, which is, whether, in point of fact, there was any delivery of the vessels at all. Then the letter goes on thus: "And indeed you could satisfactorily judge of the undertaking from a mere stay of forty-two hours on the spot. The *Chesapeake* left Falmouth in order. Mr. Crawshaw says the Circassians are wanting such a boat. If so, you can sell at 1500*l.*; but you must get the cash. Mr. Rogerson has gone to London, and will write you from there as to any other business." Here is, by an authorised agent (after the delivery according to his own statement of the vessel to himself as agent), an express direction by him to sell the vessel. Now, it is to be observed that he was the vendor; the vessel was standing in his own name at the time of the registry on the customs. He, according to his own statement, was mortgagee of the vessel. His mortgage only entitled him to sell after default in payment of the acceptances, and the acceptances were not due for three months, and yet he directs the vessels to be sold, and authorises them to be sold, providing they can get 1500*l.* for them. It is to be observed that the price that was paid to him for the vessel was 2000*l.* I was told that he said he should have asked 2500*l.*; but I confess I do not look upon the 2500*l.* paid in paid-up shares of the company as very much. I consider the 5500*l.* as the price of the ships; so that, in fact, it might well be said that if the 2000*l.* was the price of one ship, 3500*l.* was the price of the other; or it might have been divided in any way that might have been thought fit. It is also to be observed that the word is "Circas," which I read as meaning Circassians. I think no one can doubt, considering what took place with the ships, that that is the real meaning of the term. But I think all that is wholly inconsistent with any

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delivery of the ships to the Anglo-Danubian Company, or to the plts.; for here is an express authority to sell the ships without any reference to the plts. at all. Again, you have a similar thing on the 6th Aug. 1863, when a letter was written from London to Mr. Lankaski, addressed to the care of Messrs. Heald, Mathurn, and Co., at Constantinople, signed "Pro John Rogerson and Co.: W. R. Shakell," who was also authorised to write for them. The letter states this: "The present is to advise you of the *Chesapeake* having touched at Malta on the 28th ult.; and we trust, if she has not already arrived at Constantinople, she will very shortly do so, and you will get her safely discharged, and her cargo sent to its destination. You will then make arrangements to get the steamer to the Danube; but if you find the water too low to get to Belgrade, you will then make the best arrangements you can for working the vessel profitably lower down the river. The vessel must not be sold under 1500*l.*, and in the event of your obtaining a purchaser you must be careful either to obtain cash or good bills on London. The *Louise Crawshaw*, left Newcastle last week, and was at Southampton on the 3rd inst. You are also at liberty to sell this boat for 4000*l.*, same payment as for the *Chesapeake*; and should you sell either or both, you must not mention the sale to the Danubian people, but telegraph to us immediately, and we shall then replace them, by sending the *Harry Clasper* and *Wansbeck*." Now, that letter is distinct. Mr. Rogerson had not only not delivered them, but he considers himself entitled to substitute two other vessels for them. It is not pretended that the company ever agreed to buy two other vessels. Those were the only two they had bought; but he considered himself, at all events, entitled to do as he did, and on the 8th Oct. he writes to a similar effect. In my opinion the probability was, that Mr. Rogerson thought his security was very bad, and he was proposing to sell the ships before the bills had become due, or any default had been made, in order to pay himself; that he claimed to be, and acted as, mortgagee in possession and not as owner of the ships; and that it was not in that character that he intended to do what he did. But after reading the evidence it is impossible to say that he ever gave the plts. or the company the slightest control over these vessels, at any place whatever, either in the Tyne or at Constantinople, or on their way to it. But assuming the debt. Rogerson to be in the right (I will take his own case as he states it), I will then see what the result would be. Here is a contract entered into with the debt. Rogerson and Co. and the Anglo-Danubian Company. The Anglo-Danubian Company wanted boats for the Danube; they buy two boats, and they desire the vendor, who professes his willingness to act as their agent, to take the two boats to the Danube for them. The vendor still professes to act as their agent, and saying he takes possession of them as their agent, withholds from his principal all control over the vessels, and keeps them entirely to himself at Constantinople. What he would have, if I simply dismiss the bill, and give him what he claims he is entitled to, is this: He has received 1000*l.* in one action; he would receive 3000*l.* from the plts., which is due upon three bills, and which has been paid into court with interest, and he would receive the 1500*l.* for the sale of the ship at Constantinople, being a sum of upwards of 6000*l.* The whole of that would not meet the amount which he claims to be due to him, because what he claims to be due to him is not merely the amount of the acceptances, but also the money he has laid out on the vessels, which he says amounts to 3000*l.* He would receive upwards of 6000*l.*, and the Anglo-Danubian Company would literally get nothing at all. The only

thing would be this, that they would not have even the appearance of the vessels in the Danube for their benefit; they would merely have this, that in consideration of their being the equitable owners of the vessels, without having any control or any power over them, they would have an opportunity, of which they might avail themselves, of declaring to their shareholders that they had bought these two vessels, and that they were the owners of the vessels. But, in the meantime, Mr. Rogerson would have received the sum of 6000*l.* and upwards from either the Anglo-Danubian Company or the plts., as their guarantors, in order to enable the plts. simply to do and the debt. to carry on a speculative voyage, for the delivery of munitions of war upon the coast of Circassia. It is thought that I can, upon that, hold this case to be one in which the plts. are bound by their suretyship to allow that to be done; although it is plain, in my opinion, that upon the contract the vessels were to be delivered to the company, and they were to have the benefit of the contract being duly performed. I am of opinion, with respect to that, that they are distinctly discharged from the suretyship for the company. Accordingly, I make a declaration to that effect, and order the amount to be repaid to them, with costs.

Solicitor for plts., J. H. Devonshire.

Solicitor for debt. Rogerson, James Crowdy.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,
Barristers-at-Law.

May 2 and June 13, 1865.

KEMP V. HALLIDAY.

Marine policy of insurance—Total loss, what amounts to.

The ship *Chebucto* was insured in the ordinary form for 1500*l.*; she sailed with a general cargo on board, and on her voyage sustained damage such as to require repairs. Part of the damage was such as to be the subject of general average. The ship put into Falmouth for repairs, and was moored with part of her cargo on board, the residue being on shore, and the repairs were commenced, but not completed, when, on the 2nd Dec., she was sunk by the perils of the sea, and lay submerged with the portion of the cargo on board. Whilst she lay so submerged, the agent of the assured (Mr. Amos) came to the conclusion that to raise and repair the ship would cost more than she was worth; the ship's agents (Messrs. Broad and Sons) were of a different opinion, and acting on their own responsibility, and not as agents of the assured, they did in fact raise the ship, with the portion of the cargo on board. On the 9th Dec., after they had commenced raising the ship, but before the operation was completed, the assured gave notice of abandonment. The plt. claimed as for a total loss; the underwriters paid money into court as for a partial loss, and it was agreed that the payment was sufficient unless the loss was total. The Judge at the trial left the following questions to the jury: Whether there was a constructive total loss of the vessel, first, at the time when Mr. Amos gave notice that the plt. abandoned her; or, secondly, at the time she lay moored after being raised? both of which questions were answered in the affirmative. Upon the facts being turned into a special case, with leave to the court to be at liberty to draw inferences of fact in the same way as a jury would be entitled to do:

Held, per Blackburn, J., that the plt. was not entitled to recover as for a total loss:

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Held, per Shee, J., that he was entitled to recover as for a total loss.

This was an action upon a marine policy of insurance, bearing date the 6th Oct. 1863, upon the *Chebucto*, from Liverpool to Rio Janeiro, valued at 1500*l.*, but underwritten by the deft. for 25*l.* The deft. had paid 18*l.* 15*s.* into court, and at the trial a verdict was found for the plt., subject to the following case, which stated :

1. The *Chebucto*, the vessel insured, belonging to the plt., sailed on the 21st Oct. 1863 from Liverpool to Rio Janeiro, on the voyage insured, laden with a general cargo. 2. In the due prosecution of her voyage the ship met with heavy gales, and worked, strained, and leaked very much, so that it became necessary, by reason of the perils of the seas, for the safety and preservation of the cargo, ship, and crew, to cut away all forward, and to bear up for, and to put into, Falmouth harbour as a port of refuge, where the vessel, with her cargo on board, came to anchor on the 12th Nov. 1863. 3. By reason of the premises, a certain average loss was sustained. 4. On the arrival of the ship at Falmouth, the master of the ship applied to Messrs. Broad and Sons, who are ship agents at Falmouth, requesting them to act as agents for the ship, and Messrs. Broad and Sons agreed to do so. 5. On the recommendation of surveyors employed by the master, the ship was passed inside the breakwater, and was moored to the pier for the purpose of being repaired, and a portion of her cargo was discharged, the heavier portion of her cargo, however, being left in the ship. The repairs were then proceeded with, but were not completed by the 2nd Dec. 1863. 6. On the 2nd Dec., whilst the ship was lying moored to the pier, there blew a hurricane which caused the ship with that part of the cargo which had not been discharged, to sink at her moorings at a place where at low water there was a depth of twenty-two feet and at high water a depth of forty feet. 7. On the same day, namely, the 2nd Dec. 1863, the plt. was informed by a telegram sent to him by the master of the ship, that she had sunk in Falmouth harbour; and on the following day a Mr. Amos, a person experienced in the surveying and repairing of ships, arrived at Falmouth with full authority from the plt. to investigate the whole matter, and to act for him in all matters concerning the ship as according to the best of his judgment would be best for all concerned. Mr. Amos having examined the position of the ship, and having informed himself of her prior condition and taking into consideration the probable injuries the ship had sustained, and having formed a judgment of the cost of raising her and of her further repairs, came to the conclusion that it would cost more to raise and repair her than she would be worth when repaired. Accordingly on the 4th Dec. he, on the part of the plt., gave notice to Broad and Sons that the plt. abandoned the ship and would not be responsible for, and would have nothing to do with, raising or repairing her. 8. On the 7th Dec. a surveyor, Mr. Thomas, by orders of Messrs. Broad and Sons (which were given on their own responsibility, and not as agents for the plt.), commenced raising the ship, and on the 20th of that month he succeeded in raising her with all those goods on board which had not been discharged before the aforesaid 2nd Dec. She was subsequently moved into dock by orders and under the superintendence of the master, who had remained at Falmouth since the arrival of the ship in that harbour, notwithstanding that Mr. Amos, on his visit to Falmouth, had expressly ordered the captain to have nothing to do with the ship, and at the commencement of this action she was lying at Falmouth safely moored. 9. On the 4th Dec. the captain, by

the instructions of Amos, signed and sent by post a notice of abandonment to Davies and Co., of Liverpool, the brokers who had effected the policy of insurance, and who then held the same; and on the 9th Dec. Davies and Co. gave due notice of abandonment to the deft. as follows :

Liverpool 9th Dec. 1863.

Messrs. Burn and Aviley.

Gentlemen,—On behalf of the owners of the *Chebucto*, we beg to give you notice that the vessel is abandoned to you in Falmouth harbour.—Yours very truly,

D. W. DAVIES and Co.

10. The value of the cargo which sank in the ship and which was raised in her was when raised 1750*l.* The value of that previously taken out was 7000*l.* The amount of the whole freight by the charterparty was 475*l.*, and upon the portion of goods sunk 237*l.* 10*s.* The whole net freight was 75*l.* The questions that were left to the jury were, whether there was a constructive total loss of the vessel, first at the time when Mr. Amos gave notice to Broad and Sons that the plt. abandoned her; or secondly, at the time she lay moored after being raised? both of which questions were answered in the affirmative. In putting these questions to the jury, no account was taken of any liability on the part of the cargo or freight to contribute in a general average towards the expenses of raising the vessel or towards the general average loss at sea; and it is to be taken as a fact that if such liability for either loss ought to have been taken into calculation and the estimate of the cost of raising and repairing ought to have been reduced by the amount of the general average to be so constituted, then there was not a constructive total loss. 11. The court or courts of appeal were to be at liberty to draw inferences of fact in the same way as a jury would be entitled to do.

The questions for the opinion of the court were: First, whether the plt. is under the above circumstances entitled to recover on the policy against the deft. as for an absolute total loss as distinguished from a constructive total loss? And if the court should answer the above question in the negative, then, secondly, whether it was material, in determining the question of constructive total loss, to take into account the liability, if any such existed, of the cargo and freight to make a general average contribution towards the expenses of raising the ship, or towards the general average loss at sea? Thirdly, whether the notice of abandonment was given too late?

If the court should be of opinion that the plt. was entitled to retain the verdict, then judgment was to be entered for the plt. for the amount of the verdict with costs of suit. If otherwise, there was to be judgment for the deft. with costs of suit.

E. James, Q. C. (Watkin Williams with him) appeared for the plt.

Cohen (Brett, Q. C. with him) for the deft.

The following cases, &c., were cited :

Phillips on Insurance, 1343 4, 1850-1, 1545;

2 Arnold on Insurance, 1118-1121;

Pezant v. The National Insurance Company, 15 Wend. 453;

Joyce v. Dallas, 1 Moo. & R. 48;

Knight v. Faith, 15 Q. B. 649; 19 L. J. 509, Q. B.;

Cambridge v. Anderton, 2 B. & C. 691;

Lograno v. Janson, 2 Ell. & Ell. 160; 28 L. J. 337, Q. B.;

Reimer v. Ringrose, 6 Ex. 268;

Moss v. Smith, 9 C. B. 94;

Castellain v. Thompson, 13 C. B. 105; 32 L. J. 79, C. P.; 7 L. T. Rep. N. S. 424.

The arguments sufficiently appear in the following judgments.

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KEMP v. HALLIDAY.

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June 13.—SHEE, J.—I will proceed to read my judgment in the case of *Kemp v. Halliday*. Having had the advantage of reading the judgment of my brother Blackburn, I refer generally for the facts upon which our opinion is asked to his statement of them, and to the statement in the case. On the law laid down by him, as the result of a great number of differently worded and variously illustrated decisions (*Irving v. Manning*, H. of L. Cas.; and *Perry v. Aberdeen*, 9 B. & Cr., 417; *Benett v. Chapman*, 2 H. of L. Cas. 720; *Moss v. Smith*, 9 C. B. 103; *Gardiner v. Salvatore*, 1 Moo. & Rob. 117; and *Rosetto v. Gurney*, 11 L. B. 176) on the questions of abandonment and constructive total loss, I do entirely concur with him, and I think it better to adopt the language which he has used than attempt any further elucidation of the principles which it establishes. If my judgment could prevail, the plt. would retain his verdict. I differ with my learned brother rather upon the inferences to be drawn from the facts submitted to us, and upon the application to them of the law, than upon the law itself. On the first question, namely, whether the plt. is entitled to recover as an absolute total loss, as distinguished from a constructive total loss, my answer is, No. It was not impossible to raise, or, when raised, to repair, the ship. There was a chance of raising her in a condition which would enable her, after repairs had been done to her, to be used as a ship. Subsisting as she did in specie under the control of the assured, and not being in danger of immediate destruction, it would have been inexcusable to have sold her, and to have allowed her to be removed in fragments as a wreck, or to have sold her as a wreck when raised, without giving to the underwriters, by notice of abandonment, the opportunity of electing whether they would incur the expense of raising and repairing her. We can, as it seems to me, consistently with the decisions within the range of which the facts before us lie, give but one answer to this question, namely, that the ship as she lay submerged at Falmouth, and when moored in dock after she had been raised, was not an absolute total loss. To the second question proposed to us, namely, whether it was material, in determining the question of constructive total loss, to take into account the liability, if any such existed, of the cargo and freight to make a general average towards the expense of raising the ship, or towards the general average loss at sea, my answer is also in the negative. It is admitted that regard being had to the cost of raising the ship, the cost of repairing her when raised, and her probable value when repaired, she was constructively a total loss on the 4th Dec. when the plt. informed the Messrs. Broad that he abandoned her, and also when moored in dock after she had been raised, unless the liability of the freight and cargo to contribute to the general average loss at sea, and of the freight and cargo to contribute in a general average to the cost of raising her, or either of them, were, in determining the question whether she was constructively a total loss, proper items of deduction from the outlay necessary to raise and repair her. First, as to the general average loss at sea; a voluntary sacrifice of part of the ship and of her apparel having been made for the aversion of the common danger to which ship, freight, and cargo were exposed, the assured on the ship had a claim against his insurers for the share of the loss chargeable to ship, and also for the share, should it not have been paid to him, chargeable to the cargo; though on payment of this after share being subrogated to the assured on ship as respects his claim for it upon his co-contributories to the general average (see *Pothier Contract de Assurance*, No. 52, 164), such portion of the money value of the assured's share of the general average contribution as had not been expended on the repairs

before the final disaster would, as a claim upon his insurers, merge and be absorbed in the subsequent loss, if total, occasioned by that disaster (see *Marshall*, 5th edit. 435; *Cheminant v. Pearson*, 4 Taunt. 367; *Stewart v. Steele*, 5 Scott N. R. 927; and *Live v. Janson*, 12 East, 648); such portion of it as had been expended on repairs which had become valueless by reason of fresh damage done by the final disaster to the parts repaired would have to be expended again, if a resolution to repair had been taken, such portion as had been actually expended on repairs, which ensured to the benefit of the ship after the final disaster, must be taken, on these findings, to have been considered in the estimate of the repairs which would be required for her restoration, so that no portion of the indemnity recoverable by the shipowner from his insurers in respect of his ship's share of the general average loss at sea could come in aid of his liability on contracts for raising or repairing the ship. The same observations apply to such portions of the share of the general average contribution chargeable to the cargo, as before the final disaster had been expended on repairs which had become valueless by reason of fresh damage done to the parts repaired, or which still coming to the ship's benefit after the final disaster must be taken to have been considered in the estimate of the required repairs on which the resolution to abandon was based. Whether the cost of raising the ship, if she had been raised by the plt., would have been the subject of a general average or not, is a question which it is impossible, as I read the statement before us, to answer affirmatively, uninformed as we are of the state of things as respects ship, freight, and cargo in which, and the said intention with which, the cost would have been incurred. Extraordinary expenses submitted to by the master of a ship under the urgent pressure of a well-founded fear or moral certainty, should they not be submitted to, of total loss of ship, freight, and cargo (see *Emerigon*, c. 12, s. 39; *Benecke* 191 and 192; and *Bailey on General Average*, 15), all of them being in equal peril of perishing, may, so far as such expenses serve to avert a danger threatening the whole concern, and are not incurred to repair or diminish an already existing loss, as will found a claim for general average contribution, as the jettison of goods, or the cutting away of masts and cables (see *Benecke*, 214 and 215); but the right to contribution by way of general average has no place where there has not been a voluntary sacrifice of property or money for the common safety in a danger imminent and common to the ship and the property in her. The mere circumstance that an outlay absolutely indispensable to the continued existence of a ship as a ship, and to the earning of her stipulated freight, may incidentally be conducive also to the rescue of cargo remaining in the ship, but not in danger of perishing with the ship, would not impart to it the character of such a sacrifice. Expenses incurred by a shipowner with cargo on board in keeping his ship afloat, or in restoring her to a condition of navigability, if they be the necessary consequence of an accomplished misfortune, and not occasioned by, or the necessary consequence of, a voluntary bestowal of this property or of part of it for the common safety, are incurred for his own benefit to enable him, by fulfilling his contract, to earn his freight, and can no more found a claim for a general average contribution, than the expense of hiring another ship to carry the cargo to its destination. The distinction between extraordinary expenses incurred to repair or diminish a particular average loss, and extraordinary expenses incurred or occasioned by a sacrifice for the common safety, at a time when without them it would

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be impossible to avert a total loss of all the interests at risk—as in the case put by Benecke and on his authority, and partly in his words, and with the intention probably of adopting and condensing the qualifications which restrict their meaning by Mr. Mr. Arnould of a stranded ship which, having sustained a particular average loss, “is in most cases in danger of being totally lost, unless speedy measures are taken for its preservation,” is neatly precised in the words by which the positive enactment of art. 6, the French Ordinance des Arranes, tit. 7, is rectified and made conformable to principle in the corresponding art. 400 of the Code de Commerce des Arranes, tit. 11. In the former “the cost of floating a ship,” in the latter “the cost of floating a ship stranded, with the intention of averting a total loss,” is declared to be general average. The case before us, though combining a particular average loss to ship with probably a particular average loss to cargo, does not, unless we import into it intentions on the part of the shipowner which appear not to have influenced him, and danger to the cargo which does not appear to have been apprehended, differ much in the principle of its decision from the case cited in the insurance books from the Digest, of the freighted ship which, having sustained a heavy average loss in her voyage to Ostia, was compelled to put into Hippo and there incur expenses which were necessary for her own safety to enable her to reach her destination and deliver her cargo in good condition. It was argued in that case that the owners of the cargo ought to contribute to make good the damage which the ship had sustained; but the decision was against the shipowner, because the expenses had been incurred rather for the benefit of the ship than the preservation of the cargo: “Hic eorum, sumptus instruendo magis maris quam conservandorum mercium gratia factus est.” The shipowner must raise his ship or hire another, or lose his freight. It is his affair, and his only. The charges in such a misfortune of unloading, housing, drying, and reloading the cargo, fall in like manner upon the owner of it: (see Benecke, 191, 194.) Were it otherwise, every mishap of this kind in part would be converted into a general average. The shipper who has a right under his contract to have a sea-borne carriage provided for the conveyance of his goods from the place of their shipment to the place of their destination would, in addition to the agreed freight, have to bear part of the expense to which, by the very nature of the service and of the instrument by which it is rendered, the shipowner is engaged, and his goods contribute to a general average, not according to their weight, but according to their value (a provision perfectly just where all are in equal danger of total loss). Merchandise of bulk and weight so small as to offer no impediment to the raising of a ship, or none that would not yield to a small increase of mechanical power, should be burdened with a principal share of the cost of raising her, although, regard being had to her age, class, previous condition, and present employment, it would be madness on the part of her owners not to incur the expense of raising her so as to enable her to arrive at her destination, earn her freight, and be afterwards useful as a ship. In the case before us, the ship having escaped the danger which necessitated the sacrifice of part of her apparel at sea, and while moored in safety to the pier at Falmouth, was assailed by a hurricane, during the raging of which she foundered. The damage caused by this disaster to ship and cargo was damage by a peril insured against, and chargeable separately to the owners of each by them. No case for contribution between them could arise unless some new sacrifice was made to obviate and avert what, but for such sacrifice, would be the great

probability of further disaster to ship and cargo involving the total loss of both of them. Whether the cargo was irreparably damaged by its submersion or not damaged at all, averaged only to the extent of the cost of raising it alone, or of the cost above the value of the ship when raised of raising the cargo with, and in the ship, in danger of absolute total loss, or certain to be recovered in the early and necessary operation of removing the submerged ship from the pier side, is not stated, nor to what extent the freight to be earned by the shipowner was imperilled by the loss, should it prove one, of his ship. With the exception of the fact that the ship had gone down during the sway of exceptional violent winds over waters usually tranquil—in itself a strong *prima facie* objection to a claim for general average contribution—we are informed of no circumstance which might lead us to the conclusion that such motives for incurring the expense of raising the ship could have existed as might convert what in its nature was a particular average into a general average outlay. Benecke says, in the context of the passage interwoven by Mr. Arnould with his statement of the law on this point, that “if the charges of floating a ship exceed the value which is saved by it to the shipowner, and the measure be deliberately adopted to avoid the losses and expenses to which stranded goods are frequently exposed, the surplus of the charges of floating the ship above the value saved to the shipowner ought to be borne by the cargo;” but that “the charge of floating can in no case be the subject of general average.” The latter part of this passage is more roundly worded than on reference to other passages already cited from his chapter on average it seems probable that he could have intended. I read it as the expression of a general rule, subject to the exceptions which he had before indicated. The rule applies to the facts before us, and there is nothing in them which could, in my judgment, have brought the cost of raising the ship in question within any admissible exception to it. The statement on which we are asked to answer the second question put to us presents, in truth, though the disaster occurred in a place protected from all but extraordinary sea risks, and where appliances for ship’s rescue may be supposed to have been obtained, a case of shipwreck in the event of which, according to Casa Regia, the highest authority on such questions, and according to other authorities whom he cites (Van Leeuwen and De Vicq, ad tractulum quinti Weyster de Arranes, pl. 45), his and their opinions having been adopted by later writers of nearly equal weight, there is no room for general average contribution. If we were to come to a different conclusion our judgment might be cited in support of the position that the cost of raising a ship submerged in part with cargo of whatever kind on board is always to be made good to the shipowner by a general average, no matter how certain the rescue of the cargo by other means may be, how little damage it will sustain from a short delay, and as respects the ship’s freight how practicable and inexpensive to hire another ship in which to carry that cargo to its destination, that the mere fact, in fine, that the property saved benefits by an act out of the ordinary course of a ship’s service, is alone sufficient to justify the allowance in general average of the loss caused by the act, or by the expense attending it: (see Bailey, p. 10.) Nor does the theory on which such a contention must rest better recommend itself as the story of the disaster proceeds. The ship was raised with the cargo in her, not by the shipowner or the master acting for the common safety of the ship and cargo, but by persons officiously rescuing as salvors, and possessing themselves of the rescued property in the hope of reward from those whom it

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night eventually concern. The expenses incurred by them were, surely, not general average apportionable between ship, freight, and cargo, of none of which had a sacrifice been made in time of danger for the common safety, and surely were the subject of distinct and separate claims, secured by separate liens on the ship and on the cargo respectively. If the master, in the discharge of his duty to keep the ship and cargo water-borne, had raised the ship, he would have been entitled to no reward for doing so, and could have charged the cargo for no portion of the expense of which it was not the special and particular cause. The ship and cargo having been raised by strangers, they would be entitled to a reward, and would have a lien for it on each of the subjects saved, redeemable by a payment to be assessed on a fair consideration of the skill, money, time, and labour expended upon, and of the value of, each of those subjects. The ingredients of a salvage service, not contracted for or rendered in time of danger, are not the same as if a general average act. The former cannot, after the service done, be converted into the latter by agreement between the salvors and the owners of one of the subjects saved; nor are the charges which attach to the subjects saved apportionable between them on the principle of a general average. If I could feel sure, after reading the judgment of my brother Blackburn, that this view of the second question, as respects the point of general average, was correct, and that we are not bound to assume a general average intention, if such intention might, though we are not informed of it, have existed, it would be unnecessary to consider whether, supposing the cost of raising the ship were the subject of a general average contribution, the share of it chargeable to the cargo ought to be taken into account as an item of deduction in determining whether a constructive total loss had taken place. In my opinion, however, it would not be a proper item of deduction. The subject of insurance had sustained a particular average loss by perils of the sea, the measure of which loss, as between the assured on the ship and his insurers, was the cost, although the cargo may have inadvertently benefited by it (see *Watson v. The Marine Insurance Company*, 7 Johns. Rep. 57), of raising the ship, and of repairing the ship damage which the accident had occasioned; and that loss, whether partial only or constructively total, fell at once upon the underwriters on the ship. In the latter case nothing that occurred afterwards, the ship being in fact unworthy of the cost of raising and repairing her, and abandonment being totally made, could, as respects them, alter its character, or vary their liability for it. Supposing, however, that the intention with which the outlay, necessitated by the submersion of the ship, was incurred, could transform what was a particular average loss into a general average loss from its inception, or that we were at liberty, regardless of what had already happened (the ship and cargo, as they lie submerged, being in imminent danger of destruction), to consider the resolution to raise the ship as the starting point, and the outlay required for that purpose as a sacrifice by the shipowner for the common safety, in determining whether, as between the assured and the ship, not being also owner of the cargo, and his insurers, a loss constructively total had taken place, the liability of the cargo to contribute to the general average would not be an allowable item in diminution of the estimate of expenses on the amount of which the question of partial only or of constructive total loss would depend. The assured, having sustained a loss of the subject of insurance by the perils insured against, would have a right to look for his indemnity from the person who had engaged to indemnify him, without troubling himself with any remedies over against

third parties. He was not bound, on the occurrence of a misfortune involving a loss of the subject insured, so probably total as this must have been considered by Mr. Amos, and appears from the statement before us to have been, to expend his money on the chance of being reimbursed a part of it by a satisfactory adjustment of general average at Rio de Janeiro, should the cargo be safely delivered there out of the crippled ship. He had paid his premium for the option, under such circumstances, of calling upon his insurers to bear that risk of disentangling his capital from the disaster and surrendering to them his ship, they paying him as for a total loss, and all the rights and liabilities attaching to the ownership of it. This seems to me clear on principle and on authority. It has been so decided repeatedly by judges of the highest eminence, and amongst them by Kent and Story in the courts of the United States. There would be no really useful indemnity were it otherwise. If a total loss of the subject of insurance has actually taken place, its insurers must pay its real or agreed value; if a total loss of the subject of insurance has constructively taken place, they must pay its real or agreed value, and make the most of the salvage ceded to them and of the rights against third parties which attach to it. Apart from the question of general average, I cannot think that any share of the cost of raising the ship which the Messrs. Broad or the plt., after the adoption by him of their act, might consider chargeable to the cargo raised in the ship, would be an admissible item of deduction in considering whether a constructive total loss of ship had taken place. The fact that the ship, though a wreck, and the cargo might together be worth the cost of raising them and of repairing the ship, could not, in my judgment, as between her owners and their insurers, operate to make the loss on ship less than total, if the ship separately was not worth the cost of raising and repairing her. The engagement of the underwriter is, that the thing which he insures shall with reasonable repairs and expense, for which he undertakes, should they be rendered necessary by the perils insured against, reach its destination capable of being used as the thing which it was when the risk commenced, or that he will bear the loss of it. His contract is to indemnify the assured against the loss which the subject of insurance shall sustain by the perils insured against; it does not extend to, and is not limited by the loss which the assured shall sustain in consequence of his being the owner of the subject of insurance: (see *Reimer v. Ringrose*, 6 Ex. 263, and *Bailey on Perils of the Sea*, 33, 34.) I see nothing in the case of *Moss v. Smith* inconsistent with this view, but much, by implication, in support of it. A loss on freight was there claimed from the underwriter on freight because the ship had sustained damage, the repair of which, though it would have cost very much less than the value of the ship when repaired, would have cost more than the freight she was in course of earning; to which it was properly answered that the loss contended for was a loss of freight as incident to the ship, and that, the ship being practically repairable, its incident the freight could not be lost. It has none but a remote and distinguishable bearing on a case in which the ship itself by the perils insured against had become unworthy of the cost of raising and repairing her. Apply what Maule, J. and Lord Truro said to ship and cargo instead of ship and freight, and *Moss v. Smith* will be found to fail at every point as an authority governing this case. No doubt, as Lord Mansfield said in *Hamilton v. Mendez*, "it is repugnant to a contract of insurance to recover as for a total loss when the final event has determined that the damnification is in truth an average loss;" but Lord Mansfield was there dealing with the case of a single subject, a ship

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recaptured and safe before action brought; his words are not applicable to the case of two distinct subjects the property of different owners damaged by the same disaster, as to one of which the question is, whether, not being at the time of its abandonment reasonably worth the cost of raising and repairing it, it was then constructively a total loss. On the third question, whether the notice of abandonment was given too late, my opinion under all the circumstances of this case is, that the abandonment on the 9th Dec., the date of the notice given by Messrs. Davies to the deft. was in time. It is enough, if notice of abandonment be given within a reasonable delay; unreasonable or not is a question for a jury, and upon this case for us. My judgment, therefore, upon the whole matter would be for the plt.; but as it does not agree with the judgment of my brother Blackburn, I withdraw it, and judgment will be entered for the deft.

BLACKBURN, J.—It appears from the statement in the case that the ship *Chebucto* was insured in a valued policy in the ordinary form for 1500*l.*; she sailed with a general cargo on board, and on her voyage sustained damage such as to require repairs. Part of the damage thus incurred was such as to be the subject of general average. The ship put into Falmouth for repairs, and was moored, with part of her cargo on board, the residue being on shore, and the repairs were commenced but not completed. When in this state she was, on the 2nd. Dec., sunk by a peril of the sea, and lay submerged with the portion of the cargo on board. While she lay so submerged, the agent of the assured, Mr. Anos, came to the conclusion, as is stated in paragraph 7 of the case, that to raise and repair the ship would cost more than she was worth. The ship's agents, Messrs. Broad and Sons, were of a different opinion, and acting on their own responsibility, and not as agents of the assured, they did in fact raise the ship with the portion of cargo on board. On the 9th Dec., after Broad and Sons had commenced raising the ship, but before the operation was completed, the assured gave notice of abandonment. The plt. claimed as for a total loss, the underwriters paid money into court as for a partial loss, and it appears to have been agreed between the parties that the payment was sufficient unless the loss was total. It appears also to have been agreed between them that if the fact that there would be a claim for contribution against the cargo on board the submerged vessel, which cargo would be raised by the same operation as raised the hull, and which would be saved along with the hull, was to be taken into account, there was no total loss. And it seems also to have been agreed between the parties, that if the fact that part of the sea damage which necessitated the repairs was the subject of general average was to be taken into account, there was no total loss. But it seems to have been contended by the underwriters, that even if both these facts were to be discarded as immaterial, the circumstances were not such as to constitute what is called a constructive total loss. The arrangement made at the trial appears to have been, that the opinion of the jury should be taken on this disputed question of fact, and that, subject to their finding, the case should be reserved for the court. The case is by no means clearly stated; but I think that what I have stated above is the effect of the statement in paragraph 10, that the learned judge left to the jury the question whether there was a constructive total loss at the time when the vessel was submerged, and the assured's agent determined not to raise her, or after she was raised, and the jury found both these questions in favour of the plt.; but, in putting these questions to the jury, no account was taken of any liability on the

part of the cargo or freight to contribute in general average towards the expenses of raising the vessel, or towards the general average loss at sea, and it is to be taken as a fact, that if such liability for either loss ought to have been taken into calculation, and the estimate of the cost of raising and repairing ought to have been reduced by the amount of general average to be so contributed, then that there was not a constructive total loss. Some questions are raised as to the effect of the lateness of the notice of abandonment, on which it is unnecessary to come to any determination, as I conclude that on this statement there never was such a state of things as could amount to a total loss, whatever notice of abandonment was given. In coming to this conclusion I do not regard the general average incurred at sea, but proceed entirely on the ground that, as I understand the statement in the case, the cost of raising the submerged ship and cargo, though it would have been excessive, having regard to the value of the unrepaired ship alone, was reasonable, having regard to the value of the ship and cargo and freight, which were jointly saved by this expenditure from a common jeopardy. The case contains a statement of the value of the submerged cargo, which in fact was raised by the same operation as raised the hull; but as it states neither the value of the hull itself, nor the cost of raising it, this statement is valueless. I will suppose a state of figures to illustrate what I understand to be meant by the statement in the case. Let us suppose the expense of raising the ship with the portion of her cargo on board to have been 600*l.*; that the further repairs necessary would be 700*l.*; that the value of the ship when repaired would be 1200*l.*, and that the value of the portion of the cargo raised and saved along with the ship is 1500*l.* I leave out the freight, which would only complicate the statement without altering the principle. Now, inasmuch as the value of the portion of cargo saved is on these figures three times the value of the unrepaired hull, and the two were saved by the expenditure of 600*l.*; if that 600*l.* is to be charged as general average against the ship and the portion of cargo saved, 150*l.* would be chargeable to the ship, and 450*l.* against the portion of cargo saved by this expenditure. Now, it is plain that on this state of figures, if the fact that cargo was on board is disregarded, there was a total loss, for in that view a ship worth 1200*l.* would cost 600*l.* to raise her and 700*l.* to repair her, together 1300*l.*, which is more than she is worth; but if the fact that cargo is there which would be saved and contribute to the expense of raising is taken into account, there is no total loss, for it would then stand that a ship worth 1200*l.*, and a cargo worth 1500*l.*, together 2700*l.*, would be saved by the expenditure of 1300*l.*, of which 450*l.* would be separately chargeable to the cargo, and 850*l.* separately chargeable to the ship. Whether, therefore, the ship and cargo were considered together or separately, they would be well worth the expenditure required to rescue them from loss. It is on construing the statement in the case, as submitting one similar in principle to that which would arise on the figures I have given, that I come to the conclusion that the deft. is entitled to judgment; and after having carefully considered my brother Shee's reasons for the opposite opinion, I still think so, for the following reasons: It is first necessary to consider whether, if the shipowner had in this case raised the ship and cargo as Messrs. Broad and Sons did, they would have been entitled to charge that expense as general average against the portion of the cargo raised by its expenditure as well as against the hull. In order to give rise to a charge as general average, it is essential that

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there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy; but an extra expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. It is quite true that, so long as the expenditure by the shipowner is merely such as he should incur in the fulfilment of his ordinary duty as shipowner, it cannot be general average; but the expenditure in raising a submerged vessel and cargo on board is extraordinary expenditure, and if incurred to save the cargo as well as the ship (which *prima facie* is the object of such an expenditure) is chargeable against all the subjects in jeopardy saved by this expenditure. In the last edition of Arnould on Insurance, vol. 2, p. 932, sect. 340, it is said: "A stranded vessel is in most cases in danger of being lost, unless speedy steps are taken for her preservation, either by unloading the cargo to lighten her, or by endeavouring to float her by means of buoys, &c., with the cargo in her. The remuneration which the shipowner is obliged to pay for the service thus rendered gives a claim to general average contribution, provided such service shall appear to have been incurred for the joint benefit of ship and cargo, which will be the case if ship and cargo are both exposed to a common danger, and both saved from it by the exertions employed for their rescue. This, I apprehend, is a perfectly accurate statement of the law. In the present case, the greater part of the cargo was on shore and safe before the ship was submerged; but the extraordinary expenditure necessary to save the ship and the portion of the cargo on board would have been chargeable as general average against them, though not against the part that was safe." (*Morgan v. Jones*, 7 Ell. & Bl. 523.) I do not mean to say that in every case where a ship with cargo aboard is submerged, and the two are in fact raised together by one operation, the expenditure incurred would necessarily be for the common preservation of both. I think it is in every case a question of fact whether it was so, and if the cargo could be easily and cheaply taken out of the ship and saved by itself, it would not be proper to charge it with any portion of the joint operation which in that case would not be incurred for the preservation of the cargo. But it must be rather an exceptional case in which, where a vessel lies under twenty feet of water at low tide, the cargo can be easily, or indeed at all, taken out of her hold without either raising the ship with the cargo or destroying the hull for the purpose of getting the cargo out. If the contention of the assured at the trial had been that such an exceptional course was in this case practicable and the proper one, the question would have been left to the jury or the facts agreed upon, so that we might draw the proper inference of fact from them. Instead of doing so, the only fact bearing on the question is, that Messrs. Broad and Sons did in fact raise the ship with the cargo on board. As they could have no interest except to save the imperilled subjects in the proper way, so that they might be entitled to charge their outlay against them as salvage, I think the inference to be drawn from this fact is, that the mode adopted was the proper one, and I should, if necessary, draw that inference. But I think, from the way the case is stated, that it appears to have been agreed between the parties that the expense of raising the ship and cargo was in fact general average, and as such chargeable in fact on the cargo if in law it could be so. I shall now proceed to consider the question whether the circumstances that the

expense of raising the ship and cargo would be partly borne by the cargo, ought to have been taken into consideration in determining whether there was what is commonly called a constructive total loss. A contract of marine insurance is a contract to indemnify against loss by certain perils, and if the subject-matter of the insurance is totally lost in consequence of those perils, the assured is entitled to recover as for a total loss; if it is only partially lost, the assured is only entitled to recover for a partial loss. It frequently happens that by the perils insured against the subject-matter of the insurance is so far damaged that it cannot be preserved without outlay on repairs or other ways, but may be preserved by such outlay, or that it is, by perils insured against, taken out of the possession of the assured, but that they can recover the possession by exertions and expenditure; or it may be, as in the present case, that both facts exist—the subject-matter is taken out of the possession of the assured and sunk in a damaged state, but can by expenditure be raised, and then can by further expenditure be repaired. In all such cases the assured may, if he pleases, elect to incur the expenditure, and save the subject-matter, and in that case it will be a partial loss only, or he may offer to abandon the whole to the underwriters, and if they accept the abandonment it will be a total loss, the underwriters being subrogated for the assured, and entitled to all salvage and every other right of the assured. Or lastly, the circumstances may be such that, though the underwriters refuse to accept the abandonment, the assured may elect to treat it as a total loss, and force them to indemnify them for it as such, in which case, on principles of equity, not confined to marine insurance, they are subrogated for him whom they have indemnified, and have all his rights: (see *Randall v. Cochrane*, 1 Ves. 98; and *Yeates v. Whyte*, 4 N. C. 275.) If it were possible to work out the insurance so as to make it in practice a perfect indemnity, it would be the same thing in the pecuniary result whether the assured repaired or was taken to have abandoned the subject-matter; but it is not possible so to work it out, and in general it is for the benefit of the assured to treat a loss as total, and this is peculiarly the case where the policy is a valued one. It, therefore, becomes a very important subject of inquiry, under what circumstances the assured has a right against the will of the insurers to treat the loss as total. Up to the present point I believe there is no difference in the principles on which the law of insurance is administered in this and in foreign countries, and the decisions of foreign jurists are entitled to great weight. Many of those authorities cited by my brother Stree are authorities in support of the position I have laid down; I do not think it necessary to examine or cite them at length, as those principles are not now in controversy between us. But, on the part of the case which I am proceeding to argue, there is a fundamental difference between the law of insurance as administered in America and as administered in England. In America, if the subject-matter of insurance sustained damage to an extent beyond 50 per cent., the assured may abandon and recover as for a total loss. This is an implied part of the American contract, and, unless there be something express which excludes this implication, the assured has this right, and that right depends on the state of things when the abandonment was given, and is not altered by any subsequent change in the state of things. But this is not the English law. In 2 Phillips on Insurance, sect. 1536, it is said: "This rule of abandonment on account of loss over 50 per cent. of the value of the subject makes the most material difference between the American and the

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English jurisprudence relative to total loss and abandonment, and is to be kept in mind in examining the decisions of the tribunals of the two countries. It extends equally to ship, cargo, and freight. This rule and the rule in the United States, whereby the validity of the abandonment is tested by the circumstances existing at the time of making it, instead of the time of bringing the suit, as in England, give a wider range to constructive total loss and abandonment in the United States, and consequently an increased liability of underwriters for loss by the agents who have charge of the insured subject." I do not think that any American case based on principles so different from ours are authorities in an English case. I shall, therefore, with great deference to my brother Shee, who relies upon several cases in the United States, refrain from examining them, and rely only on the English decisions. It is now finally settled in England by the decision of the H. of L., in *Irving v. Manning*, "that the question of loss, whether total or not, is to be determined just as if there were no policy at all." If the subject-matter is by the underwriter's perils in such a situation that, supposing there was no policy, it would be totally lost to its owner, then, as between the assured and the underwriter, there is a total loss, not otherwise. And the question whether the thing is lost to the owner is to be treated in a practical business-like spirit, and if the owners cannot by any means which they or their representative the captain can reasonably use be saved, then it is totally lost; but if by any reasonable means which were reasonably within their reach they might redeem the subject-matter and do not do so, the total loss is not attributable to the perils which cast the subject-matter of insurance into that position, but to the neglect of the owner to take those reasonable means. If they do not take those means they cannot make the loss total by their own neglect: (see *Thorndy v. Hobson*, as explained by Lord Tenterden in *Perry v. Aberdeen*, 9 B. & C. 417.) "The duty of the master, in case of damage to the ship, is to do all that can be done towards bringing the adventure to a successful termination to repair the ship if there be reasonable prospect of doing so, at an expense not ruinous, and to bring him the cargo, and earn the freight if possible." (see *Benson v. Chapman*, 2 H. of L. Cas. 720.) The underwriters do not, by their contract, engage to indemnify against the consequences of his neglect to perform that duty. The question, however, whether it is possible must be understood in the sense in which it is explained by Maule, J., in *Moss v. Smith*: "In matters of business a thing is said to be impossible when it is not practicable, and a thing is not practicable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it into deep water, though it may be possible by some very expensive contrivance to recover it." I may add, to complete the illustration, that a diamond of great value would not be totally lost if dropped into water from whence it would cost 10*l.* to recover it, though a shilling in the same position would be totally lost. When a ship, or other subject-matter of insurance, is in such a condition that it can be saved, but only by an excessive expenditure, the assured may undoubtedly, at least if they give notice of abandonment in due time, treat it as a total loss, and recover for it as such. In *Knight v. Forth*, Lord Campbell expressed a strong opinion that it was essential that there should be such a notice, and that the owner of the shilling at the bottom of the well could not, without what would in his case be an idle ceremony, recover as for a total loss. If it were necessary for the decision of this case to determine the point, my doubt would be, whether

I was not bound in a court below to follow that as the latest decision, and to reserve for a court of error the question whether he was right in that opinion; but it is unnecessary to come to any determination on this point, for all the English authorities agree that unless the circumstances are such as to make that loss total within the principle expounded by Maule, J., in *Moss v. Smith*, no notice of abandonment can make it so, and also that even if the circumstances were such that at the time the notice of abandonment was given it was justified, yet if by subsequent events before action brought the plt. might by reasonable means obtain the thing, he can only recover for a partial loss. As was said by Holroyd, J., in *Brotherton v. Barbe*, 5 M. & Sel. 426: "Abandonment has its origin from the contract of indemnity. But it is apparent that if the assured might abandon at his pleasure he might be a gainer to a much greater extent than the value of the loss, which is inconsistent with a contract of indemnity. . . . as events have made it at the time when the action was brought it is but a partial loss." As also *Naylor v. Taylor*, 9 B. & C. 724. The question whether it is practicable to save the subject-matter within the meaning of the phrase, as explained by Maule, J. in *Moss v. Smith*, has been differently left to the jury. In *Gardiner v. Salvador*, 1 Moo. & Rob., Bailey, J. left it to the jury to say whether, "by means within the reach of the captain, which he could reasonably use," the ship could be saved. The mode of putting the question generally adopted has been to ask, "whether a prudent, uninsured owner would have done it." In *Rosetto v. Gurney*, 11 C. B. Rep., the Court, approving what had been said by Maule, J., in *Moss v. Smith*, states the rule thus: "If the damage is repairable, the loss is total or partial according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriters and the assured, impossible." The three modes of expression all seem to me to convey the same idea. No means which would cost more than the object is worth can be considered reasonable, and a prudent uninsured owner would not adopt them. But if the means within his reach would cost less than the object is worth, a prudent uninsured owner would adopt them rather than suffer the thing to perish, though a prudent insured owner, especially if insured in a valued policy, would probably act otherwise, if the law permitted him, by doing so, to recover from the underwriters for a total loss. I should observe that I think, in the present case, the questions whether there was a total loss at the time when the ship lay submerged, and that whether there was a total loss when she lay moored at Falmouth in the custody of Messrs. Broad and Sons, are identically the same. Whilst the ship lay submerged it was a question of calculation what the cost of raising her would be, but for the trial Messrs. Broad and Sons had by experiment ascertained what it was, and the assured could have got their ship by adopting their act, and then the assured would have been exactly in the same position as if they had themselves originally raised her. In considering whether it was reasonable to raise the ship and cargo in the present case, I think that every circumstance tending to increase or diminish the necessary outlay, and every circumstance tending to increase or diminish the benefit to be derived from that outlay, ought to be taken into account, and amongst those the fact that the cargo would be saved by the operation, and would contribute to the expense, seems to me a very important element. The shipowner is not asked to advance money for the benefit of strangers on the security of their property; he is the authorised agent of the owners of the

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cargo, having the custody of it, and bound to save it if he can. It was contended, on the argument, that in considering whether the subject-matter of insurance was totally lost, we were bound to look to it, and to it alone, so that in the conceivable case of a ship worth say 1500*l.* being in peril with cargo on board also worth 1500*l.*, which could be saved together by the expenditure of 2000*l.* in one operation, the assured was entitled to consider both as totally lost, because neither singly was worth that sum which would save the two. If a long series of decisions had established this we could not help it, but in truth from the time of Lord Mansfield it has been an established rule in assurance law that if the thing in fact was safe, no artificial reasoning shall be allowed to set up a total loss (see *Hamilton v. Mendez*); and the only case in which a point like this was ever attempted to be set up was *Moss v. Smith*. In that case the attempt totally failed. Maule, J. explained the law in a manner, to me, perfectly satisfactory, and what I have written is in truth but an attempt to adapt his reasoning to the present case. Lord Truro, in the same case, said: "We are asked, would any man in his senses spend 1000*l.* on the repair of a ship for the mere purpose of earning 500*l.* freight? To this I answer, certainly not. But this is not the true question. If by expending 1000*l.* on repairs he gets not only 500*l.*, but also a ship worth 3000*l.*, who will for a moment question the prudence of the outlay?" This is an authority, as it seems to me, precisely in point, and agreeing with it as I do in principle, I think our judgment should be for the deft. I need hardly say that I should not adhere to this opinion against that of my brother Shee, unless upon consideration I entertained it decidedly: but I should regret much if my decision were to be final; but that, however, is fortunately not so. This court being equally divided, there would be no judgment unless one of the judges withdrew his opinion in order that the case might go into error. It is the practice for the junior judge in such a case to withdraw his judgment, and owing to the accident of my brother Shee being junior to myself, the judgment will be entered for the deft., leaving the plt. to appeal.

Judgment for deft.

COURT OF COMMON PLEAS.

Reported by W. MAYN and W. GRAHAM, Esqrs.,
Barristers-at-Law.

Monday, Nov. 13, 1865.

WILSON AND OTHERS v. THE LONDON, ITALIAN, AND
ADRIATIC STEAM NAVIGATION COMPANY.

Merchant Shipping Amendment Act (26 Vict. c. 63), s. 7
—*Delivery on wharf instead of to consignee.*

By sect. 67 of the *Merchant Shipping Amendment Act*, where the owner of imported goods fails to make entry, or having made entry, to take delivery, by the times therein mentioned, the shipowner may make entry and land the goods at the times, and in the manner, and subject to the conditions therein expressed:

- (1.) "If a time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the time so expressed."
- (5.) "If at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed to so do, and his entry shall, in such case, be preferred to any entry which may have been made by the shipowner."

In a bill of lading it was provided that simultaneously

with the ship being ready to unload the goods, or any part thereof, the consignee was to be ready to receive them from the ship's side, either at the wharf where the ship was discharging, or into lighters, and in default thereof, the master might land the goods at the risk and expense of the consignee. The vessel having arrived in London, the shipowner, the consignee not being ready with his lighters, began to land and had landed at the wharf fifteen casks of lemon-juice out of sixty-five, when the consignee applied for the delivery of the remainder into his lighters, but the shipowner refused to comply with his request, alleging that he had a right to land the whole number on the wharf:

Held, that, as the shipowner would incur no loss by delivering the fifty casks into the lighters, consignee, both under the Act and the bill of lading, was entitled to recover from him the warehouse charges which he had to pay for the delivery of the goods at the wharf.

Declaration:

That the plt.s were owners of sixty-five pipes of lemon-juice within the meaning of the *Merchant Shipping Act 1862*, and entitled to the possession thereof; that the said goods were imported in the defts.' ship *Adria*; that before they were unshipped the plt.s made entry of them at Wilson's wharf, which was not the wharf at which the ship was unloading, and were entitled and ready and offered to take delivery, of all which the defts. had notice; and that all conditions precedent were fulfilled to entitle the plt.s to such delivery.

Breach, that the defts. would not allow them so to do, but landed the goods at Fresh Wharf, by reason whereof, &c.

Count in trover and money counts for demurrage of lighters, &c.

The fourth and fifth pleas set out a clause in a bill of lading and justified the landing of the goods under it, on the ground that the plt.s were not ready to take delivery at the time expressed therein.

The facts of the case were as follows:—The plt.s were wharfingers carrying on business at Wilson's wharf, Southwark, and were indorsees of two bills of lading for sixty-five pipes of lemon-juice shipped at Messina on board the defts.' ship *Adria* for London. The *Adria* was one of the swift steamers running between certain ports in the Mediterranean and London, with cargoes of fruit and other perishable goods; and as speed and dispatch are of so great importance to these vessels, it is the custom, when they once begin discharging in the port of London, to go on with it continuously, night and day, till it is finished.

The *Adria* reached London with the lemon-juice in question, about 12.30 p.m., on the 23rd March, and having passed her entry at the Custom-house, and also made her entry outwards, proceeded to a fresh wharf to discharge her cargo. In the afternoon of the same day, between four and five o'clock, the plt.s passed the entry of their pipes of lemon-juice, at the Custom-house, for Wilson's wharf, and got a Custom-house order for their delivery and the freight release. Up to this time the plt.s had done all that was necessary to entitle them on application to have the goods delivered into their lighters. In the afternoon of the same day the *Adria* began to discharge her cargo, and continued doing so all night. At about eight o'clock the next morning, the lighterman who had been employed by the plt.s to receive the pipes of lemon-juice, came to the *Adria* and inquired of the ship's worker when they would be ready to deliver the plt.s' goods, and was then informed that seven or eight of the pipes had already been landed at the wharf, and that he should not wait for craft, but keep on discharging the remainder. The lighterman, who had not got his lighters with him, went away and returned with them and his men about nine o'clock, at which time fifteen pipes of the lemon-juice had been discharged. The lighterman, upon coming alongside, tendered

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the warehouse charges on the fifteen, which had been landed, and at the same time claimed to have the remaining fifty pipes delivered on to his lighters; this the ship's worker refused, and declared that he would not knock off the men and stop the ship. The whole of the sixty-five pipes were therefore landed at the wharf, and consequently the plts. had to pay the warehouse charges before they could obtain possession of them; and the present action was brought to recover the charges on the last fifty pipes: the defts. contending that, after they had once discharged any of the pipes at the wharf, they had a right to go on discharging until they had landed the whole.

The material clause in the bill of lading was as follows:

Simultaneously with the ship being ready to unload the above-mentioned goods, or any part thereof, the consignee of the said goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge, or into lighters provided with a sufficient number of men to receive and stow the said goods therein; and, in default thereof, the master or agent of the ship is hereby authorised to enter the said goods at the Custom-house, and land, warehouse, or place them in lighters, at the risk and expense of the said consignee of the goods after they leave the deck of the ship.

Although the pipes were under two bills of lading, and bore different marks accordingly, some of both marks were included in the fifteen that were first landed, and accordingly the whole sixty-five pipes were taken at the trial to constitute only one lot. The 25 & 26 Vict. c. 63 (the Merchant Shipping Amendment Act), s. 67, provides that

Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or, having made entry thereof, to land the same or take delivery thereof, and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the said goods, at the times, in the manner, and subject to the conditions following (that is to say):

1. If a time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the time so expressed.
2. If no time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or holiday, after the report of the ship.
3. If at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be preferred to any entry which may have been made by the shipowner.
7. If at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods or of such wharf or warehouse as last aforesaid, twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he land or unships the same without such notice, do so at his own risk and expense.

A verdict was found for the plts. for 12*l.* odd.

Watkin Williams having obtained a rule to set it aside and enter it for the defts. or for a nonsuit, pursuant to leave reserved, on the ground that as the plts. were not ready to take delivery of the goods at the commencement of the discharge, the defts. were entitled to deliver all the goods at the wharf,

Brown, Q.C. and *F. M. White* now showed cause, and contended that, as the bill of lading did not mention any express time for delivery, the proper time was that at which the consignee was ready to receive. That even if any time had been expressed the consignees were protected by the 5th condition, the true meaning of which is, that if the owner was ready to take delivery before the whole was discharged, he had a right to do so; and that, independently of the Merchant Shipping Act, the consignees

were entitled to have the goods delivered into the lighters. They referred to

Berresford v. Montgomery, 17 C. B., N. S., 373.

Watkin Williams in support of the rule.—The fixing the time for the delivery of the goods is for the protection of the shipowner, but there is no corresponding protection for the consignee, neither does he want it. The delivery of the goods means the delivery of the whole lot; and if the consignee is not ready with his lighters at the time the captain is ready to discharge the cargo, it is his own fault. Here the consignee was not ready with his lighters, and the fact of his getting his lighters alongside after part of the goods had been landed was not being ready; and the question which the parties really wish to be decided is as to whether the shipowner is bound under the circumstances to cease landing at the wharf, and to put the goods on board the lighters.

ERLE, C. J.—I am of opinion that this rule should be discharged. The question turns upon the construction of a contract under the following clause in a bill of lading: "Simultaneously with the ship being ready to unload the above-mentioned goods or any part thereof, the consignee of the said goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge or into lighters provided with a sufficient number of men to receive them; and in default thereof the master or agent of the ship is hereby authorised to enter the said goods at the Custom-house, and land, warehouse, or place them in lighters at the risk and expense of the consignee of the goods after they leave the deck of the ship." Under this bill of lading sixty-five pipes of lemon juice were shipped, and in due course arrived in London. The ship was ready to deliver them on the 24th March, before the lighters of the consignee had arrived alongside the ship, and she had landed fifteen pipes before they came. At that time there remained fifty pipes to be landed. The consignees then demanded the delivery of the remainder of the pipes into their lighters upon such terms as would not have put the shipowner to any additional expense. This, however, he refused on the ground that, if he were ready to unload any part of the goods before the consignees were ready to receive, he had a right to unload the whole and make the consignee pay the cost of warehousing. I consider that was not the intention of the parties; what they did intend was, that if no damage would accrue to the shipowner the contract should be divisible. The same question arises under the Merchant Shipping Act, sect. 67, condition No. 5, which says, that if at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do. Now, so far as I can see, with the qualification I have mentioned, the consignee is entitled to receive the goods which had not been landed, as he could do so without any more damage to the shipowner than if he had been ready at the first to receive the whole.

WILLES, J.—I am of the same opinion. I will content myself by putting two illustrations of the alternative which would follow if the Act were construed otherwise. In this case the pipes of lemon-juice all belonged to the same person, but suppose that the first fifteen had belonged to A. and the remaining fifty to B., and that A. was not ready, and consequently the fifteen pipes were landed, but none of B.'s. Has the shipowner a right to land B.'s, and is he to suffer because of A.'s default, with which he had nothing to do? Again, suppose that fourteen out of the fifteen only belonged

[Ex.]

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[Ex.]

to A., so that one belonging to B. was put on shore with them, and B. comes and demands the forty-nine, is he not to have them delivered to him? Surely an Act of Parliament dealing with a matter of business would not bring about such an absurdity. As to the construction of the bill of lading, the authority given by it to the master is, as pointed out by my brother Keating, intended to be divisible, as it speaks of the above-mentioned goods or any part thereof. I further agree with my Lord Chief Justice that, if the shipowner had acted in such a way as to incur expense or loss of time, it might be said that this case fell within the principle, that authority once given and acted upon to the damage of the person acting is irrevocable. The case of *Blasco v. Fletcher*, 14 C. B. 147, illustrates this. There a ship was chartered from Liverpool to the Havannah, but on her voyage was wrecked on the coast of Ireland. The charterer went to the place to represent the shippers, and was told by the master to do what he thought best for the interest of the owners of the ship. He took as much of the cargo as could be restored to a merchantable condition to Liverpool, and there sold it. The shipowners afterwards revoked the authority of the charterer, but, he having acted on the authority, and thereby incurred expense, before it was countermanded, it was held that the authority could not be revoked.

KEATING, J.—I am of the same opinion, both with respect to the construction of the contract and of the Merchant Shipping Act. In truth, to come to a contrary opinion would be absurd, and would work great injustice. The shipowner says, "Because I have landed fifteen pipes, I claim a right to land the remainder, not because I have sustained any loss, but it being as easy to do one as the other, I can do which I please."

Rule discharged.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUKLEY, Esqrs. Barristers-at-Law.

Wednesday, May 31, 1865.

PRIESTLEY v. FERNIE AND OTHERS.

Shipping—Principal and agent—Right to maintain separate actions for the same cause against master of a vessel, and owner.

The master of a vessel who as such had signed a bill of lading, was sued upon it to judgment; he was afterwards arrested thereon under a ca. sa., and subsequently obtained his discharge as a bankrupt. The owner of the vessel was then sued in respect of the same cause of action:

Held, that the second action was not maintainable; the liability of the master of a ship acting for his owners, and their liability where he acts for them, is not different from the liabilities in ordinary cases of principal and agent.

Where an agent having made a contract in his own name has been sued on it to judgment, no second action is maintainable against the principal.

This was an action brought by the plt. as secretary of the Melbourne Gas Company, against defts., the shipowners, on a bill of lading, for not delivering certain goods. The plt. had sued the master in Melbourne and recovered judgment against him, but obtained no satisfaction of the debt., as the master, who had been arrested upon the plt.'s judgment, received his discharge through the Court of Bankruptcy. The plt. now sought to make the owners of the vessel liable.

The declaration alleged that Daniel Kavanagh, master of the vessel called the *Queen of Commerce*, for a voyage of the vessel from the port of Liverpool

to Hudson's Bay, Port Phillip, signed the following bill of lading:

Shipped in good order and condition, except chips and sand-cracks, by Edmund Thompson, &c., agents for Harper and Moore, in and upon the good ship or vessel called the *Queen of Commerce*, whereof Kavanagh is master for this present voyage, and now lying in the port of Liverpool and bound to Hudson's Bay, Port Phillip, 264 retorts, being marked and numbered, and enumerated as per margin, and are to be delivered in the like order and condition, except chips and sand-cracks, or breakage arising from any cause, save improper stowage, and subject to the undermentioned clauses, from the ship's tackle, at the aforesaid Hudson's Bay or railway pier (all and every the dangers and accidents of the seas, fire, and navigation of whatsoever nature or kind excepted), unto the Melbourne Gas Company, or to their assigns, freight for the said goods being payable in Melbourne as per margin, with primage and average accustomed. In witness whereof the master of the said ship or vessel hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished the rest to stand void.

Weight, contents, and value unknown, and not answerable for breakage arising from any cause except the improper stowage, nor for loss by fire, vermin, or collision. Goods for the bay or railway pier, if not taken from alongside within three days after ship's arrival, may be landed by ship's agents, and all expenses to be paid before delivery; all risk of river craft and lighterage to be borne by the shippers.

Entries to be passed by consignees within twenty-four hours after arrival of ship, or ship's agent to do so at consignee's expense.—Dated in Liverpool, 24th Nov. 1860.

DANIEL KAVANAGH.

Printed across the bill of lading was, "Freight, if payable in Liverpool, to be paid in cash on signing bills of lading. Freight, if payable abroad, to be paid in cash before delivery of goods to charterer's agents, Messrs. Swire Brothers."

In the margin of the bill of lading the goods and freight and the primage are thus described:

264 retorts, weighing 86 tons 12 cwt., at	
55s. per ton.....	£238 3 0
Primage, 10 per cent.....	23 16 3
	£261 19 3

And the company by their agents in that behalf shipped and delivered such goods as are specified in the said bill of lading to the defts., and they accepted and received of and from the said company the same on board the said vessel in such order and condition as are mentioned in the said bill of lading, to be by defts. conveyed in the said vessel to such place and for such purpose and subject to such terms and conditions as are in the said bill stated and contained; and the vessel completed the voyage, and everything has been done and happened, and all times elapsed requisite to enable the said company to have all the said terms observed and performed, and the goods delivered to the company at the place in the said bill of lading specified, and in the order and condition contracted for, and to entitle the plt. suing as aforesaid to recover in this action in respect of the matters in this count stated; yet defts., although not prevented by the said excepted dangers, accidents, causes, matters, or things, or any of them, failed to deliver the said goods to the said company in the order and condition contracted for, and wholly failed to deliver part of the said goods to the said company, and have delivered part of the said goods not in the order and condition contracted for, but in bad order and condition and damaged otherwise than in any of the said excepted particulars, and otherwise than by or through the said excepted dangers or accidents, causes, matters, and things, or any of them, and thereby the said company have lost the said goods not so delivered, and the said goods so delivered have become of less value to the said company.

Fifth plea:

That the plt., as such secretary as in the declaration alleged, and on behalf of the said company heretofore in the Supreme Court of Melbourne, in the colony of Victoria, then having jurisdiction in that behalf, impleaded the said Daniel Kavanagh, in the declaration mentioned as and being the master of the said ship, and signing the said bill of lading in the same identical causes of action as in the declaration alleged, and such proceedings were thereupon had in the

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said court; that the plt., as such secretary, recovered against the said Daniel Kavanagh 140*l.* 3*s.* for the said cause of action, and his costs of suit in that behalf; and afterwards the plt., as such secretary as aforesaid, and on behalf of the said company, in the Court of Ex. of Pleas at Westminster, impeached the said Daniel Kavanagh for and in respect of and upon the said judgment so recovered as aforesaid, and such proceedings were thereupon had in that action that the plt. afterwards, by the judgment of the said last-mentioned court, recovered against the said Daniel Kavanagh 28*l.* 10*s.* 10*d.*, and his costs of suit in that behalf, and after the recovery of the said last-mentioned judgment, the plt. for having satisfaction thereof, caused to be duly issued out of the said Court of Ex. of Pleas, a writ of *ca. sa.* upon the said judgment, and by virtue of which the said D. Kavanagh was before this suit duly taken in execution at the suit of the plt., and was kept and detained in custody to satisfy the plt. in the said action, and that they are being sued in this action in respect of the said D. Kavanagh having signed the said bill of lading as master of the said ship on behalf of the defts. as owners thereof, and that they are not otherwise liable in this action.

Demurrer to the fifth plea and joinder in demurrer.

Second replication to the fifth plea:

That the said D. K. being a prisoner under the said writ became bankrupt within the meaning of the statute in force concerning bankrupts, and thereupon was discharged from custody under the said writ of *ca. sa.*, without the consent of the plt. by act of law, under and by virtue of the statute then in force relating to bankrupts, and that such proceedings were had in the matter of the said bankruptcy that the said D. K. afterwards and before this suit duly obtained an order of discharge under the said statute, and was thereby discharged of and from the said judgments and each of them, and the said judgments are and each of them is wholly unsatisfied, and the plt. had not at any time before the recovery of the said judgment in the said Court of Ex. or before the said D. K. obtained his order of discharge as aforesaid, notice or knowledge that the said bill of lading and contract were made by the defts. or any of them.

Demurrer thereto, and rejoinder:

That after the said D. K. became and was bankrupt, as in the said second replication mentioned, and before the commencement of this suit, the plt. was admitted to prove and proved in respect of the said judgment so recovered in the said Court of Ex. as aforesaid, against the estate of the said D. K. under the said bankruptcy, for the amount due upon the said judgment.

The plt.'s points for argument were:—1. That the circumstance that an unproductive judgment had been recovered against an agent, was no legal reason why the plt. should not recover against the principal. 2. It was not shown that the defts. were in any way affected or prejudiced by the judgment.

Defts.' points for argument were:—1. That plt., by suing Kavanagh, the master, in the Supreme Court of Melbourne, and afterwards suing him in this court, upon the judgment obtained at Melbourne, had precluded himself from suing defts. in respect of the same matter. 2. That the taking of Kavanagh in execution upon the judgment obtained here was a satisfaction of the claim. 3. That it made no matter that Kavanagh was discharged from custody under the proceedings in bankruptcy. 4. That the plt., having elected to take the benefit of the bankruptcy proceedings, had lost all remedy both as against Kavanagh and the defts. 5. That if the plt. was entitled to sue the defts., defts. would have their remedy over against Kavanagh, who might thus have been twice sued in respect of the same cause of action. 6. That the plt., having elected to proceed against Kavanagh, could not also recover against the defts.

Quain, for the plt., in support of the demurrer to the plea, said that the action had been brought against the master as agent, the plt. at that time not knowing who was the principal. There was no doubt that it was the defts.' contract. There had been no release, nor payment, nor satisfaction, nothing in fact to discharge the defts. from their liability. The case was wholly different from that of a partnership where a man proceeding against one partner absolved the other from liability. Here the agent had been sued, and no satisfaction obtained for the claim, and the fact of the agent

having been sued did not prevent the plt. from proceeding against the principal. He referred to Story on Agency, s. 295, as an express authority against the plea:

Thompson v. Dawsons, 9 B. & C. 78;
3 Kent's Com. 161, were also cited.

R. G. Williams (*Aspinall* with him), for the defts., contended that as the plt. had made his election and recovered judgment, he was bound by what he had done, and the plea was an answer to the present action.

Abbott on Shipping, p. 124, 8th edit., was referred to.

Quain in reply.

Cur. adv. rut.

June 23.—BRAMWELL, B. delivered judgment.—This is the opinion of my Lord Chief Baron, my brother Channell, and myself; my brothers Martin and Pigott did not hear the case. We are of opinion that our judgment should be for the defts. If this were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that, where a contract is so made the contractee has an election to sue agent or principal, supposes he can only sue one of them; that is to say, sue to judgment. For it may be that an action brought against one might be discontinued, and fresh proceedings be well taken against the other. Further, there is abundance of authority to show that where the situation of the principal is altered by dealing with the agent as principal, the former is no longer subject to an action. But this is not the case here. The defts. may or may not be liable to indemnify the master in respect of his costs or his imprisonment, but they are clearly liable to him or his estate in respect of the damages recovered against him, and proceedings might have been taken against them as soon as judgment was recovered against the master, and before any payment by or execution against him. They are now, therefore, under a liability to the master or his estate to the extent of the whole claim, and yet it is sought to bring them under a fresh liability for that to the plt. If this, then, were the ordinary case we have mentioned, there could be no doubt on the subject. But it is said that the liability of the master of a vessel acting for his owners, and their liability where he acts for them, is different from the liabilities in ordinary cases of principal and agent, and that first one and then the other may be sued. The plt.'s argument then is, that the present case is anomalous and exceptional. Where that is contended for, strong reasons ought to be given for it. What is given here? It is certain that the master's liability is founded on the same considerations as that of an ordinary agent, namely, he makes the contract in his own name: (*Rick v. Coe*, 2 Cowp. 639; Story on Agency, sect. 296.) It is said that for purposes of commerce it is convenient that both master and owner should be suable. So it is, but why to the extent contended for, more than in any other case of principal and agent? It might be hard to make a person who deals with the master run after the owner to sue him; yet why, if he sues the master, should he afterwards sue the owner, merely because it is very right he should be able to sue the master or owner? In reality no reason can be given for the distinction attempted between this and other cases of principal and agent. We do not say none could be given why, in all cases of principal and agent, both should be suable; but that there is no particular reason applicable to the masters and owners of

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The case, then, must rest not on principle authority, and that authority is limited to a in Story on Agency. It is remarkable : is of opinion that there was by the law an option to sue either, but not if so, what he lays down is peculiar to our I doubly anomalous. He gives no reason for ites 2nd Livermore on Agency, p. 167, 169, 18. He (Story) says the second action may be obtained unless "in the first action he has a complete satisfaction of the claim." On e, however, to Livermore (we say it with spect), he really says nothing in support of proposition. What he says is, "Masters of it vessels are personally answerable upon the s made by them in relation to the employ- the ship, to repairs, or to supplies furnished ship's use. For the law gives to the mer- who contracts with the master a twofold against the owners and against the masters." s he cites *Rich v. Coe*, 2 Cowp. 639, which, a very questionable decision, justifies Liver- proposition, but not Story's. It only decides e owners are liable upon an order by the for necessities, though without their author- is true Lord Mansfield says, the master, the and the ship are trusted, but he says nothing ort what is contended for. It is remark- at Story does not cite this authority so r Livermore. *Melius est petere fontes quam iculus*. Then really there is no authority contention, while there is much the other the silence of all other writers on the sub- t is not suggested in Abbot on Shipping, nor in Kent's Commentaries (see 2 Kent, Kent, p. 217), nor in Maude and Pollock, p. r in *Machlachlan*, p. 128, nor in 1 Parsons on e Law, p. 37. There is one powerful con- on the other way—namely, if the master s under seal, no action lies on the contract the owners. Why? If the master makes ntracts, one for himself and one for his why should his contract, being under seal, the owners being sued on that which he, ster, has made for them? Nothing. But if es one contract only, as in ordinary cases he agent contracts in his own name, which chant may say binds him because made in name, or binds his owner because made for en the decisions are intelligible, and the on is correct; the owners are not liable, of a technical rule that a contract under not bind a person not executing, without authority under seal for its making. See on Shipping, ed. of 1856, p. 169. *Leslie on*, 3 Bro. & B. 171, is not opposed to this. re we give judgment for the defts.

Judgment for defts.

attorneys, *Wadson & Malleson*, Austin-friars.
s attorneys, *Nethersole & Speechly*, 1, New-inn.

EXCHEQUER CHAMBER.

ed by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,
Barristers-at-Law.

June 17 and Nov. 27, 1865.

ERROR FROM THE QUEEN'S BENCH.

ERLE, C. J., POLLOCK, C. B., MARTIN, B.,
LES and KEATING, JJ., and FIGOTT, B.)

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bottomry bond—Liability of owner of foreign
—Money paid by freighter to release cargo.

ter of a French ship undertook by charter-party
rey cargo belonging to the plt. from the West

Indies to Liverpool. The vessel put into Fayal in distress, where the master hypothecated the vessel for repairs. On her arrival in this country proceedings were had in the Admiralty Court on the bottomry bond, and the plt. was obliged to pay money to release the cargo. To an action on an implied promise to indemnify the plt., the defts. pleaded that the ship was a French ship, and the defts. French subjects domiciled in France, and that by the laws of France the owners of any French ship may in all cases free themselves from the acts and engagements of the master by the abandonment of the ship and freight, and that they had done so. The plt. demurred to this plea, and also replied, secondly, that he had elected that his goods should be carried to England, and that the law of the country where the charter-party was made and where the bottomry bond was given, was similar to the law of England, and not to that of France. To this replication the defts. demurred:

Held (affirming the judgment of the court below), that the defts. were entitled to judgment, for the authority of the master to bind the owner of a ship is governed by its flag, and therefore in this case by the law of France, which must be taken on demurrer to be as stated in the plea:

Held, also, that a party who relies upon a right or an exemption by foreign law, is bound to bring such law properly before the court, and to establish it by proof, otherwise the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England.

This was a writ of error upon a judgment for the deft. in the Q. B. The case was argued at the sittings after last Trinity Term, *C. Hutton* appearing for the app., and *Hodgson* for the resp.

The pleadings, facts, and arguments are fully set out in the report of the case in the court below: (see 10 L. T. Rep. N. S. 570.)

Cw. adv. vult.

Nov. 27.—WILLES, J.—The facts disclosed by the record are as follows:—The plt. below, a British subject at St. Thomas, a Danish West-Indian island, chartered the ship *Olivier*, belonging to the defts., who are Frenchmen, for the voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at the charterer's option. The plt. must have known that the ship was French. The charter-party was entered into by the master, in pursuance of his general authority as such, and not under any special authority from the owner. The plt. shipped a cargo at St. Marc, for Liverpool, with which the vessel sailed. On her voyage she sustained damage from a storm, which compelled her to put into Fayal, a Portuguese port, for repair. There the master properly borrowed money upon bottomry of the ship, freight, and cargo, and repaired the ship, which proceeded with the cargo, and arrived in safety at Liverpool. The bondholder proceeded in the Court of Admiralty against the ship, freight, and cargo. The ship and freight were insufficient to satisfy the bond. The deficiency and costs fell upon the plt. as owner of the cargo, and in respect thereof he seeks to be indemnified by the defts., as shipowners. The defts. abandoned the ship and freight, and it must be taken as a fact—because it is alleged, and not denied—that, by the law of France, they abandoned in time, and in such manner and under such circumstances as are required by the French law; and that, according to such law, abandonment (by which we understand a giving up of the ship and freight to the shippers) absolved him from liability. This law, if applicable, is one which furnishes an absolute bar to the plt.'s claim, by way of satisfaction or discharge, and affected the validity of the claim and not merely the mode of proceeding to enforce it. Whether the French law permits aban-

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donment under such exceptional circumstances is a question of fact not before us, and which, for the present purpose, we must assume to be answered in the affirmative: (see, however, "Duvilleneuve et Masse Dictionnaire du Contentieux Commercial," tit. Armateur, sects. 23 & 25.) By the English law a shipowner, under such circumstances, is liable personally, and not merely to the value of the ship and freight; and it is alleged, and not denied, that the Danish and Portuguese laws agree, in this respect, with our own. As to the law of the port of loading at Haiti we are not informed. Upon these facts it was insisted for the plt. that the decision ought to proceed upon either what was called the general maritime law, as regulating all maritime transactions between persons of different nationalities at sea; the Danish law, as that of the place where the contract was made (*lex loci contractus*); the Portuguese law, because the bottomry bond which in one sense caused the question to arise was given in a Portuguese port, and the rule that the place governs the act (*locus regit actum*) was supposed therefore to furnish a solution, or the English law as being that of the place of the final act of performance by the delivery of the cargo (*quasi lex loci solutionis*); in either of which alternatives the liability of the deft. was established, and it was argued that the charter-party having been entered into *bonâ fide* in the ordinary course of business by the master within the scope of his ostensible authority to contract for the employment of the vessel which the owner, by appointing a master and sending him abroad in command, allows him to assume, the right of the charterer could no more be narrowed by a provision of foreign law unknown to him, than by secret instructions from the owners, which would clearly be inoperative—a proposition which needs no authority in our law, and for which French authorities will be found in Paillet's edition of the Code de Commerce, Act 216 in the note. For the defts. it was answered that by the French law they are absolved, and that that law, as being that of the ship, governs the case, either because of the character of the transaction itself showing that the plt. impliedly submitted his goods to the operation of the law of the ship, or because the master who entered into the contract, though his doing so was within the scope of the authority which he was allowed by the owner to assume, was disabled by the French law from binding his owners otherwise than with the exception expressed or implied by exemption from liability by abandonment, and that of such disability or lack of authority his flag was sufficient notice. Upon this latter ground the Court of Q. B. gave judgment for the defts., not expressing any opinion upon the former; whereupon the plt. brought error, and the case was well argued at the sittings after Trinity Term last, before Erle, C. J., Pollock, C. B., Martin, B., Keating, J., Pigott, B., and myself, when we took time to consider. In determining a question between contracting parties, recourse must first be had to the language of the contract itself, and (force, fraud, and mistake apart) the true construction of the language of the contract (*lex contractus*) is the touchstone of legal right and wrong. It often happens, however, that disputes arise not as to the terms of the contract, but as to their application to unforeseen questions which arise incidentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby, and cannot be decided as between strangers. In such cases it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather, to what general law it is just to presume that they have submitted themselves in the matter. A familiar illustration of this

will be found in the rule that the lawful usages of a market are as much part of a contract entered into there which does not expressly exclude them, as if they were set down at large. The binding force of such usages does not depend so much upon the knowledge of the parties as upon implied acquiescence, for "Whoso goes to Rome, must do as those at Rome do." So, in the absence of express provision or special usage, the general law itself, in many points of view only a more extended usage, supplies the gaps which the parties have left, and in doing so, it sometimes modifies the construction of general words in the contract. For instance, a common carrier, while on the one hand he is bound by stringent rules for the protection of his customers, on the other he is allowed certain exemptions from liability, even upon an express contract which does not exclude such exemptions. Thus, by the common law of England, a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for nonperformance because of being prevented by the act of God or the king's enemies: (*Paradine v. Jane*, Aleyn, 27.) And yet, in consideration of the risks to which common carriers are exposed, such prevention is in their case an implied exemption; and, in the case of ordinary bailees entrusted with the custody of goods, whether by express contract or not, the exceptions of overwhelming force (*vis major*), and accident without negligence (*casus fortuitus*) are implied. In the case of carriers by sea these latter expressions, *vis major* and *casus fortuitus*, are now as to British subjects always stipulated for by the common exception in the charter-party or bill of lading; whilst in foreign contracts of affreightment, even when made in British ports, such express stipulation is sometimes omitted, as for instance in the Spanish charter in *Blasco v. Fletcher*, 14 C. B., N. S., because by the law of many countries such an exception is implied: (see *Casa Regis*, Dix, 23; *Código de Comercio*, art. 935; *Allgemeines Deutsches Handels Gesetzbuch*, art. 703.) So that, in the case just referred to, if the *lex loci contractus* were to prevail, the owner of a Spanish vessel chartered at Liverpool for the Havana, might lose the protection which the owner of an English vessel would, of course, have stipulated for. And this diversity, or conflict, if you will, upon a point so important shows that the present and like questions affect not only contracts entered into by masters of ships, the law of whose country distinguishes between the obligation of a contract by the master as such, and that of the owner himself, or of the master acting with a plenary authority, but touch all contracts of affreightment entered into in respect of any vessel in a port foreign as to her, whether the master happens to be an owner or not. Hitherto we have viewed the question generally, but in order to its satisfactory solution as applied to the present case, we must deal with the operative facts that the contract of affreightment was made by persons of different nationalities in a place where both of them were foreigners, to be performed partly there by breaking ground in order to start for the port of loading, a place which may or may not have been governed by a different law from that of the place of the contract, and where both parties would also have been foreigners, partly at the latter port by taking the cargo on board, and partly on board a ship at sea, subject there to the laws of their own country, and never out of its jurisdiction as to acts done by those on board, and partly by final delivery in the port of discharge, that the principal subject-matter of the contract was the employment of a foreign ship for a voyage across the high seas, and that the question in dispute arose in consequence of sea damage to the ship and its ordinary result. The diversity or conflict of

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which ought not to prevail is a question that as called forth an amazing amount of ingenuity, and many differences of opinion; it is, however, generally agreed, that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention; as, for instance, that the contract is to be entirely performed elsewhere, or, that the subject-matter is immovable property, situated in another country and so forth, which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general, and by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made, which intention is inferred from the subject-matter, and from the surrounding circumstances, so far as they are relevant, to construe and determine the character of the contract. The present question does not appear to have ever been decided in this country, and in America it has received opposite decisions equally entitled to respect. We must, therefore, deal with it as a new question, and endeavour to be guided in its solution by a steady application of the general principle already stated, namely, that the rights of the parties to a contract are to be judged of by that law by which they intended to bind, or rather by which they may justly be presumed to have bound themselves. We must apply this test successively to the various laws which have been suggested as applicable; and first, to the alleged general maritime law. We can understand this term in the sense of the general maritime law as administered in the English courts, that is, in truth nothing more than English law, though dealt out in a somewhat different measure to the Common Law and Chancery Courts, and in the peculiar jurisdiction of the Admiralty. But as to any other general maritime law by which we ought to adjudicate upon the rights of the subjects of a country which by the hypothesis does not recognise its alleged rule, we were not informed that may be its limits or its sanction. Passing over the origin of ethics and the elementary ideas of natural law (*jus gentium*), such as the rights of prior occupancy, and self-preservation, privilege, and the exemption of necessity, the common duties of humanity, of more or less perfect obligation, the idea of property including the obligation of contracts, and those universally recognised rights and duties upon which is based the modern system of international law (*jus inter gentes*), and which furnish no precise rule for the matter in hand, it could be difficult to maintain that there is, as to such questions as the present, depending in a great measure upon national policy and economy, any general, in the sense of universal, law binding at sea any more than upon land, nations which either have not assented or have withdrawn their assent thereto. Moreover we are not satisfied that there is any such general concurrence of mankind that shipowners should be absolutely answerable personally for the acts of the master. Pothier (*sur le Charte-partie*, art. 1, sect. 84) was cited in the affirmative, and Emerigon (*Contract à la grosse*, chap. 4, sect. 11) upon the negative side. Pothier, forming his interpretation upon the civil law, thought that the clause in the celebrated Ordonnance de la Marine of 1681 (livre 2, tit. 8, art. 2), from which Art. 216 of the Code de Commerce was taken, applied only to licit acts of the master, and that upon his contracts the owner was liable, and could not get rid of liability by abandonment. Emerigon, on the other hand, founding his opinion upon the general rule of maritime law, as he understood it, thought

that from liability for all acts of the master, whether licit or illicit, including contracts, the owner could free himself by abandonment. The jurisprudence of the Court of Cassation leans towards the opinion of Pothier, and that led, in 1841, to the modification of article 216 to its present shape, by which, according to the statement of the learned annotator in Lirey's *Gilbert's Code de Commerce*, annotated upon article 216, the opinion of Emerigon is now established in France. To this may be added that similar, though not identical, provisions for the protection of the owner are to be found in other codes; for instance, that of Spain (*Código de Comercio*, articles 621, 622), and Prussia (*Allgemeines Deutsches Handels-Gesetzbuch*, articles 451, 52, 53, and the following). This is sufficient to show that there is no general uniform rule in maritime law upon the subject; indeed, looking at home, there seems little, if any, difference in principle between the French law under consideration and our own statutory provisions for limited liability in respect of obligations by reason of collision, which latter have now by express enactment been extended to collision between British and foreign vessels: (25 & 26 Vict. c. 63, s. 54; *The Amelia*, 1 Moo. P. C., N. S., 471; 32 L. J. 191, P. C.) In truth, any general, much more any universal, maritime law, binding upon all nations using the highway of the sea in time of peace, except when limited as administered in some court, is easier longed for than found. Accordingly, we observe that both the very learned judge of the Court of Admiralty and the Judicial Committee of the Privy Council, in deciding in the case of the *Hambury* (*Duranty v. Hart*, 2 Moo. P. C., N. S., 289) that the validity of a bottomry bond given in a foreign port was to be determined by the general maritime law, and not by the law of the ship or the port where the bond was given, added to the expression "the general maritime law," this qualification, namely, "as administered in England." That case was cited as an authority, and at first sight it appeared to be one for applying the English law to the present case, but upon consideration it appears altogether distinguishable. The alleged agency of the master in that case was founded upon necessity alone, and it was incumbent upon the bondholder to establish such necessity by evidence, and in order to do that he was bound (according to the rule prevailing since the case of the *Bonaparte*) to show a communication with the owner of the cargo, that being, as the court held, reasonably practicable. So that the *lex fori* was undoubtedly supreme upon the question which then arose, it being one of evidence and procedure. Had the decision been intended to go further, the Judicial Committee of the Privy Council would probably have considered and compared the case of *Cannell v. Sewell*, 5 H. & N. 728, and pointed out the distinction in this respect between an hypothecation in case of necessity, and a sale in case of necessity, which, according to the decision of the majority of the court in *Cannell v. Sewell* (against the opinion of Byles, J.), depends for its validity upon the law of the place where the sale was made, and not the general maritime law as administered in England, upon which however we offer no opinion. In one other point of view, the general maritime law as administered in England, or (to avoid periphrasis) the law of England, namely, as to the law of the contemplated place of final performance or port of discharge, remains to be considered. It is manifest, however, that what was to be done at Liverpool, besides that it might, at the charterer's option, have been done at Havre, was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby. It is true that, as to the mode of delivery, the usages of Liverpool would govern, as

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those of Algiers did in *Robertson v. Jackson*, 2 C. B. 412, and as in the mode of taking on board the cargo, the usage of the port of lading would be regarded (see *Hudson v. Clementson*, 18 C. B. 213); and the custom set out in the pleadings in *Gattorno v. Adams*, 12 C. B., N. S., which custom was proved at the trial at the Guildhall sittings after Michaelmas Term 1862, and made an end of the case; and in this point of view it seems impossible to exclude the law of England, or even that of Haiti, from relevancy in respect of the manner of performing that portion of the service contracted for, which was to be rendered in their respective territories, because the ship must needs for the time being conform to the usages of the port where she is. And, for a like reason, the adjustment of a general average at the port of discharge, according to the law prevailing there, is binding upon the shipowners and the merchants, who must be taken to have assented to adjustment being made at the usual and proper place, and, as a consequence, according to the law of that place: (*Simmons v. White*, 2 B. & C. 835.) It is unnecessary, however, to discuss this point further, because we have been anticipated and the question set at rest in an instructive judgment of the Judicial Committee delivered by Turner, L. J., since the argument of the present case in that of the *Peninsular and Oriental Company v. Shand*, P. C., 20th July 1865, *Jurist*, Oct. 7, where a passenger in an English vessel from Southampton to the Mauritius, where French law prevails, sued the shipowners for the loss of his baggage upon an alleged liability by French law from which liability the shipowner was exempt by the English law, and the passenger obtained judgment in his favour in the Mauritius court, which judgment was reversed upon appeal by the Judicial Committee, their Lordships holding that the law of England governed the case. Next, as to the law of Portugal, the only semblance of authority for resorting to that law, as being the law of the place where the bottomry bond was given, is the case already referred to of *Cumell v. Sewell*; and we consider that the judgment in that case, if applicable at all, as to which we say nothing, could affect the validity of the bottomry, and not the duties imposed upon the shipowner towards the merchant by the fact of the bottomry, which duties must be traced to the contract of affreightment and the bailment founded thereupon. The law of Haiti is not stated or relied upon by either party, and there remains only to be considered the laws of Denmark and France, between which we must choose. In favour of the law of Denmark there is the cardinal fact that the contract was made within Danish territory; and further, that the first act done towards performance was weighing anchor in a Danish port. For the law of France, on the other hand, many practical considerations may be suggested; and first, the subject-matter of the contract, the employment of a sea-going vessel for a service, the greater and more onerous part of which was to be rendered on the high seas, where she was for all purposes of jurisdiction, criminal or civil, with respect to all persons, things, and transactions on board, a floating island, over which France had as absolute and for all purposes of peace as exclusive a sovereignty as on her dominions by land, and which, even whilst in a foreign port (according to notions of jurisdiction adopted by this country, 18 & 19 Vict. 91, s. 11; 24 & 25 Vict. c. 94, s. 9, and carried to a greater length abroad, Ortolan "Diplomatie de la Mer," chap. 13, the work of a French naval officer, but of which a jurist might be proud), was never completely removed from French jurisdiction. Next, it must be remembered, that although bills of lading are ordinarily given at the port of lading, charter-parties are often made elsewhere, and it seems strange and unlikely to have been within the

contemplation of the parties that these rights or liabilities in respect of the identical voyage should vary, first, according as the vessel was taken up at the port of lading or not; and secondly, if she were taken up elsewhere, according to the law of the place where the charter-party was made, or even ratified. If a Frenchman had chartered the *Olivier* on the same terms as the *pils*, did, it should seem strange if he could appeal to Danish law against his own countrymen, because of the charter-party being made or ratified in a Danish port, though for a service to be rendered thereat by a transient visitor, for the most part within French jurisdiction. Moreover, there are many ports which have few or no sea-going vessels of their own, and no fixed maritime jurisprudence, and which yet supply valuable cargoes to the ships of other countries. Take Alexandria, for instance, with her mixed population and her maritime commerce almost in the hands of strangers. Is every vessel that leaves Alexandria with grain, under a charter-party or bill of lading made there, and every passenger vessel leaving Alexandria or Suez, be she English, Austrian, or French, subject to an Egyptian law? As to not a few semi-savage places in Africa with neither sea-going ships nor maritime laws, the same question arises. What is the law in such cases, or is there none except that of the court within whose jurisdiction the litigation commences? Again, it may be asked, does a ship which visits many ports in one voyage, whilst she undoubtedly retains the criminal law of her own country, put on a new sort of civil liability at each new country she visits in respect of cargo there taken on board? A steamer, for instance, starts from Southampton for Gibraltar, calling at Vigo, Lisbon, and Cadiz. A Portuguese going from Southampton to Vigo would naturally expect to sail subject in all respects to English law, that being the law of the place and the ship. But if the locality of the contract is to govern throughout, an Englishman going from Vigo to Lisbon on the same voyage would be under English law as to crimes and all obligations not connected with the contract of carriage, but under Spanish law as to the contract of carriage; and a Spaniard going from Lisbon to Cadiz during the same voyage would enjoy Portuguese law as to his carriage, and be subject to English law in other respects. The cases which we have thus put are not extreme nor exceptional; on the contrary, they are such as would ordinarily give rise to the question which law is to prevail. The inconvenience and even absurdities which would follow from adopting the law of the place of contract in preference to that of the vessel are strong to prove that the latter ought to be resorted to. No inconvenience comparable to that which would attend an opposite decision has been suggested. The ignorance of French law on the part of the charterer is no more than many Englishmen, contracting in England with respect to English matters, might plead as to their own law in case of an unforeseen accident. Nor can we allow any weight to the argument that this is an impolitic law as tending to interfere with commerce, especially in making merchants cautious how they engage foreign vessels. That is matter for the consideration of foreigners themselves, and nothing short of a violation of natural justice or of our own laws or policy could justify us in holding a foreign law void because it is impolitic. No doubt the French law was intended to encourage shipping by limiting the liability of shipowners, and in this respect it goes somewhat further than our own, but whether wisely or not is within the competence and for the consideration of the French Legislature, and upon which, sitting here, we ought to pronounce no opinion. Exceptional cases, should they arise, must

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be dealt with upon their own merits. In laying down a rule of law, regard ought rather to be had to the majority of cases upon which doubt and litigation are more likely to arise; and the general rule that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce. In order to preclude all misapprehension, it may be well to add that a party who relies upon a right, or an exemption by foreign law, is bound to bring such law properly before the court, and to establish it in proof. Otherwise the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England: (see *Brown v. Gray*, note to *Lacon v. Higgins*, Q. B., M. 1821.) For these reasons we have arrived at the same conclusion as the Court of Q. B., and without examining the ground upon which the court proceeded, we are of opinion that the judgment was right and ought to be affirmed.

Judgment for the deft.

ERROR FROM THE QUEEN'S BENCH.

Monday, Nov. 27, 1865.

Before ERLE, C. J., POLLOCK, C. B., WILLES and BYLES, J.J., CHANNELL, B., KEATING, J., and FIGOTT, B.)

WILSON v. RANKIN.

A policy on freight is not rendered void by the master's act, without the owner's authority or knowledge, in loading part of the cargo on deck contrary to the Customs Consolidation Act (16 & 17 Vict. c. 107), s. 170 et seq.:

So held by the Ex. Ch., affirming the decision of the Court of Q. B.

This was a writ of error, and an appeal upon a judgment of the Court of Q. B.

The pleading and facts are set out in the report of the case in the Q. B. (12 L. T. Rep. N. S. 20.)

Cohen (Mellish, Q. C. with him) for the deft.—The declaration is upon a policy of insurance on freight, and the question is, whether the fourth plea is good. That in substance alleges that the cargo insured in respect of which the freight was claimed was timber shipped on board a vessel, after the coming into operation of the Customs Consolidation Act 1853 (16 & 17 Vict. c. 107), and that the whole of the cargo was not below deck, but part of it was loaded on deck contrary to the statute, and that the plt. was the owner of the ship. It is submitted that the plt. is not entitled to recover, as the loading of the cargo on deck was illegal, and the master's act was the owner's in this case. The effect of the loading was to render the ship in a certain sense unseaworthy; that is, the ship was not seaworthy within the meaning of the statute. In all policies there is an implied warranty that those provisions have been complied with which are essential to the legality of the voyage. The nature of the loading not having been communicated to the underwriters, they are absolved from any liability on the policy:

Cunard v. Hyde, E. B. & E. 670; *Ib.*, 2 E. & E. 1;
Bell v. Carstairs, 14 East, 374;
Dawson v. Atty., 7 East, 367, 392;
Earle v. Rowcroft, 8 East, 126;
Hobbs v. Harman, 8 Camp. 93;
Burgess v. Wickham, 33 L. J. 17, 26, Q. B.;
Marshall on Ins. by Shea, 186;
Duar on Ins. (Amer.) 818, 377, 410.

Brett, Q. C. (Milward, Q. C. with him) contra, was not called upon to argue.

ERLE, C. J.—In this case it appeared in the plea in an action on a policy on freight that, contrary to the statute, the master had taken out a cargo in November or December, and part of the cargo he was taking out was loaded contrary to the provision of the 16 & 17 Vict. Now it is clear that if Wilson the shipowner had done that or had been cognisant of it, according to the case of *Cunard v. Hyde* it might have been an illegal voyage, and the policy thereon might have been rendered void; but the owner is not shown to have known anything of it or to have been party to it in any way. And the judgment of the court below was that, by reason of knowledge and authority from him to the master not being shown, the rule laid down in *Cunard v. Hyde* did not apply to the present case. The court was of opinion upon that decision that though the master had authority to load a cargo, it was not an authority to violate the statute in loading the cargo, nor was it an act of the master that the owner must be presumed to have assented to. In that judgment we concur. We are also of opinion that the second ground taken in the court below was a valid ground. Even if it had been shown, in fact, that the master had rendered this an illegal voyage without the knowledge or authority of the owner, it would have been a barratrous act on the part of the master, and the insurers would have been liable by reason of the barratry, and on that ground the insurers on freight ought to be liable. There was a further contention in the present case that there was a statutory unseaworthiness shown, because the ship had taken on board timber on the deck, and had sailed from Canada without having a certificate of clearance, and it was attempted to say that the insurer was discharged on the principle on which it has been held that, if a ship sails without being provided with proper documents, the risk of the insurers is increased, and the liability for loss greater than would be if the ship had the documents; that, therefore, the ship sailing without the certificate of clearance required by the statute in Canada at the time of sailing, there was no cargo on board, and the absence of that document created a statutory unseaworthiness within the principle of the case I have adverted to. It appears that the principle by no means applies. The document in question here is a document merely relating to the compliance with the requisitions of the statute at the port of loading, to secure a compliance with the provision of the statute there, and it does not at all bear upon the risk of the voyage after the ship is out of the port of discharge, and does not at all bear upon the ship in the port of discharge. We think that, though the argument was scarcely pressed by the learned counsel with any idea that it would succeed, there is nothing in the argument, and that the judgment should be affirmed. This was the only question brought before us, and we carefully limit the judgment to the exact question that is to be decided.

The rest of the Court concurred.

Judgment affirmed.

Attorneys for the plt., *Gregory and Rowcliffe.*

Attorneys for the deft., *Field and Roscoe.*

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THE PYRUS v. THE SMALES.

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COURT OF ADMIRALTY.

Thursday, May 11, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE PYRUS v. THE SMALES. (a)

Collision.

The Admiralty regulations directing "that where two vessels are crossing, the one on the starboard tack close-hauled and the other on the port tack, the vessel on the port tack shall give way to the vessel on the starboard tack, and that the starboard tack vessel shall keep her course:"

Held, under the above regulations, that the vessel on the starboard tack having put her helm about, instead of simply holding on her course, was solely liable for the consequences of a collision between the two vessels.

Deane, Q.C. and Potter appeared for the *Pyrus*.

Brett, Q.C. and E. C. Clarkson for the *Smales*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the barque *Pyrus*, 318 tons, from Dublin, laden with hay for Shields, against the brig *Smales*, 213 tons, from Hamburg, in ballast for Hartlepool, to obtain compensation for damage sustained from a collision between them off Hartley, near Tynemouth, shortly after twelve o'clock, a.m., of the 11th Dec. last. It was agreed on both sides that the wind was S.W., the barque stating the weather as full moon or thereabouts, very light, blowing hard: the brig representing it as rather hazy, with strong breezes and a high sea. The tide was about half-flood. The case for the *Pyrus* was, that while standing off to the S.E. close-hauled on the starboard tack, under whole sails, making between four and five knots, without lights, the green light of the brig was seen nearly ahead, distant about one mile, that the *Pyrus* kept her course, and the green light advanced across her hawse, and got quite clear on her weather or starboard bow, when it disappeared, and the red light of the brig came into view, and the brig, then under a port helm, bore down upon and ran right stem on into the barque's starboard bow, in the way of the fore-rigging, doing a great deal of damage; that, when the collision was apparently inevitable, the helm of the barque was put hard a-starboard, and her main and mizen sheets eased off, in order to lighten the blow; that the barque's crew, when the brig was approaching her weather side, hailed her to go under the barque's stern, but without effect. The defence of the *Smales*, on whose part a cross-action was brought, was, that she was proceeding under two single-reefed topsails, foresail, double-reefed trysail, and foretopmast staysail, closehauled on the port tack, heading west, going from three to four knots, carrying the proper Admiralty regulation lights, when the *Pyrus* was made out with no lights visible at the distance of about half-a-mile, bearing about N.W. by N., and that as soon as it was ascertained that the *Pyrus* was on the starboard tack, the helm of the *Smales* was put hard a-port; that the *Pyrus* starboarded her helm and the collision ensued, which was attributed by the *Smales* to the improper navigation of the *Pyrus*, and to her not exhibiting any lights. Now the rule of law was, that every vessel is compellable, under the circumstances, to carry lights from sunset to sunrise, and that unless she does carry these lights, if a collision occurs in consequence of the absence of the lights, whether she was morally justified or not in having no lights, she must bear the consequences. The true and only question to consider upon the lights is, whether the absence of the lights on board the *Pyrus* was in any degree contributory to the collision.

As to the starboarding, the question is, whether there was any necessity for the starboarding of the helm of the *Pyrus*, and that such was the urgency of the case, that the master was justified in so doing to avoid imminent danger; if so, then it is not to be imputed to him that he took a measure which was not necessary. But if it was an erroneous act done, and there was no just ground to stimulate him to do that act, but that it had no effect upon the collision, then we need not look to it further. It must be held that these two vessels were crossing each other, and that they fell within the 12th rule issued by parliamentary authority, and also the 18th, which directs that where one vessel is to give way, the other shall keep her course. It was the duty of the *Smales*, being on the port tack, to give way to the *Pyrus*. The master of the *Pyrus* says: "As we were proceeding under the circumstances I have mentioned, one of the men from forward reported a 'ship ahead.' I went forward immediately, and I saw a vessel a little on our port bow," it being admitted he was sailing in a south-easterly direction, "about half a point distant, from a mile to a mile and a half. I saw the vessel's green light, and also the vessel itself, quite plain. I could see she was a brig standing in to the westward, on the port tack, and apparently closehauled. I did not make any alteration in my vessel. She was then close to the wind, and it was therefore unnecessary for me to give any orders. I stood watching the strange vessel, first from her port bows, and then as she crossed our bows. I went into our starboard bow and still watched her. She crossed our bows and got full five or six points on our starboard bow. She was then, I should say, 300 or 400 yards distant from us, and I then saw her alter her course." Then he misses the green light, and the red light comes in, and that occurs from her porting. It is to be questioned whether it would be possible for this vessel to have crossed the bows, having got on the starboard side of the vessel, to have gone some hundred yards, and to have borne round and run straight into the *Pyrus* in the manner stated. It is difficult to comprehend, if this was the state of the case, how it was possible that the helm of this vessel, if it had been ever so much starboarded, could by possibility have aided and assisted in this collision; for, if the *Pyrus* was with her head to the S.E., and if she starboarded, her head would go more to the E., and if the other vessel was coming in from the westward upon her, it would not tend to bring about a collision, but she would be running away from the other vessel. Then there is the case on the other side, and the master of the *Smales* says, "Whilst I was on the quarter-deck, just moving about on the starboard side, I saw a vessel without any light, about three points on our starboard bow, and distant about half-a-mile. I could not then make her out very plainly; I could just see her sails; she bore from us about N.W. by W. I did not look at the compass, but I judge that to be pretty high correct. In about two minutes after I had so seen the said vessel one of the hands forward reported 'a vessel on the lee bow'; it was the same that I had seen. I was still watching her. In about five minutes after my first seeing the said vessel, I was able to make her out sufficiently well to see how she was standing. At this time she was about from a quarter to half a mile distant from us, nearer a quarter than half a mile, I should say, from guess; and I then saw she was a closehauled starboard-tacked ship, heading S.E. I immediately ordered my helm to be ported: 'Put the helm to port and go under the ship's lee.' The helm was immediately ported. I saw it done, and my ship instantly paid off, and thereby

(a) See the *Shipping and Mercantile Gazette* of May 13th.

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brought the strange ship about two or three points on our weather (port) bow, and the two vessels were thereby brought into a safe position for passing each other. About five minutes after I had first put my helm a-port, and whilst my vessel was still paying off under her port helm, and when the strange ship was, as I have said, about from two to three points on my weather bow, and was within a quarter of a mile distant of us, I saw she altered her course under a starboard helm, and began paying off, and so following me up. I put hard a-port, and ordered the trysail sheet to be let go." Now, the only way this evidence of the master of the *Smales* can be reconciled with the probabilities of the case is this, that the *Smales* never did cross the hawse of the *Pyrus* at all, but that she was approaching her, and having ported in order to avoid coming into contact with her, the *Pyrus* so starboarded that she intercepted, as it were, her course, and then the collision took place. Upon the facts of the case, and on a comparison of the evidence on both sides, we are of opinion that the *Pyrus* was solely to blame for this collision.

The Court was assisted by Capt. Farrer and Capt. Bayley.

Wednesday, July 5, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE MONSOON v. THE NEPTUNE.

Steamers and sailing ships—Collision—Admiralty regulations—Construction of articles 15, 18, and 19.

15th regulation.—If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

18th regulation.—Where by the above rule one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article, viz.:

19th regulation.—In obeying and construing the above rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from such rules necessary, in order to avoid immediate danger.

Case 1: Steamer in default.

Brett, Q.C. and E. C. Clarkson for the *Monsoon*.

Vernon Lushington for the *Neptune*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the barque *Monsoon*, 296 tons register, from Port Natal, with a general cargo and passengers for London, against the General Steam Navigation Company's steamship *Neptune*, 364 tons register, from Havre, with passengers and cargo for London, to obtain compensation in damages for injuries sustained by reason of a collision between them in the vicinity of the North Foreland, about ten p.m. on the 25th March last. The barque stated the wind as W. by S., and the weather as fine, clear, and starlight; the steamer represented the former as about W., and the latter as very dark, but clear. The case for the *Monsoon* was, that she was under double-reefed foretopsail, maintopsail, jib, and mizen, in Margate Roads, proceeding close-hauled on the port tack, heading N.W. by N., the tide being about three-quarters flood, and making about two knots, carrying the Admiralty regulation lights, and in charge of a duly licensed Trinity Cinque Port pilot to take her to Gravesend; that the pilot having determined not to proceed further with the barque on that night,

an attempt was made to stay her, in order to bring her to anchor; that she, however, refused stays, and thereupon her mizen was brailed up, her maintopsail was taken in and her helm was put hard a-port, and she was wore round with a view to bringing her head on tide, and letting her anchor go; that whilst the barque was so wearing round, and a part of her crew were engaged in taking in the foretopsail, and when her head was about E.S.E., the look-out from on board her made out the three lights of the *Neptune*, bearing about one point on her starboard bow, and at the distance of about one mile; that the lights were watched from the barque, and it being seen that the *Neptune* was approaching the barque, and rendering a collision immediate, the *Neptune* was loudly hailed to port her helm, and then to stop her engines, but no notice was apparently taken of such hailing, and the *Neptune*, under a starboard helm, ran into and with her starboard bow struck the barque on her port bow, and did her very considerable damage. The defence on the part of the steamer set forth, that the tide was flood, running about three knots; that the *Neptune* was steering north by west, going about three knots an hour, and was carrying the regulation lights brightly burning, when the green light of the barque was observed about two points on her port bow, distant about a mile; that the *Neptune's* helm was thereupon immediately put hard a-starboard; that shortly after, on both her lights coming into view, her engines were eased; that in a few seconds afterwards, on her green light disappearing and her red light only being visible, the *Neptune's* engines were stopped, but the *Monsoon* not keeping her course, came on under a port helm, and with her stern struck the *Neptune* a violent blow on the starboard. The court had to decide two questions on this case: first, whether the *Neptune* was to blame, and secondly, whether any fault was to be imputed to the *Monsoon*. The 15th article of the steering and sailing rules appeared to be applicable to this case: "If two ships, one of which is a sailing ship, and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." It was clear both these vessels were proceeding up channel, and that at the time when they descried each other, whether the distance was a mile, more or less, if it involved a risk of collision, it was the duty of the steamer to keep out of the way. If the steamer did not keep out of the way, the burden of proof was upon her to show there were sufficient causes and reasons why she did not obey the statute. On the other hand, there was also an obligation imposed on the *Monsoon*, because the words of the 18th article were these: "That where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course," subject, of course, to certain contingencies. The question was, whether the steamer took proper measures and means to keep out of the way of the *Monsoon*, and whether the *Monsoon* did keep her course; or whether, if she did not keep her course, there was any sufficient justification by the facts and circumstances of the case? The case of the *Monsoon* was, that after the *Neptune* was seen in the manner stated, the lights were watched from the barque, and it being seen that the *Neptune* was approaching the barque and rendering a collision imminent, the *Neptune* was loudly hailed to port her helm, and then to stop her engines; but no notice was apparently taken of such hailing, and the *Neptune*, under a starboard helm, ran into and with her starboard bow struck the barque on her port bow and did the damage. It did not appear whether it was intended to impute any particular blame to the *Neptune* for coming under a starboard helm, nor

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did it appear to be of great importance to consider what was the intention of the pleader here, for the substance of the pleading was, that she did not comply with the 15th article and keep out of the way. On the other side, on behalf of the *Neptune*, the statement was, in substance, that the *Neptune* did that which was right under the circumstances; that she did do all that she could do to avoid the collision, that it was right to put her helm hard a-starboard, and right afterwards to ease her engines in the manner they were eased; and the blame was thrown upon the *Monsoon* in not keeping her course. As to the weather, it seemed to be pretty nearly agreed on that the night was dark but clear, and the wind was about half a gale, certainly not stronger. The questions then to be determined were, whether the *Neptune* was right in immediately starboarding, and whether her engines were eased in due time; because there was another regulation, that if there is the least danger of collision the engines are to be immediately eased to prevent the consequences of a violent collision. Under all the circumstances of the case, the court felt bound to hold that the *Neptune* was solely to blame for the collision.

The Court was assisted by Capt. Shuttleworth and Capt. Webb.

Tuesday, July 11, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE JOHN HARLEY v. THE WILLIAM TELL.

Ships' moorings—Burden of proof.

Where two ships come into collision, and the main allegations to be sustained or disproved are, that the collision occurred through one of the ships being improperly moored, or from her having an insufficient or an improper look-out; the burden of proof (or, rather, of disproving such allegations) lies upon the ship so accused.

O'Malley, Q. C. and Dr. Wamby appeared for the *John Harley*.

Deane, Q. C. and Tristram for the *William Tell*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the brig *John Harley*, 275 tons, from Cork, in ballast for Newport, against the ship *William Tell*, 1174 tons, to obtain compensation for damage sustained by reason of the ships coming into collision about 2 a.m. on the 16th Jan. last, in the Upper Dock, Newport, Monmouthshire. The brig stated the wind as N.W., and the weather as very cloudy, with a strong gale of wind. The ship represented the former as N.N.W., and the latter as a violent gale with terrific squalls. The case for the *John Harley* was, that she was lying in the floating docks, moored securely from her bows to a buoy at the northern part of the dock in question; and that her master, expecting a gale of wind on the night of the 13th, remained on board her; that the *William Tell*, which was lying a short distance ahead of her, with her stern nearly opposite to her (the brig's) bows, and moored close to the quay-walk of the northern end of the dock by one small chain only run out from her port bow, broke away from her mooring, and drifted stern on against the starboard bow of the *John Harley*, forcing her from her moorings, and carrying away bulwarks, rails, and stanchions, and doing other serious damage; that the *William Tell* continued to drift in a southern direction, forcing the *John Harley* before her, until the port bow of the *John Harley* came into violent contact with another vessel, whereby the *John Harley* sustained still further damage. It was further pleaded, that the

collision and damage consequent thereon were solely attributable to those on board and in charge of the *William Tell*, by reason of their not having properly and securely moored the said vessel; and that no blame whatever was imputable in respect thereof to the master or any of the crew of the *John Harley*. The answer on the part of the *William Tell* alleged, that she was properly moored in the floating docks at Newport, under the directions of the berth master of the docks; that on the night of the 13th of the month in question, and from thenceforward up to the time of her parting from her moorings on the morning of the 14th of the same month, the *William Tell* was lying alongside the ship *Rochester* (which was on her port side), and was moored in the manner following: forward she had a one-inch mooring chain on shore attached to the mooring ring of the dock, on the port bow, nine parts of a three and three-quarter inch line attached to the forecable of the *Rochester*, the end of an eight and a half-inch hawser attached to the top-gallant forecable of the *Rochester*. Amidships she had five parts of a three and three-quarter inch line attached to about the amidships of the *Rochester*, and two parts of the same line attached to the *Rochester's* quarter pipe as a spring, and aft she had the end of a seven-inch hawser attached to the buoy, and on the starboard quarter she had two parts of a four and a half inch hawser also attached to the buoy; and that there was a vessel called the *Jeanne Myers* fastened to the *William Tell* on her starboard side. That for some time before, and at 2.20 a.m. on the 14th, it was blowing a violent gale, accompanied by terrific squalls, the wind being N.N.W., and that at about 2.20 a.m. the *William Tell*, by reason of the violence of the gale, parted from the *Rochester* and began drifting down the dock with the *Jeanne Myers* fastened on her starboard side; that an attempt was immediately made to get the *William Tell's* hawser on board the *Rochester*, but, as none of the crew of the *Rochester* were on deck to heave a hauling-line to the *William Tell*, such attempt failed; that at this time the gale continued blowing with great violence, accompanied by terrific squalls, and that the *William Tell* in one of the squalls, parted from the mooring ring; that one of the *William Tell's* anchors was thereupon as soon as possible let go, but that immediately afterwards the stern of the *William Tell* came into collision amidships with the barque *Gauss*, which was also in the docks and had broken from her moorings, and was then lying with her broadside facing the north end of the dock; that while the *William Tell* was drifting down the dock the brig *John Harley* drifted, quartering across the *William Tell's* stern, and that when the *William Tell* was brought to by the aforesaid collision with the *Gauss*, the *Jeanne Myers* came in collision with the brig *John Harley*, riding her down on her starboard bow, the port bow of the *John Harley* being then in contact with the *Gauss*. It was then denied that the collision was solely, or in any way, attributable to those on board the *William Tell*. It had been settled ever since the days of Lord Maclesfield, when he was impeached for misconduct, that those facts which could be proved almost exclusively by one party in the case, whether plt. or deft., such person was bound to prove; and upon the question arising in this case, whether the vessel was properly moored or not, the burden of proof lay upon those who represent the interests of that vessel, and not upon those who alleged she was improperly moored; precisely in the same way as if the question had been as to whether there had been a good look-out or not upon a vessel on a dark night. One party in such a case would allege that there was not a good look-out, and certainly the burden of proof would be upon

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the vessel who alleged that there was a good look-out, and not upon those who could not give such evidence as the persons could who were on board the vessel. There was no question but that in such a case as the present the burden of proof was upon those who alleged the vessel was properly moored, and that they were bound to show that she was so moored. There was some difficulty in coming to the conclusion that the piece of chain which was found fastened to the ring by the deputy dock-master was the chain which properly belonged to the *William Tell*; but there was no doubt that the chain by which she was moored was a one-inch mooring chain, because it was in their own affidavit expressly so stated. The question to be decided was, taking their own statement of the manner in which they were moored with a one-inch mooring chain attached to the wall, and with the other chains which were mentioned with regard to their moorings to the *Rochester*, whether, upon the whole, she was properly and sufficiently moored on that night; and whether, as this storm was raging at a considerable period before the collision took place, there was not a warning to increase the moorings in case it should appear to be necessary? Supposing the *William Tell* was improperly moored, or assuming the case either way, the next question to consider was what occurred and what took place during the night? There was no doubt, from all the evidence in the case, that it was a most tempestuous night, the wind varying, but being principally from the N.W. and blowing in violent and sudden squalls. It was said for the *William Tell*, first, that she never came in contact with the *John Harley* at all, and that the *Gauss* and the *Regent*, which were alongside, or nearly alongside, the *John Harley*, broke from their moorings before the *William Tell* came up and ran into the *John Harley*, or close to her. It did not appear from the evidence that either the *George Buxton*, or the *Alabama*, or the *Gauss*, or the *Regent*, broke away from their moorings before the *John Harley* was struck, and before the *William Tell* came into immediate contact with her. Was the *William Tell* the vessel that was the cause of the damage to the *John Harley*? The court was of opinion that she was, and there must be a decree accordingly.

The Court was assisted by Capt. Owen and Capt. Nesbitt, of the Trinity-house.

Saturday, July, 22, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE FRUITER v. THE FINGAL.

Steamships meeting end on—Collision—Admiralty regulations as to rules of the road—Construction of.

13th regulation: *If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helm of both shall be put to port, so that each may pass on the port side of the other.*

14th regulation: *If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.*

Brett, Q. C. and E. C. Clarkson for the *Fingal*.

Butt and Pritchard for the *Fruiter*.

Dr. LUSHINGTON gave judgment in this case, which came before the court in the form of an action brought by the schooner *Fruiter*, 105 tons, from London for Plymouth, laden with fruit, against the screw steamship *Fingal*, 613 tons, 90-horse power, from Dantzic for London, laden with a general

cargo and passengers, to obtain compensation for damages sustained by a collision between them off Cuckold's Point, in the river Thames, about eight o'clock in the morning of December last. The wind was stated by the parties as S.W.; and the weather on one side was described as dull but no fog or rain, and on the other as moderate and clear, the tide being about high water. The case for the *Fruiter* was, that on the morning in question she was in tow of a steam-tug called the *Highland Maid*, and was in the river Thames off Rotherhithe; that the steam-tug had also another vessel, called the *Esperanza*, in tow, and the *Fruiter* was being towed astern of the *Esperanza*, and by a separate hawser fastened to the tug and not to the *Esperanza*; that the jib, topsail, topgallant-sail, and mainsail were set, but only occasionally drawing, and the *Fruiter* was being towed at the rate of about three knots an hour; that the master was at the wheel steering, and the waterman and all the crew were forward on the look-out, and a good look-out was kept on board the vessel; that the *Fruiter*, in tow of the steam-tug, was proceeding down the river to the southward of mid-channel, and when the tug reached Cuckold's Point, Rotherhithe, those on board the tug, and immediately afterwards those on board the *Fruiter*, observed the steam-vessel *Fingal* coming up the river, and distant from 200 to 300 yards, and about two points on the port bow of the tug; that the helm of the tug was put hard a-port, and the helm of the *Fruiter* was ported as much as possible consistently with passing a brig at anchor on her starboard side, and on the *Fruiter's* passing the brig the helm of the *Fruiter* was put hard a-port, and all the three vessels were kept as near as possible to the southern shore; that the *Fingal* nevertheless continued to approach the *Fruiter*, apparently under a starboard helm, and the *Fruiter's* bow-rope was, therefore, cast off from the tug, and the *Fingal* immediately afterwards, still apparently under a starboard helm, and without stopping her engines, struck with her stern and port bow the port quarter of the *Esperanza*, and then with her starboard bow struck first the jibboom and then the port bow of the *Fruiter*; that the *Fingal* carried away the jibboom, bowsprit, knightheads, and cutwater of the *Fruiter*, and did other damage; that the *Fingal* backed astern and away from the *Fruiter*, and afterwards continued her course up the river. The anchor-chain of the *Fruiter* was set fast by the collision, but was, after some delay and difficulty, cleared, the anchor let go, and the vessel brought up, and as the *Fruiter* had received so much damage as to be unable to continue her voyage, she was subsequently towed back again to London. The defence on the part of the *Fingal* pleaded, that while in charge of a duly licensed Trinity pilot, and being at the upper end of Limehouse Reach, as a matter of precaution, and owing to the great number of craft coming down the river, her engines were stopped, and she was allowed to drift with the tide, with her head angling in towards the south shore; that whilst so drifting the *Fruiter*, which was the aftermost vessel in tow, was seen distant 500 or 600 yards on her starboard bow coming down the river; that the tug with the two vessels in tow, instead of passing to the northward of the *Fingal*, as she could and ought to have done, and although warned and hailed from the *Fingal* so to do, attempted, under a port helm, to pass to the southward of her; and, notwithstanding the engines of the *Fingal* were turned astern with a view, if possible, of avoiding a collision, the foremost of the vessels in tow with her port quarter struck the stern of the *Fingal*, and the *Fruiter*, which had been cast off by the tug, with her jibboom and bowsprit struck the *Fingal* on the starboard bow, about the cathead. It was then denied that the collision was in any way caused

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by the *Fingal*, or those on board her. Now, the article of the Admiralty Steering and Regulation Rules was, that "if two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helm of both shall be put to port, so that each may pass on the port side of the other." Looking at the facts of this case, and the conflicting evidence, could it be said that these two vessels were meeting end on, or nearly end on? Part of the evidence stated that they were within two points of meeting end on, and if they were so they would fall in with the latter part of the statement—nearly end on; and if they did, and there was no nautical impediment, undoubtedly the directions of the 13th article were not complied with, because both these vessels did not put their helms a-port. If the 13th article did not apply, we come to the next, the 14th, viz., "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of the way of the other." Now, it appears to the court, that the *Fingal* had the other vessel on her starboard side, and therefore it was her duty to keep out of the way. As to the tug with the two vessels in tow, did she or did she not keep to the southward coming round this place called Cuckold's Point, and was she or was she not to the southward of mid-channel before the collision, and at the collision? Upon that there is conflicting evidence beyond all doubt. It has been pointed out that one of the strongest arguments in favour of her being to the southward is that the *Frailer* was close to the brig at the time of the collision. Undoubtedly that was a fact, supposing it to be of importance, or that there was any doubt whatever that she was at the time in question considerably to the southward of mid-channel. Take it she had ported in due time, and was to the southward of mid-channel, and saw the screw coming across from the north shore angling to the south, was it her duty or not to port? That she did port there is not a shadow of doubt; but the question raised was, whether she was to the southward of mid-channel at the time? The screw-ship states that, as she was approaching, going to Cuckold's Point, she saw the road was blocked off Cuckold's Point, and she could not proceed to the northward, and she then stopped and reversed her engines, and at the time in question she was going a very little ahead, if at all. On a careful consideration of the evidence on both sides, the court was of opinion that the *Fingal* was wholly to blame, and must be so held.

The Court was assisted by Capt. Pigott and Capt. Webb of the Trinity-house.

THE WHEAT-SHEAF V. THE INTREPID.

Overtaking ships—Collision—Admiralty regulations as to rules of the road—Construction of.

The 17th Admiralty regulation, "that every vessel overtaking any other vessel shall keep out of the way of the vessel being overtaken," applies to foreign ships as well as to British.

A French ship, under sail, following a British ship in tow on entering a harbour, came into collision with her whilst crossing the bar:

Held, that the collision so occurring was occasioned by the negligence of the French ship in not attending to the rule of the road as laid down in the 17th Admiralty regulation, and that the French ship was liable for the loss caused by such collision.

Brett, Q. C. and E. C. Clarkson appeared for the *Wheat-sheaf*.

Deane, Q. C. and Vernon Lushington for the *Intrepide*.

Dr. LUSHINGTON gave judgment in this case, which was an action of damage brought by the British ship *Wheat-sheaf*, 108 tons, from London, in ballast for Sunderland, against the French schooner *Intrepide*, 105 tons register, to obtain compensation for damage sustained on the 17th Nov. last under the following circumstances. The case of the *Wheat-sheaf* was, that when about two miles off Sunderland harbour, the master of the *Wheat-sheaf* engaged a steam-tug to tow her into the harbour, and such tug accordingly took her in tow, and between eight and nine a.m. of the day in question proceeded with the *Wheat-sheaf* in tow for that harbour, and whilst approaching that harbour, and before entering it, all sail was taken off the *Wheat-sheaf*; that the wind at this time was about S.E. by S., a fresh breeze, the weather was fine, and the tide was about half-ebb; that the *Wheat-sheaf*, in tow of the tug, proceeded into harbour, and as she was entering it the *Intrepide*, which had previously been seen hove-to outside the harbour, was noticed at the distance of about a cable's length astern of the *Wheat-sheaf* and also coming into Sunderland harbour; that the *Intrepide* was under sail, and was going very considerably faster than and overtaking the *Wheat-sheaf*; that the *Wheat-sheaf* and her tug kept on up the harbour, in the expectation that the *Intrepide* would keep clear, as she ought to have done; that the *Intrepide* passed very close to the *Wheat-sheaf* on her starboard side, ran against the tow-ropes with which the tug was towing the *Wheat-sheaf*, and rendered a collision between herself and the tug imminent; whereupon the tug, to save herself, slipped the tow-ropes, and although every endeavour was made by those on board the *Wheat-sheaf* to save her from so doing, the *Wheat-sheaf* drove on to the ground and suffered considerable damage, and was compelled to take the assistance of her tug and another tug to get her off; that those on board the *Intrepide* did not whilst passing the *Wheat-sheaf* and her tug take proper measures to keep clear of the *Wheat-sheaf* and her tug as they ought to have done; that those on board the *Intrepide*, whilst passing the *Wheat-sheaf* and her tug, improperly starboarded the helm of the *Intrepide*; that the collision and the damages and losses consequent thereon were occasioned by the negligence and improper navigation of the *Intrepide*, and no blame with regard thereto was attributable to the *Wheat-sheaf* or her tug. The defence on the part of the *Intrepide* set forth, that on the morning in question she was lying-to off the harbour of Sunderland, when those on board her observed the *Wheat-sheaf* two miles distant, bearing about S.W.; that the wind was blowing fresh from about S.S.E.; the tide was ebb, running strong, and there was a heavy sea on; that about 9 a.m. the *Wheat-sheaf*, then in tow of a steam-tug, was observed to be making for the entrance of the harbour, and when it appeared, as the fact was, that she had got near enough to the harbour to get in safely before the *Intrepide*, the *Intrepide's* sails were filled, and her course made to cross the bar; that as the *Intrepide* was advancing, being astern but to the northward of the *Wheat-sheaf*, the *Wheat-sheaf* was observed to touch the bar in crossing; that the *Wheat-sheaf's* engine was thereby stopped, and the distance between the two vessels was diminished; that the *Intrepide* crossed the bar, being then under all sail except the flying jib and foretop-sail, and sailing at about the rate of four knots an hour, and between the piers picked up a licensed pilot, who, on boarding, took the wheel; that the *Wheat-sheaf* was then observed to take the ground on the couch or bank near the south pier, and the steam-tug, in order to try to get her off, crossed over to the northward, carrying the tow-line across the *Intrepide's* course; that the *Intrepide*, meanwhile, necessarily advanced, and, as

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there was no room for her to pass between the steam-tug and the north pier, was obliged to continue her course, and she consequently ran against the tow-rope between the tug and the *Wheatsheaf*; but the *Intrepide's* helm was not starboarded; that the pilot on board the *Wheatsheaf* hailed those on board the tug to let go the tow-rope, but it was not let go till just as the *Intrepide's* stem came against the rope; that the rope was not carried away, and the *Intrepide* never touched either the *Wheatsheaf* or the tug. It was then pleaded, that the *Intrepide* was in no wise instrumental to the *Wheatsheaf's* getting on shore; that the contact of the *Intrepide* with the tow-rope between the *Wheatsheaf* and the tug was not caused by any negligence of those on board the *Intrepide*, but was, so far as they were concerned, an inevitable accident; and that the contact of the *Intrepide* with the tow-rope between the *Wheatsheaf* and the tug was occasioned by the default of those on board the *Wheatsheaf* or the tug. Now the court could not discover any materials to conclude that it was an inevitable accident which caused this calamity, and therefore one or other of the two vessels must be to blame. There was great difficulty from the extreme contradiction in the evidence in the case, and more especially from a fact that crept out in the course of that evidence, which was, that there was a sort of feud sprung up between the pilots, and they seemed to have adopted their own courses, and, as frequently arises in such a state of things, the evidence was not to be relied on, on the one side or the other, with the same satisfaction as if no such feeling had previously existed. The case appeared to fall within the 17th rule of the statutory regulations, that "Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel." The fact was undoubted, that the *Wheatsheaf* was first, and that the *Intrepide* was following her, and that it was not a matter of necessity that the *Intrepide* should have kept so close to the *Wheatsheaf* as she happened to do; and it was her duty, therefore, in accordance with this 17th article, which was equally binding upon French vessels as upon English vessels, to keep out of the way. Therefore, one of the principal questions to determine was this: did the *Intrepide* adopt those proper measures which would enable her to escape the consequences which subsequently occurred? It had been said, on the part of the French vessel, that it was very improbable she should have starboarded, there being no necessity for such a proceeding, and it being obviously indiscreet for her to do so. It was said for the *Intrepide* that the *Wheatsheaf* struck on the bar on getting between the piers, but that was entirely unsupported by the evidence. Upon the whole of the evidence taken together, the court was of opinion that the *Intrepide* was solely to blame, and there must be a decree accordingly.

The court was assisted by Captain Bax and und Captain Lambert, of the Trinity-house.

Tuesday, Nov. 7, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE HELEN.

Wages—Breach of blockade.

In a suit upon an agreement contemplating a breach of blockade of the ports of the Confederate States of America, and upon a motion to strike out the fourth article of the deft.'s answer which pleaded that such agreement was not binding by reason of a breach of blockade being illegal:

Held, that a breach of blockade by neutrals is not an offence against the municipal law of this country.

Ordinarily, decisions of the H. of L. and the P. C. and the Courts of Common Law are absolutely binding upon the Court of Admiralty.

Brett, Q. C. and E. C. Clarkson for plt.

Milward, Q. C. and Pritchard for deft.

The facts of this case sufficiently appear in the judgment, in which the following cases were referred to:

Santissima Trinidad, 7 Wheat. Rep. 840;
Richardson v. The Marine Insurance Company, 6 Mass. Rep. 113;
Seaton, Maitland, and Co. v. Low, 1 Johns. Rep.;
 Arnould, 763, 764, 766, 773;
 3 Kent's Com. 367;
 2 Parsons, 95;
 Phillips, c. 8, s. 2, 163;
 Marshall, 87;
 Maud & Pollock, 809;
 2 Twiss, 297.

Dr. LUSHINGTON.—This is a motion by the plt. to reject the fourth article of the defts.' answer. The parties in this cause are John Andrews Wardell, formerly the master of the *Helen*, plt.; and the Albion Trading Company, the owners of the ship, defts. The master sues for wages, with certain premiums added, alleged to have been earned between July 1864 and March 1865. The answer states that, according to the agreement as set forth by the defts., the plt. has been paid all that was due to him. This part of the answer is not objected to. The fourth and last article is the one objected to. It alleges that the agreement was entered into for the purpose of breaking the blockade of the Southern States of America; that such an agreement is contrary to law, and cannot be enforced by this court. In the course of the argument, the judgment recently delivered by Lord Westbury whilst he was L. C., in *Ex parte Chavasse*, 6 N. R. 26, was cited as governing the case. The law there laid down is briefly stated, that a contract of partnership in blockade running is not contrary to the municipal law of this country; and by the decree the partnership was declared valid, and the accounts ordered accordingly. It was admitted that this decision is directly applicable to the present case. A decision of the L. C. is to be treated by the court with the greatest respect; but is it absolutely binding? Decisions of the following tribunals are absolutely binding upon the Court of Admiralty, viz., the H. of L., the Privy Council, and when deciding upon the construction of a statute, the courts of common law. All, then, that this court has to do, is to inquire if such decision is applicable to the case before it. If so, then it is the duty of the court to obey whatever may be its own judgment. On the present occasion no decision has been cited from the H. of L., the Privy Council, or the courts of common law. But, as an intimation has been given that this case will be carried to the Judicial Committee, that tribunal might be inclined to consider me remiss in my duty if I had omitted to form an independent judgment on the case, and to state my reasons for so doing. It is, I conceive, admitted on all hands that the court must enforce the agreement with the master unless it is satisfied that such agreement is illegal by the municipal law of Great Britain. In order to prove this proposition, the defts. say that the agreement to break the blockade by a neutral ship is on the part of all parties concerned illegal according to the law of nations which is a part of the municipal law of this country; ergo, this contract is illegal by municipal law. Now, a good deal may depend on the sense in which the word "illegal" is used. I am strongly inclined to think that the defts. attach to it a more extensive

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meaning than it can properly bear, or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal so far, that if carried out they would lead to acts which might under certain circumstances expose the parties concerned to such penal consequences as are sanctioned by international law for breach of blockade or for the carrying of contraband. If so, the illegality is of a limited character. For instance, suppose a vessel, after breaking the blockade, completes her voyage home, and is afterwards seized on another voyage, the original taint of illegality, whatever it may have been, is purged, and the ship cannot be condemned; yet if the voyage was *ab initio* wholly and absolutely illegal both by the law of nations and the municipal law, why should the successful termination purge the offence? Let me consider the relative situation of the parties. A neutral country has a right to trade with other countries in time of peace. One of these countries becomes a belligerent and is blockaded. Why should the rights of the neutral be affected by the acts of the other belligerent? The answer of the blockading power is, "Mine is a just and necessary war;" a matter which in ordinary cases a neutral cannot question. The belligerent further says, "I must seize contraband. I must enforce blockade to carry on the war." In this state of things there has been a long and admitted usage on the part of all civilised states, a concession by both parties—the belligerent and neutral—an universal usage which constitutes the law of nations. It is only with reference to this usage that the belligerent can interfere with the neutral. Suppose no question of blockade or contraband, no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do. What is this usage as to blockade? There are several conditions to be observed in order to justify the seizure of a ship. Amongst other things the blockade must be effective and, save accidental interruption by weather, constantly enforced. The neutral vessel must be taken *in delicto*. The blockade must be enforced against all nations alike, including the belligerent one. When all the necessary conditions are satisfied, then by the law of nations the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral state. It never has been a part of admitted common usage that such voyages should be deemed illegal by the neutral state, still less that the neutral state should be bound to prevent them. The belligerent has not a shadow of right to require more than universal usage has given him, amongst which is not included the power to say to the neutral, "You shall help me to enforce my belligerent right by curtailing your own freedom of commerce, and making that illegal by your own law which was not so before." This doctrine is not inconsistent with the maxim that the law of nations is part of the law of this country. The fact is, the law of nations has never declared that a neutral state is bound to impede or diminish its own trade by municipal restriction; for our own Foreign Enlistment Act is itself a proof that, to constitute transactions between British subjects when neutrals and belligerents a municipal offence by the law of Great Britain a statute was necessary. If the acts mentioned in that statute were in themselves a violation of municipal law, why any statute at all? I am now speaking of fitting out ships of war; not of levying soldiers, which stands upon a different footing. I may here say, that in principle there is no essential difference whether the question of breach of municipal law is raised with regard to contraband or breach of blockade. Then how stands the case upon authority? Mr. Duer is the only text-writer who

maintains an opinion contrary to what I have stated to be the law. He maintains it with much ability and acuteness, but he stands alone. He, however, admits that an insurance of a contraband cargo is no offence against the municipal law of a neutral country according to the practice of all the principal states of Continental Europe, and in the American courts the question has been more than once agitated, but with the same result. In the English courts the only case in which the point has been actually decided is the recent case (above cited) before Westbury, L. C. With regard to the cases mentioned in Mr. Duer's book (*Naylor v. Naylor*, 9 B. & C. 718; *Medaras v. Hill*, 8 Bing. 231), it is enough to say that, in the view which the court eventually took of the facts, the question of law did not arise. It is in those two cases impossible to say with certainty what was the opinion of the judges at Nisi Prius. I cannot entertain any doubt as to the judgment I ought to pronounce in this case. It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that to carry on trade with a blockaded port is, or ought to be, a municipal offence by the law of nations. I must direct the fourth article of the answer to be struck out. I cannot pass by the fact that the attempt to introduce this novel doctrine comes from an avowed *particeps criminis*, who seeks to benefit himself by it. As he has failed in every respect, he must pay the costs of his experiment.

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Master's wages—Disbursements—Maritime lien—Mortgagee.

Against the balance of proceeds of sale of a vessel sold in a bottomry suit the master has in respect of his claims, both for wages and disbursements, priority over the rights of the mortgagee.

V. Lushington appeared for the master.

Rutherford for the mortgagee.

The facts of the case will appear in the following judgment:

Dr. LUSHINGTON.—This is a question small in amount, but yet of some considerable difficulty when it comes to be examined minutely. The facts of the case are as follows: In Aug. 1863 Arthur James Thorman was the sole owner of the vessel. On the 15th of that month he executed a mortgage of her to the deft. George Tanner for 1100*l.*, and on the 9th June 1864 executed a second mortgage of her to Arthur James Thorman for 500*l.*, and on the 28th Dec. transferred the vessel to G. W. Thomas, and procured the mortgage of June 9 to be given up; so that G. W. Thomas became sole owner subject to the mortgage of 15th Aug. 1863 to George Tanner. On the 22nd Dec. 1864, before the last transfer had been executed, but no doubt after it had been agreed upon between the parties, G. W. Thomas hired the plt. as master, and the vessel shortly afterwards proceeded to sea in the plt.'s charge. Bad weather came on, and plt. put into Flushing, where he gave a bottomry bond. On the return of the vessel to Swansea, in Feb. 1865, it was arrested at the suit of the bottomry bondholders. On the 13th April the master instituted this cause to recover his wages and disbursements [and on the 20th filed a citation *in rem*]. Considerable delay took place in the conduct of the cause, and it was not until the 15th May that an appearance was entered on behalf of George Tanner, the mortgagee. On the 26th May the bondholders' petition was filed. The deft. allowed the time for putting in an answer to go by, and was obliged to make a special application to the court on the 11th July for leave to put in his answer. The answer,

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is, states that the mortgage of the 15th Aug. contained a covenant that the vessel should not be port of London until the mortgage had paid off, and that to secure this covenant the rate of registry was deposited with the deft., at this covenant contained in the mortgage subsequently communicated to G. W. Thomas, nevertheless, acting in collusion with the and behind the back of the deft. Tanner, the vessel to be sent to sea, the vessel of course without any certificate of registry on board; at the is master conspiring with G. W. Thomas at the deft.'s rights, and has made fraudulent for wages and disbursements. Under these stances the deft. insists that his right as is superior to that of as master. On the 7th July the master moved the court to reject the claim of the deft. The principal question is, what are the rights of a master as against those of the mortgagee, first, in respect of his wages and secondly, in respect of his disbursements? To deal with the question of wages firstly the master had no lien on the ship for his (Smith v. Plummer, 1 Barn. & Ald. 381.) By the 7th section of the 7 & 8 Vict. c. 112, he first had the same rights and liens for the recovery of wages as a seaman, but only in the case of the property of the owner; but this restriction was removed by the 191st section of the Merchant Shipping Act 1854, which enacts that "every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of wages which by this Act, or by any law or custom, any seaman not being a master has for the recovery of his wages." But this was not sufficient, a seaman could not recover wages in the Admiralty Court if there were a special contract affecting the same, and as the master's wages are invariably determined by special contract, this position was not greatly improved by the Merchant Shipping Act 1854. Now, however, this position has ceased to exist, for by the 10th section of the Admiralty Court Act 1861, it is enacted "the High Court of Admiralty shall have jurisdiction over any claim by a seaman of any wages earned by him on board the ship, or the same be due under a special contract or otherwise, and also over any claim by the master of a ship for wages earned by him on board the ship." It is no doubt that the claim of a seaman for his wages overrides that of a mortgagee; it follows, therefore, that the master claiming his wages is to be preferred to the mortgagee. With regard to a master's disbursements, the case is somewhat different. As to the Merchant Shipping Act 1854 the master's only remedy was by a personal action in equity or at common law against the owner. That was the first time enabled the master to sue in the Admiralty Court for his disbursements, but only under certain circumstances. The 191st section of that Act enacts that, "if in any proceeding in any Court of Admiralty or Vice-Admiralty touching the claim of a master for wages, any right of set-off or counterclaim is set up, it shall be lawful for such court to hear and adjudicate upon all questions, and to take into account then arising or outstanding and allowed between the parties to the proceeding, and set payment of any balance which is found to be due." So, then, if in a suit by a master for his wages a counter claim was set up, he might prefer a writ for his disbursements, and in such case it was the duty of the court to enforce against the ship the payment of the balance due to the master in respect of disbursements as well as wages, and this was whether the deft. was the owner or the mortgagee. But under that Act a master could not bring a suit in this court to recover his disbursements and it was partly to remedy this defect that

the 10th section of the Admiralty Court Act 1861 was passed. By this it is provided, that "the High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship, provided always that if in any such cause the plaintiff do not recover 50*l.* he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court." The question now before the court is, whether under the section the master's claim for his disbursements is to be preferred to the claim of a mortgagee? I think under this Act a seaman should have a maritime lien for his wages, although fixed by special contract, because before the Act he had such a lien for wages earned not under any special contract, and for a similar reason there would be a maritime lien for damage done by any ship. If this be so, then under this Act the master claiming for disbursements is to be preferred to the mortgagee, because before the Act his claim for his disbursements was entitled to a similar preference where the court could take cognisance, namely in the case of a set-off. I wish it to be distinctly understood that this judgment deals only with the 10th section of the Admiralty Court Act 1861, and does not commit the court to any construction of any previous Act. With regard to the allegations of fraud contained in the answer, they cannot be struck out, for if fraud be proved, no claim that is based upon it can be maintained.

NISI PRIUS.

LONDON SITTINGS AFTER TERM.

Friday, Dec. 8, 1865.

(Before POLLOCK, C. B. and a Special Jury.)

FOWLER v. GRAVES.

Policy of insurance—Concealment of name of vessel—Goods shipped by any one of a line of steamers.

The plaintiff, while in London received orders to insure goods shipped on board one of a line of steamers between Jamaica and Liverpool. The steamer had then started on her voyage. He insured the goods with the deft. by a valued policy upon every kind of goods and merchandise, "by any steamer" from Liverpool to Jamaica. At the time of effecting the insurance he did not disclose the name of the vessel to the insurers, although he had the bills of lading in his possession. Evidence was given to show that, according to the practice of underwriters, the insurance of goods "by any steamer" would indicate that the voyage had not commenced at the date of the insurance, and that from the non-disclosure of the name of the vessel it would be inferred that the assured did not himself know it:

Held, that it was for the jury to say whether the non-disclosure of the name of the vessel had a material influence upon the underwriters in assessing the premium or in accepting the risk, and that upon their finding this question in the affirmative, the underwriters would be entitled to a verdict.

This was an action upon a policy of insurance valued at 300*l.* upon every kind of goods and merchandises from Liverpool to Jamaica. The deft. pleaded: 1. A denial of the policy. 2. A denial of the shipment of the goods. 3. A denial of the loss. 4. That certain facts material to the risk were concealed.

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Maude (Edward James, Q. C. with him), in opening the case, stated that the goods in question were shipped on board a steamer called the *Ascalon*, which left Liverpool for Jamaica on the 5th Feb. 1865, and was lost on the 15th. Bills of lading of these goods had been sent to the plt. at London, and on the 16th Feb. he received orders to insure the goods. He went to the insurance office, and effected the insurance on the 18th, but did not state the name of the vessel. The plt. and other witnesses were called, and from their evidence and that of insurance brokers called on behalf of the deft., it appeared that where a vessel was insured like the one in question it was usual to give the name of it to the underwriter. If the name were not given it would be thought that the assured did not know it. One of the witnesses for the defence, who had large experience in insurance, stated that where an insurance was effected upon "any steamer" it would be understood that the hazard had not commenced. There was also some evidence to show that in the interval between the starting of the vessel on her voyage and the effecting of the insurance the weather had been bad, and that it blew a gale from the west. The plt. admitted that, if the underwriter had known the vessel had sailed, there might have been a difficulty in effecting the insurance.

POLLOCK, C. B. left it to the jury to say whether any importance attached to the disclosure of the name of the vessel to the underwriters. If a reasonable man would have been influenced by a knowledge of the name of the vessel in assessing the premium, or in accepting the risk, the concealment was a material one.

The Jury gave their verdict for the deft.

UNITED STATES DISTRICT COURT OF ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate in Admiralty

SOUTHERN DISTRICT OF NEW YORK.

(Before BENEDICT, J.)

THE ENERGIE.

Damage to cargo—Bill of lading—Weight and contents unknown—Presumptions—Explaining receipt—Evidence.

Where a bill of lading for a bale of cloth contained the words "weight and contents unknown."

Held, that the carrier was not called upon to prove the delivery of any certain number of pieces of cloth in the bale.

But where the bale, when delivered from the ship, was seen to have its outer ropes removed, and its outer covering cut, and on its arrival at the store it was found that its inner covering had been also cut, and a piece of cloth was missing, and no one of the employes of the ship who stowed the bale or broke it out was called as a witness:

Held, that it was incumbent on the carrier to show that the injury was only external.

A receipt signed by the carman who took away the bale, as in good order:

Held to be explained under the circumstances.

Whether the invoice is any evidence of the contents of the bale, quære.

*This was an action upon a bill of lading. The libel alleged that three bales of cloth were shipped in good order on board the *Energie* at Antwerp,*

bound for New York, and that the master gave ordinary bill of lading, undertaking to deliver in like good order at New York, but that when delivered one of them was in bad order, the bale being opened, and a piece of cloth abstracted.

The answer alleged that the bill of lading contained the clause "weight and contents unknown" and that the shipowner was ignorant of the contents of the bales, but that all of them, with contents as shipped, had been delivered.

The bale in question was composed, as is of a certain number of pieces of cloth placed upon another, and covered first with a wrapping paper, and then another of oil-cloth; then so as to be compact and hard, and bound with ropes; then surrounded with straw, and covered with canvas, two of its sides protected by boards, and the whole bound with ropes. Upon arrival it was received from the ship by the consignee's (the libellant's) carman and carted to the store, and there at once examined, when found to be without its external ropes, and loose instead of compact, while on one side had been cut through all the coverings and the ropes, so that the pieces of cloth could be removed by the hand. Some of the pieces of cloth were cut and soiled with finger-marks, and the bale contained but nine pieces. The invoice, which was allowed in evidence subject to objection, was the only evidence given of the number of pieces originally in the bale, called for ten pieces.

For libellant, *Goeff.*

For resp., *Larocque.*

BENEDICT, J.—The bill of lading in this case acknowledged the bale in question to have been in good external condition when shipped, and the master testifies that it was then in such condition. Upon the discharge of the cargo, the carman, having one of the bales upon his cart, as the defence shows, called for this one, when the stevedore reported from the hold of the ship, that it had been put out, because it was in bad order and needed sewing. The Custom-house officer passed down the word that the carman was to sew it, and would take it as it was. It was accordingly put in the slings and transferred from the hold to the cart. The carman testifies that he took it directly to the store; that he went alone and did not stop or get off his cart by the way. He says that when he received the bale he saw that the exterior ropes were gone, and the outer wrapping cut, and that he delivered it at the store in the condition in which he received it from the ship. None of the crew who stowed the ship in Antwerp are produced in court, nor does the resp. call the stevedores or other employes of the ship who delivered the bale in New York, except the mate, who was stationed upon the pier, and who did not appear ever to have seen the bale until it was placed upon the cart. Upon this evidence it is held that the carrier has shown the delivery of the bale and its contents in like order as shipped, although, under the bill of lading, the memorandum "weight and contents unknown," he was not called upon to show the delivery of any certain number of pieces of cloth; yet the fact appears that the bale, as delivered by the carman, was in bad external condition, the outer ropes gone and its covering cut, it was bent upon the carrier to show that the injury was only external. Failing to produce the evidence of any of the persons who stowed the bale in Antwerp or who broke it out and placed it in the hold of the New York, he cannot ask the court to presume that the injury was merely external. On the other

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the presumption is against him, and is that, if any part of the bale was abstracted at any time, it was while in charge of the ship, where the ropes were removed and the covering cut. The evidence which the ship has produced to overcome this presumption fails to meet the requirements of the case. The only witnesses who saw the bale when landed are the carman, the custom-house officer, and the mate. The mate was on the pier, and testifies that both he and the carman examined the bale as it went on the cart, that it was then firm and in shape, and its only injury was that the outer canvas covering had been torn a little. A receipt for the bale as "in good order" is also produced, and the mate says that he read it to the carman before it was signed, and that the carman signed it without objection or remark as to the condition of the bale. I am not, however, satisfied by the evidence of the mate that, after the bale came up from the hold, any examination of it, sufficient to detect the fact that the interior coverings had been cut, was made. The carman says no examination was made. The custom-house officer, who was at the hatch superintending the landing, saw no examination; while the stevedores below, who had kept back the bale because they thought it was not in order to be delivered, were not produced, or their absence accounted for. As to the receipt, it seems to me to be explained by the circumstance that, when the bale was reported in bad order, the custom-house officer announced that the carman would take it as it was rather than wait. The slings would be likely to keep the bale in shape, as but two of the interior ropes were cut. The injury beneath the straw would not be readily seen, as the carman in his hurry was, doubtless, satisfied that the injury was merely external, and so willing to give the receipt. It was, however, extremely careless in the carman, and had the proofs from the ship been more full, they might well have fastened the loss upon him. Upon the whole evidence, as it stands, I am therefore inclined to hold that the bale was opened in the ship, and that if any part of it was abstracted it was there done, and not in a public street in the daytime by a carman who had a few moments before given a receipt for the bale in good order. But it is insisted on the part of the resp. that the invoice is not evidence against him, and that there is, therefore, no evidence of any loss from the bale, and that the libel must for this reason be dismissed. I do not think that the case in its present position calls for a decision of the point thus made. For outside of the invoice there is the evidence that the bale was deprived of its exterior ropes, was cut through, and some of the pieces of cloth opened, while its looseness at once satisfied a practical eye that a part of its original contents was one. This evidence is sufficient to prevent a dismissal of the libel for want of proof of any damage, and entitles the libellant to a reference, where the amount of damage may be shown by such legal evidence as the respective parties may produce.

EASTERN DISTRICT OF NEW YORK.

(Before BENEDICT, J.)

THE FLORENCE.

Seaman's wages—Forfeiture by misconduct.

Where a mate of a vessel, having a dispute with the master about the rate of his wages, on leaving the ship took the ship's chronometer with him, and retained it in order to force a settlement of his claim, until compelled to give it up by the police:

Held, that this was an act of misconduct which should cause a forfeiture of wages.

MARL. CAS.—VOL. II.

Forfeiture of wages is not given merely as a compensation to the owner for actual loss suffered by the seaman's misconduct; it is enforced also by way of punishment.

This action was brought by Frederick Munderloch against the barque *Florence*, to recover wages due to him for services as mate on board the barque. There were some immaterial questions about the rate of wages at which he was employed, as he had not signed articles; but it appeared that, after the dispute arose as to the rate of wages, the libellant was discharged, and, on leaving the ship, he took the vessel's chronometer with him to his boarding-house, and refused to give it up till the amount which he claimed was paid. The master was compelled to apply to the police, and by their aid he recovered the chronometer without any loss to the ship. On this ground a forfeiture of all the wages was claimed.

BENEDICT, J.—This proceeding cannot be deemed other than an act of gross misconduct on the part of the libellant. He was not an ignorant sailor, but an intelligent chief mate. He was at the time in sole charge of the vessel, and in the position of a trustee. He is presumed to know, and must, in fact, have known, that the law gave him a perfect security, for any sum justly due to him, and that the Court of Admiralty stands always open to adjudicate upon such demands with promptness, and in the liberal spirit of the maritime law, and he deliberately undertook to decide for himself the question between him and the master, and to compel payment of his claim as he made it, by removing and unlawfully detaining a portion of the property committed to his charge. Such an act should not be allowed to pass unnoticed in a court where violations of duty far more venial in character, when committed by seamen, are constantly punished by forfeiture of wages. But it is contended here that no wages can be declared forfeited to the owner, for the owner sustained no loss, inasmuch as the chronometer was regained by the police, and returned without expense. This defence cannot prevail according to the view which I entertain of the law applicable to such cases. I am of opinion that it is the law of the sea, as well for the quarter-deck as for the fore-castle, that any unlawful appropriation of any part of the vessel, her tackle, apparel, or furniture, or of the cargo, will, in a court of admiralty, be visited with forfeiture of wages, either partial or total, according to the circumstances of the case, whether actual pecuniary loss to the owner by the act be proved or not. I am aware that expressions can be found in books of high authority which seem to countenance the idea that forfeiture is but a compensation allowed to the owner for his loss to prevent circuity of action. I am also aware that in most of the reported cases of embezzlement, the amount of the forfeiture has been limited to a sum sufficient to compensate the owner for the loss resulting from the unlawful act. A careful examination of the cases satisfies me, however, that the view here taken is sustained by good authority, and rests upon principles well settled. No such limit as is contended for by the libellant is suggested by Lord Tenterden in his statement of the law of forfeiture. "It seems," he says, "that neglect of duty, disobedience of orders, habitual drunkenness, or any cause which will justify a master in discharging a seaman during a voyage, will also deprive him of his wages:" (Abbott on Shipping, part 4, c. 3, s. 4.) The language used by Chancellor Kent is: "Whatever unjustifiable conduct will warrant the act of the master in discharging a seaman during the voyage, will equally deprive the seaman of his wages:" (3 Kent, p. 198.) In the case of *The Blaireau*, 2 Cranch, 267, Chief Justice Marshall

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declares that forfeiture of salvage reward by embezzlement, and forfeiture of wages for embezzlement, rest upon the same ground. But it has never been supposed that the forfeiture of salvage was limited to the amount of loss sustained by the owners of the property; nor do I understand that forfeiture of salvage for this offence has been inflicted as a method of compensating the owners for the damage sustained by them in the loss of their property. The distinction in the law of forfeiture here involved is clearly alluded to by Lord Stowell in the case of *The Baltic Merchant*, Ed. Ad., p. 98, and was more distinctly announced by Judge Story in *Cloutman v. Tunison*, 1 Sum. 373. In the latter case, which was a case of absence without leave, the learned judge, while he finds that there was no statutory desertion, nor desertion under the maritime law, inflicts a partial forfeiture, and deems the owner entitled to withhold part of the wages due, "not merely as a compensation for the loss of the services of the second mate during the period, but something more—as a just admonition to officers having such high and responsible duties devolved upon them, and designedly departing from them." This view has been followed by the learned judge of the Southern District of New York, who, in *Scott v. Russell, Olcott*, p. 261, inflicted a partial forfeiture "by way of correction and amends," and "with a view to operate as a proper check to seamen, rather than to compensate the owner." "The forfeiture authorised by law in cases of this nature," says Judge Story, in a case of insubordination, "is not given to the owner as a mere boon, but is designed to operate primarily as a warning penalty upon seamen for misconduct:" (*The ship Mentor*, 4 Mason, p. 97.) It is in accordance with this view of the maritime law that forfeitures are inflicted for insolence, for petty plunder of esculents, &c.; for it cannot be supposed that in such cases the amount of pecuniary damage sustained by the owner is to be computed, and its compensation the object of the decree. Forfeiture is inflicted in these cases "for the good of the service," to adopt an expression of Judge Story in one of the cases cited. The power to withhold part of the wages is given by the maritime law, in order the better to secure faithfulness and efficient service from an ignorant, unreliable, irresponsible class of men, and this power, when exercised in a proper case, with caution, and a due regard for the weaknesses and temptations of this unfortunate class, a court of admiralty will always sustain. If such be the reason of the law of forfeiture, and such its application by the courts, I see no reason for excluding a case like the present from its operation. It comes within the letter of the law as declared by Lord Tenterden, Chancellor Kent, and perhaps within the more restricted language of Dr. Lushington, in the case of *The Blake*, 1 Lush. R. The act of the libellant was one calculated to put at considerable risk a valuable article. The ship was already cleared, and might well have been detained by his action. The master was put to the trouble of obtaining the assistance of the police, so that the case might well have permitted a deduction from the wages upon the ground of compensation for a "supposed loss," as has been done in some of the adjudged cases. I prefer, however, to place my decision upon the ground that the act was one of gross misconduct in a chief officer, a method of procedure calculated, if encouraged, to put every owner at the mercy of the crews to which he is obliged to intrust his property, an offence to be classed with the offences of insubordination, insolence, theft, and the like, and like them to be visited with the maritime penalty of forfeiture. I do not, however, think it necessary, in this case, to cast upon the libellant all the expenses of this proceeding in addition to the

loss of his wages, and shall, therefore, allow him a portion of his demand. His claim is for 75 dols.; I allow him 25 dols., but it must be without costs.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROGER,
ESQs., Barristers-at-Law.

Dec. 7, 1865, and Jan. 18, 1866.

(Before the LORDS JUSTICES.)

GLAHOLM v. BARKER.

Collision at sea—Loss of life—Passenger—Seamen—Liability of shipowner—Lord Campbell's Act—The Merchant Shipping Acts.

The liability under Lord Campbell's Act (9 & 10 Vict. c. 93) of a shipowner for damages in respect of loss of life occasioned by a collision at sea is, although there be no passengers aboard, by the Merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 63) modified, and limited to a sum not exceeding 15L for each ton of his vessel's registered tonnage.

This was an appeal by the plts. against a decree of the M. R. declaring their liability, as owners of a certain brig, to the representatives of seamen who were drowned, in consequence of a collision at sea between the said brig and the vessel upon which the seamen were employed at the time. The case is reported 12 L. T. Rep. N. S. 370, and no further statement of the facts is at all necessary.

Hobhouse, Q. C. and Druce supported the appeal.

Osborne, Q. C. and Haddan appeared in support of his Lordship's judgment.

The arguments sufficiently appear from the judgment of Turner, L. J., below.

The authorities cited were:

Hill v. Andrus, 1 K. & J. 263;

The African Steamship Company v. Stearns & Kennedy, 1 K. & J. 326;

Dobree v. Schroder, 6 Sim. 291; on app. 2 Myl. & Cr. 489;

Stevens v. Prowse, not reported;

Nixon v. Roberts, 1 J. & Hem. 739; 4 L. T. Rep. N. S. 679;

The Fusilier, 12 L. T. Rep. N. S. 186; and

The several Acts of Parliament mentioned in the judgment.

Judgment was reserved until the 18th January, when

Lord Justice TURNER said:—This is an appeal from a decree of the M. R. The bill is filed by the owners of a brig called the *Edith Mary*, stating that the said brig was, on Saturday the 13th Feb. 1864, on a voyage bound northward in ballast, and that during a severe gale of wind on that day when off Filey, in Yorkshire, she came into collision with a vessel called the *Thomas Barker*, and that by that collision the said *Thomas Barker* was sunk and totally lost, and all the crew but two were drowned. The *Thomas Barker* was the property of the defts. *Thomas Barker*, and she was laden with coal, but she had no passengers on board, nor were there either passengers or cargo on board the *Edith Mary* at the time of the collision. It further states that several of the defts. in the suit, who are the personal representatives of several of the seamen who were drowned, have brought actions against the plt. to recover large sums of money by reason of the loss of the lives of these seamen, and by reason of other matters as to which it appears that their claims have since been settled. There are also other defts. to the bill who had other claims against the plt. arising

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liation then mentioned, but it appears aims have also been settled, and the n remaining to be decided at the re cause was the extent of the plts.' reason of the loss of the lives of the were drowned. The bill prays that the plts.' liability in respect of the matters rding to the Merchant Shipping Act 1862, red and distributed between the defts., r persons who shall establish claims lts., and that in the meantime the defts. ined from prosecuting the action already and from commencing and prosecuting ainst the plts. touching the other matters on the hearing of the cause, the M. R. e, declared that the plts. were liable o the extent of 15*l.* per registered ton *Edith Mary*, and the plts. undertaking l claims not exceeding that amount, egard to such payments as they had erly made to some of the parties, his ered an inquiry to what amount the able, and the proportions thereof to efts. were respectively entitled, and s then directed of the proportions so to d, and an injunction was ordered to ings in the actions. The appeal is ainst this decree so far as respects on, and the direction consequent upon urse of the arguments upon the appeal of Parliament were brought under our s, namely, Lord Campbell's Act, 9 & 1; the Merchant Shipping Act 1854, c. 104; the Merchant Shipping Repeal & 18 Vict. c. 120; and the Mercha t ct Amendment Act 1862, 25 & 26 and the Act. 13 & 14 Vict. c. 21, was to. It is upon the provisions of these

I think, for the reasons which I shall te, upon the provisions of the four first our determination of this case must remedy in such cases as the present properly observed at the bar, altogety. In dealing with this case it will be refer to these statutes in their order d Campbell's Act first introduced into his country a remedy in cases of inju- with the loss of life, the law up to the passing of that Act having stood thus— of death resulting from injury the he injury died with the person. As to is sufficient for the present purpose to is expressed in the most general and re terms, and that, looking to the terms an be no reasonable doubt that it was end, and must be considered to have loss of life resulting from collisions at than from other causes. After the this statute, therefore, the owners vessels were liable for loss of life a collisions to any amount which ht assess as the value of the life. e state of the law when the Mer- ing Act 1854 was passed. By the 5th sections of this Act it was enacted 504. No owner of any sea-going ship, ain, shall, in cases where all or any of events occur without his actual fault at is to say, . . . 3. Where any loss onal injury is by reason of the impro- n of such sea-going ship as aforesaid, y person carried in any other ship or ere any loss or damage is by reason of proper navigation of such sea-going aid, caused to any other ship or boat, oods, merchandise, or other things m board any other ship or boat; be r damages to an extent beyond the

value of his ship and the freight due, and to grow due, in respect of such ship during the voyage which at the time of the happening of any such events as aforesaid is in prosecution or contracted for, subject to the following proviso; that is to say, that in no case where any liability as aforesaid is incurred in respect of loss of life or personal injury to any passenger, shall the value of any such ship and the freight thereof be taken to be less than 15*l.* per registered ton. 505. For the purposes of the ninth part of this Act, the freight shall be deemed to include the value of the carriage of any goods or merchandise belonging to the owners of the ship, passage-money, and also the hire due, or to grow due, under or by virtue of any contract, except any such hire, in the case of a ship hired for a time, as may not begin to be earned until after the expiration of six months after such loss or damage." Upon these sections there follows a variety of provisions framed, as it would appear, for working them out. Then follows the Merchant Shipping Repeal Act 1854, by the 4th section of which it is enacted that "there shall be hereby repealed the several Acts and parts of Acts set forth in the 1st schedule hereto, to the extent to which such acts or parts of Acts are therein expressed to be repealed, and all such provisions of any other Acts, or of any charters, and all such laws, customs, and rules as are inconsistent with the provisions of the Merchant Shipping Act 1854," but amongst the Acts or parts of Acts so repealed, Lord Campbell's Act does not appear. Ultimately we come to the Merchant Shipping Act Amendment Act 1862, which repeals the 504th and 505th sections of the Merchant Shipping Act 1854, and by the 54th section enacts as follows: "The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say. . . 3. When any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat; 4. Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat, be answerable in damages in respect of loss of life or personal injury either alone or together with loss or damage to ships, boats, goods, merchandise, or other things whatsoever, to an aggregate amount exceeding 15*l.* for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury, or not, to an aggregate amount exceeding 8*l.* for each ton of their ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage, without deduction on account of engine-room."

That the provisions of these statutes involve cases of this description in some perplexity cannot, I think, be denied; but it does not seem to me that the perplexity is incapable of being unravalled. It was first argued for the apps., that the provisions of Lord Campbell's Act being, as it was insisted, inconsistent with the provisions of the Merchant Shipping Act 1854, the 4th section of the Merchant Shipping Repeal Act 1854 must be taken to have repealed Lord Campbell's Act, and that no obligation upon the owners of ships was created by the Merchant Shipping Act 1854, the provisions of that Act being in the negative merely that the owners should not be liable beyond the amount specified in the Act; and, on the other hand, it was argued, on the part of the resps., that the Merchant Shipping Act 1854, of itself and independently of Lord Campbell's Act, created a liability in the owners of ships to the extent referred to in the Act.

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Upon this ground, whether the Merchant Shipping Act 1854 ought to be construed as having of itself and independently of Lord Campbell's Act created a liability in the owners of ships to the extent contended for, or otherwise, I do not think it necessary for us to give any opinion; for, looking to the course of legislation to which I have referred, I am quite satisfied that the 4th section of the Merchant Shipping Act Repeal Act 1854 was not intended to repeal, and did not repeal, Lord Campbell's Act, but was intended and operated only to modify the liability which attached upon the owners of ships under the provisions of that Act. The language of this 4th section does not seem to me to be in any degree inconsistent with this view. It first purports to repeal the Acts and parts of Acts mentioned in the schedule to the extent to which they were therein expressed to be repealed, and there is no mention whatever in the schedule of Lord Campbell's Act, although some of the Acts there specified are repealed as to particular subjects, and it would obviously have been perfectly easy to specify the subject as to which Lord Campbell's Act was to be repealed, if it had been the intention to repeal it. The section then further purports to repeal all such provisions of other Acts as are inconsistent with the provisions of the Merchant Shipping Act 1854; but the provisions of Lord Campbell's Act are not inconsistent with the provisions of the Merchant Shipping Act 1854, except in so far as damages might be recoverable under the former Act beyond the limit which is specified in the latter. Besides, it is scarcely possible to suppose that the Legislature, if it intended to repeal Lord Campbell's Act, should have omitted to provide in express terms the more limited security referred to in the Merchant Shipping Act 1854. I am therefore of opinion that the app's argument upon this point cannot be maintained. But then a further argument was raised in their behalf, for which we are indebted to the ingenuity of Mr. Druce. He argued that, assuming Lord Campbell's Act to be modified only by the 504th and 505th sections of the Merchant Shipping Act 1854, and not repealed by the Merchant Shipping Act Repeal Act 1854, the modifications introduced by the above sections ought to be taken to have been incorporated into Lord Campbell's Act, and that, being so incorporated, they must subsist, notwithstanding the repeal of the above sections by the Merchant Shipping Amendment Act 1862. I must confess that, in the complication of these Acts, I felt at the time when this case was argued to some degree embarrassed by this argument; but, in considering it, I am satisfied that it cannot be supported. The modification introduced by these sections is not, in terms, incorporated into Lord Campbell's Act. It must, no doubt, have affected that Act so long as it subsisted; but when it was destroyed, its effect must have ceased; otherwise the consequence would be that, where any provision of an Act of Parliament has been modified by a subsequent Act, the modification could not be altered without at the same time repealing or altering the original Act—a proposition which cannot, I think, be maintained. With respect to the Act 13 & 14 Vict. c. 21, providing that where a statute which has repealed other statutes is itself repealed, the repeal of it shall not, without express enactment, operate to revive the statutes which have been repealed by it—a provision on which some argument was attempted to be raised on the part of the apps., I do not think that it has any bearing upon this case, there not being, in my opinion, as I have already stated, any repeal of Lord Campbell's Act. The argument on the part of the apps. upon this point, if pushed to its consequences, would go this length—that Lord Campbell's Act was repealed by the Merchant Shipping Act 1854,

sects. 504 & 505, and was not revived by the repeal of those sections by the Merchant Shipping Act Amendment Act 1862, and that these Acts, being in the negative only, the apps. have no remedy—a consequence which, in my opinion, goes far, independently of what has already said, to show that it was not intended to repeal Lord Campbell's Act, or that, if it was intended, it was intended also that the subsequent Acts, although expressed in the negative, should operate in the affirmative, and either of these views would be fatal to this appeal. The apps. also place much value on the general policy of the law in favour of the shipping interest as evidenced by early Acts limiting the liability of shipowners; but those Acts were prior to the passing of Lord Campbell's Act, and were repealed by the Merchant Shipping Act 1854. They furnish, therefore, no evidence of the policy of the law after the passing of Lord Campbell's Act, except that the repeal of them was certainly not favourable to the apps.' view. I add, too, that we can only judge of the policy of an Act of Parliament from the words in which it is expressed. For the reasons which I have stated, my opinion is, that these appeals are altogether groundless, and ought to be dismissed with costs.

Lord Justice KNIGHT BRUCE was of the opinion.

Appeal dismissed with costs, but the declaration varied by inserting in the declaration of the liability words limiting that liability to an amount "not exceeding" 15l. a ton.

Solicitors for the plts: J. W. Hickin, age Brown and Son, of Sunderland.

Solicitors for the defts. (resps. on this occasion) Maples and Teesdale, agents for Lietch and A North Shields.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Friday, Dec. 8, 1865.

SCHOTSMANN AND ANOTHER v. THE LANCASHIRE & YORKSHIRE RAILWAY COMPANY AND OTHERS

Vendor and purchaser—Goods—Stoppage in transit—Delivery—Insolvency.

The possession by a purchaser of goods of the bill of lading (the title-deeds thereof) puts an end to a claim in the vendor to stop the goods in transit.

There may be not only actual delivery, but also delivery of goods to a purchaser or owner there such virtual delivery may be equivalent to as one. But the putting of goods on board a general ship operates, as to the actual delivery of them, in a way than to place them within the control of the captain of the vessel; and the fact that the captain of such a ship is appointed by the owner of the goods does not make him more the agent for the delivery of them than if he had been appointed by any other person.

If, therefore, a ship is a general trading ship and is not sent out for the express purpose of receiving the goods, the delivery of them on board such a general ship amounts only to the putting of them under the control of the captain of it, and not to an actual delivery of the goods to the owner.

The signature by the master of a vessel of a bill of lading of goods, and the retention by him of the bill, the others being returned to the shipper, held not to amount to a virtual delivery of the goods to the captain, as the agent of the consignee.

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an is said to be insolvent, it does not mean that it must be evidence of some particular act of fraud or bankruptcy on his part; but merely that it is in a position to pay his debts.

It was instituted for the purpose of obtaining a declaration of the court that the plts. were to have certain flour delivered up to them; or, alternatively, to a lien on the purchase-money; for an injunction to restrain the railway company, from parting with the flour for a direction that damages might be paid in respect of so much of the flour as removed from the control of the defts.

The facts of the case were shortly these: In the month of July 1864, Schotsmann, who was then carrying on business at Lille, entered a tract to sell 1870 sacks of flour to a person named Cunliffe, who carried on business at Goole, under the style of "James Fort and Co." Delafosse, of Rouen (as Schotsmann's agent), shipped the flour on board the *Londos*, which was a general trader, one of several steamers regularly between Goole and the Continent, under the management of the firm of Watson, and Co., commission, shipping, and forwarding agents. Cunliffe was also a partner in the firm of Delafosse and Co., but the business of the two firms was conducted separately. The flour was shipped, the master of the vessel issued four bills of lading, all dated the 11th Oct. 1864. One of the bills he kept in his own hands; he returned the other three to Messrs. Watson, Fort and Co., or their assigns, he or they to pay the freight.

The bills were for the delivery of the flour to Messrs. Fort and Co., or their assigns, he or they to pay the freight.

On 30th Sept. 1864 the Messrs. Delafosse returned one of the bills to them as delivered to Messrs. J. Fort and Co., but only to Emille Fort, or to his order.

Oct. 30, 1864.

(Signed)

FREDERIC DELAFOSSE.

The bill, so indorsed, was delivered to Schotsmann by him indorsed over to Craig, as his agent. The Messrs. Delafosse subsequently forwarded other two bills of lading to Craig. The third was made by the Messrs. Delafosse in ignorance of their having heard that the Messrs. Fort and Co. were in embarrassed circumstances, although no positive act of insolvency on their part was shown to have been then committed. The first act alleged was the dishonour, on the 11th Oct. 1864, of a bill of exchange accepted by them that day the *Londos* arrived in the Humberside, as the agent of Schotsmann, stopped the ship *in transitu*, and gave notice to the master to pay the freight he had taken. In spite of that notice the defts.' company was also served) was warehoused by them in the name of Fort and Co., and they refused to surrender the bills. It was alleged by the defts. that the flour had been subsequently sold and delivered to the purchasers by order of James Fort

On 11th Oct. 1864 the firm of James Fort and Co. were adjudicated bankrupts, and left. Banner was in November appointed assignee.

In those circumstances this suit was instituted, a bill in which prayed a declaration to the effect stated.

Mr. Q. C., Eddis, and C. P. Brett appeared for the plaintiffs, and contended as follows:—Actual delivery of goods to the owner put an end to the stoppage *in transitu* as to them; here, however, there was no such delivery, inasmuch as the flour was not handed to Cunliffe or his

agent, and therefore the plt. was entitled to stop the flour, as his agent Craig had done, *in transitu*. They cited

Mitchell v. Ede, 11 Ad. & Ell. 888;

Van Casteel v. Booker, 2 Ex. 691;

Turner v. Liverpool Dock Company, 6 Ex. 543;

Heiney v. Earle, 8 Ell. & Bl. 410; on appeal, 427.

Jessel, Q. C., and *Lorence Bird*, for the defts., the railway company, directed the attention of the court to the peculiar position in which they were placed in the case, and contended that, as against them, the plt. had no equity to the relief prayed by the bill in the suit. They cited

Chitty on Contracts, 893;

Ogle v. Atkinson, 5 Taunt. 759;

Buhlman v. Inglis, 3 East, 381; and

Fowler v. M. Taggart, 1b. 396;

16 & 17 Vict. c. 107, ss. 50, 53;

18 & 19 Vict. c. 111, s. 8.

Selwyn, Q. C. and *Lindley*, for Cunliffe's assignee, maintained that there had been a virtual delivery of the flour, which was equivalent to an actual delivery of it. They cited

Dutton v. Solomonson, 3 B. & P. 582;

Fragano v. Long, 4 B. & C. 219;

Selw. N. P. 1288, 1292;

London and North-Western Railway Company v. Baitell, 7 H. & N. 400; 5 L. T. Rep. N. S. 899.

W. H. Terrell for Cunliffe.

THE MASTER OF THE ROLLS.—I think the principle of these cases is not much in dispute. The difficulties in them generally arise on questions of fact. It will not, I apprehend, be questioned on either side that in every case where there is a contract for the sale of goods, the property in the goods passes to the vendee as soon as they are delivered for his benefit to any common carrier, subject to the right of stoppage *in transitu* before the actual or virtual delivery and possession of the goods take place. The only real question here is this: whether there was an actual or virtual delivery of the goods when they were put on board the ship at Rouen? Because, if there was not, the stoppage *in transitu* clearly took place on the morning before they were delivered at Goole. A proposition has been stated on behalf of the defts. which will not, I think, be disputed by anybody—viz., that if a vendee of goods sends his own ship for the goods, and they are delivered on board that ship, that is an actual delivery of the goods to the vendee, and the stoppage *in transitu* is at an end. That is what I consider the decision in *Ogle v. Atkinson* practically amounts to. There may also be an actual delivery, although the ship is not the ship of the vendee. For instance, if the purchaser sends over an agent on his behalf to receive the goods for him, and they are delivered to his agent in his character of agent for the purchaser, then there is an actual delivery of the goods, and the stoppage *in transitu* is at an end. Now, a very material point in this case consists in this: whether there was, in the absence of anything to the contrary, an actual delivery to the owner of the ship, assuming the ship to be a general ship with a general cargo? In the case of *Ogle v. Atkinson* the purchaser of the goods expressly sent his own ship for the goods, and the captain was sent as the agent of the purchaser to receive them. The court in that case held, that as soon as the goods were put on board the ship they were actually delivered to the captain, as the particular agent of the purchaser. It is true that other goods were afterwards taken on board; but the ship was sent expressly for the purpose of receiving the goods sold, and that case was, consequently, analogous to the one put by Mr. Bird, of a carrier being the

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purchaser, and sending one of his ordinary carrier waggons to receive the goods. In that case no one could doubt that the delivery would be perfect. If the ship is a general ship the case of *Mitchell v. Ede* determines that it stands precisely in the situation of a common carrier; and the fact that the ship which is used as a common carrier is the property of the vendee, does not make the mere placing of the goods on board a delivery. I admit that it is a very material part of the defts.' case, that there may be a virtual delivery which would be the same thing as an actual delivery. If the bills of lading had been sent to Mr. Cunliffe, then I apprehend that the stoppage *in transitu* would, so soon as he had got the bills, have been at an end. So also, if the bills had been delivered to an agent of his on board the vessel. The possession of the title-deeds (if I may so say) would have put an end to the stoppage *in transitu*. I do not think that the evidence here amounts to such a case. What occurred was this: when the goods were put on board the captain signed four bills of lading; he then delivered three of them to Messrs. Delafosse and Co., as the shippers, and retained one himself. If Messrs. Delafosse had delivered all the bills of lading to the captain, that would have been a virtual delivery to Mr. Cunliffe, or his agent. But the mere retention by the captain of one of the bills cannot be treated in the same view, unless it was retained by him under an express arrangement that it should be considered as an actual delivery. There is, I think, an analogy between the present case and that of *Mitchell v. Ede*, though that case was not one of vendor and purchaser. There the captain had signed the bill of lading and had delivered it to the shipper. But suppose the captain had afterwards made another bill of lading, signed it, and kept it in his own possession, as he might have done; would that have made any difference in the decision of that case? It is clear, according to the opinion of Sir John Campbell, who argued the case, that if the bill of lading had been delivered by the shipper to the captain, the ownership of the goods would have passed; or, in a case like the present, the right of stoppage *in transitu* would have determined. But it is impossible to say that the captain, who might, if he had chosen, have made a bill of lading the next day without the sanction of the shipper, could by such means have created a transfer of the property contrary to the intention of the shipper. So here, also; the mere making, signing, and retention of a bill of lading would not take away the shipper's right of stoppage *in transitu*; it not being done with his sanction, and not being done with the intention of constituting thereby a virtual delivery of the goods. It is important to observe, and it should always be borne in mind, that there is a distinction between Mr. Cunliffe or Messrs. James Fort and Co., and Messrs. Watson, Cunliffe, and Co. They are two distinct sets of persons. It is very true that Mr. Cunliffe was (if I may so say) the sole partner in one firm; and that he was partner with another person in the other firm. But they are totally separate and distinct characters, and in courts of law we have constantly to deal with that circumstance. One man frequently unites in his own person different characters. He may be a consignee and an executor, but what he does as executor does not effect what he does as consignee. This vessel was a vessel that was duly advertised as a trading vessel between Goole and Rouen, by Messrs. Watson, Cunliffe, and Co., for the common carriage of goods. Therefore it appears to me that this was not a vessel sent by Cunliffe for the reception of those goods, but that he was a mere common carrier. The expression in Cunliffe's answer having reference to that is as follows: "I admit that Messrs. Delafosse did thereupon; and in fact (but whether or not as

the agents of and in behalf of the plt. Emili Schotsmann, I cannot set forth as to my belief or otherwise), on or about the 28th Sept. 1864, ship 1870 sacks of wheat flour on board a screw steamer called the *Londos*, and that (that is, he admits that) "the said *Londos* was then bound from Rouen to Goole; that she was loading and advertised to be trading between those ports; that she brought over from Rouen to Goole a general cargo; that Messrs. Watson, Cunliffe, and Co. were the agents and consignees of the said ship; and that Thomas Woodhead was the master thereof." Now I mean to allow this, that if Cunliffe, hearing that the flour had been purchased for him, had sent this ship expressly for the purpose of taking that flour, and had so informed Messrs. Delafosse and Co., though he had taken in other goods and another cargo, then this case would have come within the case of *Oyle v. Atkinson*. There would then have been an actual delivery the moment the goods were put on board the vessel. But having regard to the description of the vessel, I am of opinion that, unless the goods were intended to be delivered to some express agent of the vendor, there was no delivery by putting them on board this ship. Putting them on board the ship is nothing more than this, that it is necessarily putting them within the control of the captain; and the fact that the captain of the ship is appointed by the owner does not make him more the agent for the receipt of the goods than if any other person had appointed him. The whole question in the case resolves itself into this, whether the ship was a trading ship generally, or was specially sent out for the express purpose of receiving these goods? If not, the delivery of them on board the ship is only delivering them to the captain, who has the control of the ship. He is only the agent for the owner for the general purposes of the ship, and not for the express purpose of receiving the goods, unless he has been expressly deputed for that purpose. I have admitted that if all the bills of lading had been delivered to the master in this case, as the agent of the vendee, for the purpose of transferring the property, there would have been a virtual delivery of the goods, which would have put an end to the stoppage of them *in transitu*. But I think the evidence in this case does not amount to that. The evidence which is stated is only this: "The master on the 28th Sept. signed four bills of lading of the flour, one of which he retained, and the other three of which he handed back to the said Messrs. Delafosse." I find no other evidence on that subject. But Mr. Jessel, in pointing out the extremely meagre character of the evidence on that point, wanted to bring me to this conclusion, that I must assume everything that was not proved, against the plts. I am not of that opinion. If the defts. rely on the virtual delivery of the goods, it is for them to prove it. In the absence of evidence the presumption is the other way. On the other points I am also of opinion for the plts. The fact that three days after the stoppage *in transitu* Cunliffe dishonoured his acceptance, is evidence of his insolvency at the time at which the stoppage took place. When a man is said to be insolvent, it does not mean that there must be evidence of some particular act of insolvency or bankruptcy, but merely that he is not then in a position to pay his debts. I am of opinion, also, that the court has jurisdiction over the railway company in respect of the goods which they allowed to pass out of their control. An injunction could have been applied for; and their parting with the property after notice given to them not to do so constitutes the very case which Sir Hugh Cairns' Act was passed to meet. I must therefore make a declaration that the plt. Schotsmann is entitled to a sum up

[Q. B.]

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the cargo of the flour, or the produce thereof, subject to the freight and charges. There must be inquiries, what is the amount of the unpaid purchase-money, and what is due in respect thereof, and as to what has become of the flour? and if any part has been sold otherwise than by order of the court, what it produced, and by whom the proceeds have been received? The costs of the *plt.* Schotsmann up to and including the hearing must be added to his security.

[*Vide*, in connection with this case, that of *Burke v. Rogerson*, *ante* p. 266.]

Solicitors for the *plt.*, *Pritchard and Sons*, for *George England*, Howden.

Solicitors for the company, *Clarke, Woodcock, and Ryland*, for *T. A. and J. Grundy and Co.*, Manchester.

Solicitors for *Cunliffe, T. Horrex*.

Solicitors for the assignee, *Williamson, Hill, and Co.*, for *Haigh and Deane*, Liverpool.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,
Barristers at-Law.

Saturday, Nov. 21, 1865.

JOSEPH GEORGE CHURCHWARD v. THE QUEEN
(Petition of Right).

Petition of right—Admiralty contract for postal mail service—Nature of.

The suppliant contracted with Her Majesty's Commissioners of the Admiralty to convey Her Majesty's mails from C. to D., during the continuance of the contract, and the commissioners for and on behalf of Her Majesty agreed to pay the suppliant from and out of the moneys to be provided by Parliament 18,000*l.* per year; the contract to continue from the date until A.D. 1870:

Held, that there was no obligation on the part of the commissioners to employ the suppliant under the contract. Parliament not having provided moneys for the payment.

This was a petition of right.

The petition stated that by articles of agreement made the 26th April 1859, between the Admiralty of the first part, and the suppliant J. G. Churchward of the second part, it was, among other things, witnessed that, in consideration of the payments thereafter stipulated to be made to the petitioner, he did, for himself, &c., covenant, &c., with the said commissioners (of the Admiralty), that he would, during the continuance of the said contract, diligently and faithfully, and to the satisfaction of the said commissioners for the time being, convey in the manner in the said agreement specified, Her Majesty's mails, which should at any time or times, and from time to time by the said commissioners, or Her Majesty's Postmaster-General, or any of the officers or agents of the said commissioners, &c., be required to be conveyed from Dover to Calais, and from Calais to Dover, and from Dover to Ostend, and from Ostend to Dover, as thereafter mentioned, and the said commissioners, in consideration of the premises, &c., did, for and on behalf of Her Majesty, agree with him that they, on behalf of Her Majesty, would pay, or cause to be paid to him, by bills, payable by Her Majesty's Postmaster-General, in seven days from and after the respective dates thereof, a sum out of moneys to be provided by Parliament, after the rate of 18,000*l.* per annum, by quarterly payments, &c., and that it was

further agreed that the said contract should commence on the day of the date thereof, and should continue in force until the 26th April 1870, and should then determine if either of the parties should have given to the other of them twelve months' previous notice in writing of its being their intention that the same should so determine, &c. The petitioner then averred that he entered upon the performance of the said agreement, and did convey Her Majesty's mails in accordance with the said agreement until the breach of covenant hereinafter mentioned, and that, although he, his officers, servants, and agents, have at all times strictly and punctually performed the covenants, &c., and he has always been ready and willing to perform the said agreement, yet the said commissioners did not nor would allow or permit, and did not nor would observe or perform the said agreement on their part, and have broken the same in this; that they have omitted, neglected, and refused to employ the petitioner to carry the said mails, and did not nor would permit him to continue to perform the said agreement, &c., and have thereby prevented him from earning, and deprived him of the moneys, gains and profits, which he would otherwise have derived and acquired therefrom, and by reason of the premises he has been deprived of the benefits, while he remains subject to the burden, of a certain lease of certain premises situate at Dover, dated the 2nd July 1859, granted to him by the said commissioners, and which were with the knowledge of the commissioners taken by him for the purpose of carrying out the said agreement. The petition stated other losses as consequent upon the nonfulfilment by the commissioners of their agreement, and he therefore humbly prayed that the sum of 126,000*l.* may be paid to him as compensation for the damages and losses he has sustained, and that Her Majesty would be pleased to indorse upon the petition "Let right be done."

To this petition the Attorney-General pleaded on behalf of the Crown.

The second plea (which is the material one) set out the articles of agreement *verbatim*, the only material portion of which, as far as concerns the present question, was a portion of the ninth paragraph, which ran as follows:

And the said commissioners, in consideration of the premises and of the contractor, his officers, servants, and agents, at all times strictly and punctually performing the covenants and agreements hereby entered into by the contractor, do for and on behalf of Her Majesty, her heirs and successors, agree with the contractor that they, the said commissioners, on behalf of Her Majesty, will pay, or cause to be paid to the contractor, by bills payable by Her Majesty's Postmaster-General in seven days from and after the respective dates thereof, a sum out of moneys to be provided by Parliament, after the rate of 18,000*l.* per annum, by quarterly payments, and with a proportionate part thereof should this contract terminate on any other day than a day of payment, &c.

The third plea stated that the said articles of agreement were in the foregoing words, and that the breaches in the said petition mentioned were committed after the 2nd June 1863, and that the claim made by the suppliant is by virtue of the said articles of the 26th April 1859, and that the suppliant is the same Joseph George Churchward, and the articles of the 26th April 1859 are respectively the same as Joseph George Churchward and the contract bearing date the 26th April 1859 in the statute of the 26 & 27 Vict. c. 99, and the statute 27 & 28 Vict. c. 73, and that no moneys were ever provided by Parliament for the payment of the suppliant for or out of which the suppliant could be paid for the performance of the said contract for any part of the said period subsequent to the 20th June 1863, or for the payment to the suppliant for or in respect of or out of which the suppliant could be paid or compensated for or in respect of any damages sustained by the suppliant by reason of

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any of the breaches of the said contract committed subsequent to the said 20th June 1863.

There was also a demurrer to the petition as being bad in substance.

The suppliant also demurred to the second and third pleas.

By sect. 15 of the 26 & 27 Vict. c. 99 (the Appropriation Act of 1863), there is this provision:

And any sum or sums of money, not exceeding 950,000*l.*, to defray the charge of the Post-office packet service, which will come in course of payment during the year ending on the 31st March 1864, which sum includes provision for payments to Mr. Joseph George Churchward for the conveyance of mails between Dover and Calais, and Dover and Ostend, from the 1st April 1863 to the 20th June 1863, but no part of which sum is to be applicable or applied in or towards making any payment in respect of the period subsequent to the 20th June 1863 to the said Mr. Joseph George Churchward, or to any person claiming through or under him by virtue of a certain contract, bearing date the 26th April 1859, made between the Lords Commissioners of Her Majesty's Admiralty (for and on behalf of Her Majesty) of the first part, and the said Joseph George Churchward of the second part, or in or towards the satisfaction of any claim whatsoever of the said Joseph George Churchward by virtue of that contract, so far as relates to any period subsequent to the 20th June 1863.

By sect. 17 of the 27 & 28 Vict. c. 73 (the Consolidation Fund Appropriation Act of 1864), there is another grant for the Post-office packet service, with a similar restriction against applying any part thereof to any payment to Mr. Joseph George Churchward in respect of any period subsequent to the 20th June 1863.

Sir Hugh Cairns, Q. C. (Bovill, Q. C. and Hannen with him) now appeared for the suppliant; and

The Attorney-General (the Solicitor-General and Poulnden with him) for the Crown.

The following cases and statutes were cited:

Cordage v. Pole, 1 Wms. Saund. 119;
Wood v. The Copper Miners' Company, 2 C. B. 906;
 — *v. Elderton*, 4 H. of L. Cas. 625;
Tobin v. The Queen, 16 C. B., N. S., 355; 10 L. T. Rep. N. S. 762;
Feathers v. The Queen, 12 L. T. Rep. N. S. 114;
Dunn v. Snylen, 5 Q. B. 685;
Macbeath v. Haldimand, 1 T. R. 172;
Scott v. Avery, 5 H. of L. Cas. 811, 823, 837, 853;
Clark v. Watson, 18 C. B., N. S. 278;
 26 & 27 Vict. c. 99, s. 15;
 27 & 28 Vict. c. 73, s. 17;
 23 & 24 Vict. c. 84, ss. 13, 14.

As the judgments of the learned Judges go very fully into all the disputed points, it is unnecessary to give the arguments of counsel.

COCKBURN, C. J.—The discussion which has taken place, and the elaborate and able arguments which we have had the advantage of hearing, have thrown so much light upon the case, and have tended so completely to dissipate any difficulty or doubt which at one time may have weighed upon my mind, that, however great may be the interests concerned, and whatever may be the importance of the case, we should gain nothing by taking further time to consider it; and we shall probably best consult the general convenience by at once giving our judgment upon it. It is necessary at the outset to look carefully to see what is the true substance of this petition. I take it that the real matter of complaint is the breach by the Lords of the Admiralty of an alleged contract to employ the suppliant, Mr. Churchward, to carry the mails between Dover and the ports of Calais and Ostend, and also to do certain services connected with, and subordinate to, that which was the main and principal contract. When we come to consider the contract, in order to see whether it involves an obligation, on which the petition mainly rests, to employ Mr. Churchward in the manner mentioned, we shall find that the con-

tractor, in consideration of certain sums to be paid to him, in the first place the subsidy of 18,000*l.* a-year, and other minor sums, stipulated for incidental services, bound himself to the commissioners to provide and maintain certain steam-vessels of a certain tonnage and power, and cause them to make certain specific voyages between the ports referred to, and to convey in those vessels the mails which the Commissioners of the Admiralty or the Post-office might require to be carried; and he engaged, also, to do certain other things in connection with, and in subordination to, the main matter of the contracts. In the first place, he is to provide vessels when required for the passage of distinguished persons, and also to provide vessels specially for the transmission of the Bombay and China mails when they happen to be too late for the ordinary mails. He is also to keep in readiness steamers at Calais to land the mails when the state of the tide does not allow of communication with the harbour. All these matters, however, are subordinate to the main subject of the contract. On the other hand, the Commissioners of the Admiralty, in consideration of the services thus to be rendered by Mr. Churchward, the contractor, engaged to pay him a subsidy of 18,000*l.* a-year out of funds to be provided by Parliament. The petitioner alleges in his petition that the Lords Commissioners of the Admiralty have broken their contract in respect of this, that they have not employed him to carry the mails or to perform these other services, whereby he alleges he has been prevented from earning the reward which otherwise would have accrued to him by the performance of the contract on his part. Now, on the part of the Crown, this obligation of the commissioners to employ Mr. Churchward for the purposes of the services in question (on which obligation the petition rests) is denied, and we are to determine whether there is in this contract, either by express provision or by necessary implication, any such obligation on the part of the Commissioners of the Admiralty, who for this purpose must be deemed to be the agents of the Crown. I have stated the substance of the contract, and it appears clearly that there is no such express covenant. But, then, on the part of the petitioner it is alleged it must be necessarily implied. And that is the question—the only question—which we are called upon to determine. Sir H. Cairns has, indeed, in his able argument pressed it upon us that the complaint was not founded only upon the refusal to employ the petitioner in carrying the mails, but also in respect of the other matters. But the larger and more general complaint appears to be only an amplification of the main and more material one—the refusal to allow him to carry the mails. But, taking it in its larger sense and giving it the full construction for which Sir H. Cairns contends, it can amount to no more than this, that, whereas the petitioner, the contractor, has undertaken to perform certain services in respect of which he is to be employed by the Admiralty, and in consequence of which employment he is to claim certain remuneration, the Admiralty have not employed him in respect of every one of these services. Therefore that brings us back to the question whether there is any obligation on the part of the Admiralty to deliver the mails to Mr. Churchward, and to convey them and do all the other services which in the aggregate make up the consideration for the contract on the part of the Crown. Now, that being so, we come to the question whether in this contract, there being no such term expressed, it can be properly and reasonably implied; for, if it cannot, there is no obligation on the commissioners to employ Mr. Churchward in respect of these services which he bound himself by his covenants to perform; and then this petition, which is based entirely upon the contract,

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tion of that obligation, of necessity fails. Now, in considering this question, I entirely concur in the proposition laid down by Sir H. Cairns, that although the contract may appear upon the face of it to be obligatory only on one party—there are occasions on which we must imply, though the contract is silent about it, a corresponding and correlative obligation on the part of the other party in whose favour alone it may appear on the face of it to be drawn. No doubt, where the act to be done by the party binding himself can only be done by something of a corresponding character being done by the opposite party, a corresponding obligation to do the thing necessary for the completion of the contract can be implied. Thus, if a man engages to do work and render service which necessitates a great outlay of money and time and trouble, and he is only to be paid by the measure of the work which he has performed, it necessarily pre-supposes an obligation on the part of the person to whom he engages to do the work or render the service to allow it to be done, for otherwise the other party could not earn his remuneration. But in all such cases we must take care not to make a contract speak where it is intentionally silent, and, above all, not to make it speak contrary to what appears from the whole tenor and terms of the contract to be its real meaning. Taking this as the sound and safe rule of construction, I will proceed to consider how far, upon the contract, we are at liberty to imply that covenant on the part of the Admiralty on which the petition necessarily rests. The case may be looked at in two points of view; either with the addition of the condition that the payments under the contract are to be made out of funds provided by Parliament; or without the addition of that condition. The way in which the case was put, apart from that condition, was this.—The contractor has engaged to prepare and provide vessels at a great expense, and he cannot be paid unless he actually performs his contract by conveying the mails, and that although there is no express stipulation by the commissioners to employ him it must be implied. At first sight there is something very striking in this view, but I think, when we come to consider the terms of the contract, we shall see that it is founded on an hypothesis altogether fallacious, and upon a reading which appears to me to be inadmissible. The way in which Sir H. Cairns invites us to read the contract is, not that the contractor is bound to convey all the mails which he may be required to convey, but all the mails which the Admiralty or the Post-office may require to be conveyed between the ports mentioned. But I think that is altogether a mistake in the reading of the contract. It would involve this extraordinary consequence, that if a war arose in which it was expedient to send no mails except in vessels of war, that would be a breach of the contract. Or that, if it were thought more convenient to send the mails by some other route there would be a violation of the contract. But I cannot think that a true construction of the contract. The true construction of it is this, that the Post-office or the Admiralty are entitled to exact from the contractor that he shall have his vessels in readiness according to the terms of the contract, and shall carry all the mails which they may require him to carry between the ports in question. If that be so, the argument as to the necessity for implying this covenant, and that otherwise the contractor would not be entitled to any remuneration, wholly fails. If, indeed, the contract had been that the contractor should be paid not by way of annual subsidy, but according to the number of mails carried, then we might have implied the covenant which is contended for. But, according to my view, the meaning of the contract is, that so long as Mr. Churchward was prepared to carry out

the contract, and had his vessels ready (supposing there was no question as to the funds out of which he was to be paid), he would be entitled to his remuneration, so that it is unnecessary to imply the covenant in question. Then arises the second view of the case, whether it makes any difference that there is that condition that the payments shall be out of funds to be provided by Parliament. Both sides relied upon it. Sir H. Cairns put the case thus:—That the contractor has relied upon the good faith of Parliament, and the high sense of national honour upon which Parliament always acts in making good the engagements which the Ministers of the Crown, or the heads of public departments, may have entered into. And that if this service had been allowed to be rendered Parliament would have found the funds, and that, therefore, an obligation on the part of the Admiralty was to be implied to allow him to render the service. That argument to some extent is met by the construction I feel myself bound to put upon the contract. For, if I am right in supposing that the contractor fulfils all that is required of him when he has his vessels ready to carry the mails, then he would have a good case to submit to Parliament. It may be said, however, that he would have a better and stronger claim when he has done the work. And therefore it may be that, if there were no other answer to the argument on the part of the suppliant, he might be entitled to succeed. But then we must look, on the other hand, to the consequences which would follow from the implication of such an obligation upon the Admiralty. These consequences were pointed out by the Attorney-General in the course of his powerful address, and were well worthy the most serious consideration. We start with this, that there is involved in the contract the possibility of Parliament refusing to find the funds. The Commissioners do not make themselves, or their department, or the Crown, answerable for default in payment of the 18,000*l.* a-year. It is left to Parliament to find the funds, and in that is necessarily involved the possibility of Parliament, in the exercise of its high powers and its wisdom, refusing so to do. And, in point of fact, we cannot shut our eyes to the fact (for it is sufficiently apparent on the face of the record and the Acts of Parliament) that Parliament has refused to find the funds for two successive years. From the Appropriation Acts we find not merely that Parliament has omitted to find the funds, but that Parliament has had the case before it, and has carefully provided for the exclusion of the claim from the funds it provided; and when we come to consider how far there was in this contract an intention on the part of the commissioners—to be implied from the other terms of the contract—to bind the Crown even in the event of Parliament not providing the funds, let us see what would be the position of all parties concerned if after Parliament refusing to find funds, the commissioners should have nevertheless continued to employ the contractor. First, the Government would have put itself in a position of antagonism with Parliament, and have virtually set at naught its authority. Secondly, a great public department would have continued to employ a public contractor in the public service without the means of paying him; for, though we are told that possibly in the course of future years Parliament might find the funds, we can hardly suppose that a Minister would be warranted in assuming such a possibility when, so far as experience has gone, Parliament has refused to find the funds; and it appears to me that to employ a public contractor without the means of payment (even if he were willing so to be employed) would be a course of proceeding altogether derogatory to the dignity of the Crown and the honour of the country. Thirdly, the contract certainly could not be enforced.

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under those circumstances by the public department; for, supposing that Parliament refused to find the funds to pay the contractor, he would surely be entitled to resist the enforcement of the contract. A court of equity would probably relieve him against it if it were attempted to enforce it under such circumstances, and probably even a court of law might deem the provision of the funds by Parliament a "condition precedent" to the obligation; and at all events, it is impossible to suppose that a jury would give more than nominal damages. Therefore the practical result would be that, upon Parliament refusing to find the funds, the Admiralty would not be in a position to enforce the contract. Could, then, the contractor enforce it? Such a state of things we cannot suppose to have been intended, and we cannot therefore, imply a covenant which should have such consequences. I am far from saying that if, by express terms, the Admiralty had engaged, whether Parliament provided the funds or not, to employ Mr. Churchward to perform these services, a petition of right would not lie if that contract were broken. In this case, however, there is, it is clear, no such express contract, and we are called upon to imply it. I have described the consequences which would follow from such a contract if it were express, and cannot suppose that a public department, representing the Crown, and entering into such a contract, and knowing that they could only pay the contractor out of the funds provided by Parliament, would, nevertheless, bind themselves to employ him, notwithstanding that they had no funds out of which to pay him. Such a course would be clearly inconsistent with the dignity of the Crown or the honour of the country, and it would involve the department in the greatest difficulty with Parliament, if, notwithstanding the refusal of Parliament to find the funds, they should persist in employing the contractor. Looking at these considerations, and also to the fact that another department, the Post-office, had control over the mails, it is unreasonable to suppose that the Admiralty could ever have intended to enter into any such engagement. Let us put the matter to this plain and practical test. Suppose the Admiralty had been required to insert such a stipulation in express terms, that they would continue to employ the contractor notwithstanding that Parliament should refuse to find the funds. Can any reasonable person suppose that the Admiralty, with the startling and anomalous consequences which must ensue thus brought before them, would have assented to such a covenant? And if every one's own good sense must tell him that they would not, how can we imply a covenant on their part which we are morally certain they would never have agreed to? If we were to introduce this term into the contract, we should be violating the sound rule of construction—not to make a contract speak where it is intentionally silent; and still less, to make it say that which it is manifest, from the whole tenour of the contract, the parties never intended to say. I think, therefore, that as the whole case turns upon whether there was this engagement on the part of the Admiralty—that this petition of right fails, and that there must be judgment for the Crown. I agree that if there were no question as to the fund, or if there had been a fund provided applicable to the contract, and if the petitioner, being ready to perform his contract, had been prevented from doing so by the Admiralty, then he would have been entitled to sustain a claim for remuneration. But then it must have been one quite different from the present, and founded on his right to receive the subsidy. But that is not so. Parliament having refused to provide the funds, he is not in a position to claim the subsidy, and is compelled to base his complaint upon a covenant supposed to be implied, and on which he claims

damages. For the reason I have stated I am of opinion that no such covenant can be implied, and that, therefore, as that is the basis of the claim, there must be judgment for the Crown.

MELLOR, J. said he was of the same opinion. It was not contended, he said, that the petitioner, without alleging that Parliament had provided funds, could sustain a claim for nonpayment of the subsidy; but his case was that there was an implied covenant to let him convey the mails, and that he was entitled to damages for its breach. But could not be conceived that the Admiralty intended whatever might be the change of circumstances, the discoveries or improvements in science to themselves, for ten years to come, to send the mails by the vessels of Mr. Churchward. And in considering a question of implication, it was very material to bear in mind the nature of the contract and the position of the contracting party. It was not reasonable to imply such a covenant on the part of a great public department with reference to a great branch of the public service. In any point of view the petition must rest upon such an implication, and as he was unable to draw that implication, he thought there must be judgment for the Crown.

SHEE, J.—The claim, in substance, is that the Admiralty have broken their covenant by not allowing the contractor to carry the mails. But there is no such covenant in terms, and it cannot be reasonably implied. This case stands upon a different footing from those cited—cases of private contracts; and the Appropriation Act afforded a defence. It was notorious that the Crown could only contract for payment subject to funds being found by Parliament. The condition of Parliamentary sanction was usually imposed upon Government contractors by some such condition contained in this contract, and such was the nature upon the justice and honour of Parliament, that the Queen's subjects were not prevented by that condition from entering into such contracts. The inconvenience, such as it was, attached to matters of far more importance than Post-office contracts. Treaties with foreign powers, involving the honour and liability of the Crown, are often dependent upon the acceptance by Parliament of the obligations contracted and the provision of the requisite funds. And a few years ago the fulfilment by the Crown of a treaty between Her Majesty and a co-belligerent—containing a pecuniary guarantee by the Crown—was imperilled by some opposition in the House of Commons and only saved by a majority of three. It was beyond the power of the Admiralty, as the contractor must have known, to contract on behalf of the Crown on any terms but those on which this contract is limited; and I am clearly of opinion that the provision of funds by Parliament would be a condition precedent. The most important department of the public service would be entirely free from the control of Parliament, if this condition were not given effect to. And I am, moreover, of opinion that the direct enactments in these two Appropriation Acts afford a defence to the suit, and that a judgment for the petitioner would be an express violation of those enactments. On these grounds I am of opinion that there must be judgment for the Crown.

LUSH, J. said he also was of the same opinion. The question was whether there was a contract on the part of the Crown, absolute and without any qualification or condition, to employ the contractor for eleven years in the carrying of these mails. It was admitted that there was no express contract to that effect, and the question is whether it can be implied.

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ar that it could not, and that therefore be judgment for the Crown.

Judgment for the Crown.

LET OF COMMON PLEAS.

d by W. MAYD and W. GRAHAM, Esqrs.,
Barristers at-Law.

Wednesday, Jan. 17, 1866.

HORT v. SIMPSON AND OTHERS.

*ling, indorsement of—Transfer of right of
rued before indorsement—Wrongful delivery
-Bills of Lading Act (18 & 19 Vic.*

*ing shipped goods in the defts.' ship, indorsed
lading in blank, and delivered it to a bank
y to secure advances. On the arrival of
at Bombay they were wrongfully delivered
ts. to a third party. After such wrongful
he plt. repaid the bank, who re-indorsed the
ling to the plt., who thereupon brought this
inst the defts. for not delivering the goods:*

*urrer, that the right of action on the contract
of lading vested in the plt. on the reindorse-
he bill of lading, notwithstanding that the
been wrongfully delivered at the time of such
rent.*

ion.—First count:

hereas heretofore the plt., at the request of the
to be delivered to the defts., and they received
certain goods and merchandise of the plt.'s of
to be by them on board a ship of the defts.
purely carried and conveyed by the defts. therein
to wit from the river Thames to Bombay, and
at Bombay aforesaid, to be safely and securely
the plt., certain perils and casualties only ex-
strain freight and reward to the defts. in that
the defts. were not prevented from so carrying
g or delivering the said goods and merchandise
her of the perils or casualties aforesaid; and all
ere fulfilled and all times elapsed necessary to
to have the said goods and merchandise safely
carried and conveyed and delivered by the defts.
yet the defts. did not so safely and securely
liver, &c.

unt:

by a bill of lading made on the 3rd Sept.
defts., and delivered to the plt., the defts.
plt. that certain goods of the plt. in the said
mentioned, and then shipped on board the ship
e port of London, should be delivered at Bom-
(certain perils and casualties only excepted) to
assigns, he or they paying freight for the same,
and average accustomed; and the plt. indorsed
o the Central Bank of Western India, to whom
n the said goods thereby passed, and they after-
rased the said bill of lading to the plt., to whom
in the said goods passed; and, although the
e said goods as aforesaid was not prevented by
rils or casualties aforesaid, and all conditions
ed, and all things happened, and all times
lary to entitle the plt. to maintain this action for
ereinafter mentioned, yet the said goods were
he defts. to persons not entitled to receive or
ue, and the same have been, and are wholly

r to the third count.

a to the first count:

aid goods and merchandise were so delivered
the defts., and received by them after the 14th
id that the same were so delivered and received
subject to the terms of a certain bill of lading
for the same by the master of the ship in the
entioned, and that the agreement for the car-
ance, and delivery of the same was contained
said bill of lading, and not otherwise, and the
it the said bill of lading was and is in the words
llowing, that is to say: "Shipped in good order
ditioned, by Thos. Short, jun., in and upon the
essel called the *Dorothy*, whereof is master of
oyage, Bruce, and now riding in the river
ound for Bombay, thirty-one cases merchandise,
and numbered as in the margin, and are to be
in the like good order and well conditioned at
port of Bombay (the set of God, the Queen's

enemies, fire, and all and every other dangers and acci-
dents of the seas, rivers, and navigation of what nature and
kind soever, save risks of boats, so far as ships are liable
thereto excepted) unto order. Freight to be paid in
London, ship lost or not lost, or to assigns. Freight for
the said goods, with prime and average accustomed. In
witness whereof the master of the ship hath affirmed
to three bills of lading all of this tenor and date,
one of which bills being accomplished the others to
stand void. Dated 3rd Sept. 1863. Weight and contents
unknown. Not accountable for leakage and breakage.
Benjamin Bruce, entered pro pro Thomas Short, jun., George
Short." That after the shipment of the said goods and mer-
chandise, and before the arrival of the said ship at Bombay
the plt. indorsed the said bill of lading to certain persons to
the defts. unknown in order to pass the property in the said
goods and merchandise to such persons, and that thereupon
and by reason of such indorsement the property in the said
goods and merchandise mentioned in the first count passed to
the said persons, and that the said persons were the holders of
the said bill of lading at the time of the committing of the
said grievances in the first count mentioned, and the persons
entitled to receive the said goods and merchandise, were and
are the parties entitled to sue the defts. in respect of the
grievances mentioned in the said first count.

Tenth plea to the third count:

That the said bill of lading was made after the 14th Aug.
1863, and that the reindorsement thereof by the Central Bank
of Western India to the plt. was first made after the alleged
default of the defts. and not otherwise, and at the time of the
alleged default the said Central Bank of Western India were
the holders of the said bill of lading and the persons entitled
to receive the said goods and to sue the defts. in respect of
such alleged default.

Demurrer to the tenth plea.

Second replication to the third plea:

That whilst the said persons to whom the plt. indorsed the
said bill of lading as therein mentioned, were the holders of
the said bill of lading; the defts. did not at any time deliver
to the said persons, nor did the said persons at any time
during such period or at all have delivery of the said goods
and merchandise from the defts., who have altogether made
default in performing their duty and the terms of the bail-
ment in the declaration mentioned, to wit, by delivering the
said goods and merchandise to persons not entitled to receive
the same, to wit, to persons other than the said persons in the
third plea mentioned and other than the plt.; and the plt.
further says, that the said bill of lading was indorsed by the
plt., as in the said third plea mentioned in blank and not
otherwise, and was delivered to the said indorsees thereof
by the said plt. so indorsed in blank, which is the indorsement
in the said third plea mentioned; and that after such indorse-
ment, and whilst the said indorsees thereof in the said
plea mentioned were the lawful holders thereof, they, with
the intent to pass and revert the property in the said goods
and merchandise, to and in the plt. thereby, redelivered
the said bill of lading so indorsed in blank to the plt. with
such intent as aforesaid, and so as to pass and revert the said
property, and all rights of action in respect of the said goods
to and in the plt.; and the plt. further says, that the said
indorsement of the said bill of lading to the said persons in the
said plea mentioned, was not made with intent to pass, and
did not as between the plt. and the said indorsees pass the
absolute property in and an indefeasible right to the said
goods and merchandise to the said persons, but with intent
and in pursuance of an agreement between them and
the plt. to give them a right in the nature of a pledge upon
and in respect of the said goods and merchandise, by way of
further assurance to secure money advanced and paid by
them to the plt.; and the plt. further says, that before and at
the time of the said redelivery of the said bill of lading to the
plt., the said money had been repaid to the said persons, and
all claims of theirs upon or in respect of the said goods had
been and were satisfied.

Demurrer to the second replication and rejoinder:

That the said indorsees in the said replication mentioned
first redelivered the said bill of lading so indorsed in blank
as therein mentioned to the plt. upon the alleged default of
the defts. in the said replication mentioned, and not otherwise;
and that at the time of the said alleged default the said in-
dorsees were the holders of the said bill of lading, and the
parties entitled to receive the said goods and merchandise,
and to sue for the nondelivery thereof.

Demurrer to the above rejoinder. The following
were the plt.'s points for argument: 1. That by
force of the statute the plt. as indorsee of the bill
of lading is entitled to sue for any breaches of the
contract therein contained, even though those
breaches happened before the reindorsement to the
plt. of the bill of lading, if in fact the said breaches
have not been previously released or satisfied.
2. That its appearing on record that indorsement
by the plt. of the bill of lading was by way of
pledge only the right to sue remained in the plt., or

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[C.]

at all events has been re-vested in him. 8. That there is no departure from the first count in the special replication thereto; that the bill of lading having been reindorsed to the plt. he may declare as if it had never passed from him, as he might have done had the instrument been a bill of exchange.

The defts.' points were:—1. That the third count of the declaration is bad, because it does not show that the bill of lading was reindorsed before the time for delivering the goods had elapsed. 2. That, at all events, it is sufficiently answered by the tenth plea, which shows that the indorsement took place after the alleged default. 3. That the Bills of Lading Act does not operate to transfer rights of action already existing at the time of the transfer. 4. That, after arrival of the ship and default made, the property in the goods did not pass to the plt. by the reindorsement of the bill of lading. 5. The defts. will also contend that the plt.'s second replication to the defts.' third plea is bad, for the following reasons: first, that it does not allege a reindorsement of the bill of lading before default; secondly, that it is a departure from the declaration. They will further contend that, at all events, it is sufficiently answered by the rejoinder thereto, which shows that the reindorsement took place after the alleged default.

Dowdeswell for the plt.—The question is, if the indorsement of the bill of lading carried with it the right of action which had accrued at the time of the indorsement; and another point is, if the original consignor who afterwards becomes holder of the bill of lading is not remitted back to his original rights. In *Thompson v. Dorning*, 14 M. & W. 403, followed by *Howard v. Shepherd*, 9 C. B. 297, it was held that the assignee of a bill of lading had no rights on the contract, and the only person, therefore, who could sue for breaches was the original consignor. That was felt to be a great inconvenience, and to remedy it the 18 & 19 Vict. c. 111 was passed, and I submit that it places the holder of a bill of lading in the same position as the holder of a bill of exchange. By sect. 1 of that Act it is enacted that "every consignee of goods named in a bill of lading and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." Therefore, as long as the property passed, all rights of suit vested in the holder of the bill of lading. Here, there having been default in delivering the goods while the bank in India was holder of the bill of lading, it is said that the plt. has no right under it. [WILLES, J.—If that were so, the Act would be useless, as, if you repay your money and get back the bill of lading, you are not to have a right of action on it.] Just so; I say we are in the same position as the holder of a bill of exchange, where there is never any question if the right of action had accrued before the indorsement. There would be endless difficulties if the contention of the other side was right, as a bill of lading may have been in fifty different hands, and there may have been several injuries to the goods at different times, and it might be impossible to say when any one of them occurred.

The Court called on

Sir G. Honyman for the deft.—There was a question as to departure, but I shall not trouble the court with that. It is admitted on the record that plt. indorsed the bill, so that the property in the

goods passed to another person, and that he took back the bill after the goods were lost, and actually delivered to a third person. I say that it is every indorsement of a bill of lading which transfers the rights of action, and my contention here is that the property did not pass by the indorsement. The mere fact of writing on that which was a waste paper, or merely handing it back to the consignor, did not pass the property:

Lickbarrow v. Mason, 1 Sm. L. C. 710, 713;

Wright v. Campbell, 4 Burr. 2046.

And from all the cases it seems that the bill of lading only operates to pass the property in goods while they are *in transitu*. There can be no hardship in this case, as if the plt. has paid the bank, he can sue in the bank's name. If this bill of lading carries with it the rights of action, it would be enabling the parties to assign an action over.

Dowdeswell in reply.—There is no ground for saying that the voyage was terminated, and a wrongful delivery of my goods does not divest the property in me. If the voyage was at an end, perhaps the bill of lading would not pass the property; but that does not appear on this record. All that appears on the declaration is, that they were delivered to the wrong party, and that might have been at the Cape.

Honyman.—If that is so, I should ask to insert the plea an averment of delivery at Bombay.

WILLES, J.—You can insert an averment of delivery on arrival.

Dowdeswell.—That would not help the plt.: (*Ju v. Dowle*, 9 M. & W. 19, where it was held that plt. was entitled to a verdict on a plea of *detinet* where it appeared that the deft. had wrongfully delivered the goods to a third party.)

ERLE, C. J.—I am of opinion that our judgment should be for the plt. The bill of lading was indorsed in blank, and money was raised on it, there was no indorsee of the bill of lading when it was outstanding, and it was afterwards delivered to the plt., the original consignor, the holder; and without recourse to the bill of lading the plt. had all the rights at common law of the original contractor. But, independent of that, the party who took the bill of lading indorsed in blank might be said to take all the rights under it, the deft. by making a wrongful delivery of the goods is not to put an end to the rights under the bill of lading.

WILLES, J.—I am of the same opinion. The construction of the Act is, that the rights of the contract may be transferred by indorsement of the bill of lading, and so long as the indorsement remains in force, so long do the rights of the indorsee continue. I agree that the deft. cannot better his position by pleading a wrongful delivery of the goods to a third person.

KEATING, J.—I am of the same opinion. A wrongful delivery was no delivery, and the plt. is remitted to his original rights.

M. SMITH, J.—The true construction of the statute is, that the rights under the contract pass to one assignee to another, and the plt. is not deprived of his rights by a wrongful delivery by the deft. I see no reason why the bill of lading should not have been assignable, and the rights on the contract with it.

Judgment for the

C. P.]

THE ANGLO-AFRICAN COMPANY (LIMITED) v. LAMZED AND OTHERS.

[C. P.]

Friday, Jan. 19, 1866.

THE ANGLO-AFRICAN COMPANY (LIMITED) v.
LAMZED AND OTHERS.*Charter-party—Stevodore—Duty of shipowner to load a full cargo.*

In an action on a charter-party against a shipowner for not loading a full cargo, the defts. in their plea set out the charter-party, which contained the clause, "Charterer's stevedore to be employed by ship," and averred that they were ready and willing to employ the charterer's stevedore, but the plts. did not provide any stevedore; and by reason of the default of the plt., the master of the ship was forced to and did load the cargo without the assistance of any stevedore, and did load the same to the best of his skill and ability:

Held, on demurrer, that the clause in the charter-party gave the charterer the option of appointing a stevedore, and that, if he did not exercise it, the shipowner was bound to load as much as the ship could reasonably carry, and that the plea was therefore no answer to the action.

The declaration was on the charter-party set out in the plea; and after setting out the effect of the charter-party it proceeded as follows:

And the pita. say that the said ship loaded an outward cargo according to the said charter-party, and therewith proceeded on the outward voyage and delivered the same according to the said charter-party, and that the pita. were always ready and willing to ship a homeward cargo according to the said charter-party; and that before action brought all conditions had happened, and all things had been done, and all times had elapsed necessary to entitle the pita. to have the said charter-party performed by the defts., and to sue them for the breach thereof hereinafter mentioned; yet the defts., although not prevented by any of the excepted perils, made default in reloading such lawful merchandise as was sent alongside the said ship at the ports mentioned in the charter-party not exceeding what the said ship could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and by reason thereof a great part of the cargo provided for the said ship by the pita., and which the said ship could and ought to have loaded agreeably to the terms of the said charter-party was left behind; and by reason of the premises the pita. were deprived of the profits they would have gained from the said merchandise being loaded on board the said ship agreeably to the terms of the said charter-party, and have been compelled to provide other means of transport for the same and have otherwise been put to loss and inconvenience.

Fourth plea:

That the said charter-party was and is of the tenor and effect following, that is to say: "London, 2nd May 1864, Charter-party. It this day mutually agreed between Captain W. Silly, master of the good ship or vessel called the *Lianne*, 60, now in the London Docks, and Messrs. Spyer and Heywood, agents for the Anglo-African Company (Limited), of London, merchants. That the said ship being light, staunch, and strong, and every way fitted for the voyage, sail, with all convenient speed, sail and proceed to the West India Docks, or so near thereto as she may safely get, and here load from the factors of the said affreighters such lawful merchandise as they may have to ship, and therewith proceed to Sierra Leone and the Island of Shellio if required, and there deliver the same, and reload such lawful merchandise as may be sent alongside at either port, which the said affreighters bind themselves to ship not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded, sail therewith proceed to London, Bristol, or Liverpool at her option, on signing bills of lading, or so near thereto as she may safely get, and deliver the same on being paid freight at the rate of a lump sum of 550*l.* for the voyage out and home, and five guineas gratuity to the master; Charterer's stevedore to be employed by ship (the act of God, Queen's enemies, fire, and all and every other the dangers and accidents of the seas, rivers, and navigations of whatever nature, and kind soever during the said voyage, always excepted). The freight to be paid by as much cash as the master may require for ship's disbursement abroad, not exceeding 50*l.*, to be advanced free of interest or commission, but subject to insurance, and remainder at final rate of discharge on true delivery of the cargo, one half by cash, and the other half by good and approved bill of exchange at two months' date, or by cash at master's option: fourteen working days are to be allowed the said merchant (if the ship is not sooner dispatched for loading in London, and twenty running days for discharging and loading in Sierra Leone, Shellio, and ten days on demurrage over and above the said laying days at 4*l.* per day; cargo to be discharged from alongside, as customary

by the regular traders, and to be brought alongside at charterer's risk and expense; lien on the cargo for freight, dead freight, and demurrage; penalty for non-performance of this agreement, estimated freight 150*l.*, advance by charterers, acceptance at two months' date on signing bills of lading, subject to insurance out only; time occupied in shifting ports not to count as lay days." And the defts. say that, according to the form and effect of the said charter-party, a stevedore was to be provided by the pita. to reload and stow the said ship, which stevedore was to be employed by the defts. for that purpose, and such stevedore being so employed by the defts. as aforesaid, the defts., according to the usage of merchants, would not be responsible or liable to the pita. for, or in respect of any default in such reloading and stowing, and the defts. were ready and willing to perform the said charter-party on their part, and to employ the charterer's stevedore as therein agreed, whereof the pita. had notice, but the pita. did not, nor would provide any stevedore for the purpose of reloading and stowing the said homeward cargo according to the said charter-party, and by reason of the default of the pita. in that behalf the master of the said ship was forced and obliged to, and did reload the said cargo without the assistance of any stevedore, and did reload and stow the same to the best of his skill and ability, and that the pita.'s alleged cause of action is for and in respect of the said ship not having reloaded as much merchandise for the said homeward cargo as she might have reloaded if a competent stevedore had been provided and employed in and about the reloading and stowing of the said cargo, and the defts. say that the alleged breach of the said charter-party was caused by such default of the pita. as aforesaid, and not otherwise.

Second replication to the fourth plea:

That before and at the time of making the said charter-party, and thence until, and at the time of loading the homeward cargo, there was not any stevedore or person carrying on the business of stevedores at Sierra Leone or the Island of Shellio, as the pita. and the defts., and the said William Silly, and the said Messrs. Spyer and Heywood respectively well knew at the time of making the said charter-party; but there was at the said West India Docks before and at the time of making the said charter-party, and at the time of loading the outward cargo, a number of stevedores, as the pita. and the defts., and the said William Silly, and the said Messrs. Spyer and Heywood well knew at the time of making the said charter-party.

Demurrer to the fourth plea.

The ground of demurrer stated in the margin was that the charter-party gives the charterers an option of appointing a stevedore, but imposes on them no obligation to do so.

Demurrer to the second replication.

The ground of demurrer stated in the margin was, that the facts stated could not vary the contract of the parties.

Sir George Honyman for the pita.—The question is, if there is anything in the facts stated to relieve the ship-owner from loading the cargo sent alongside by the charterers. The clause "charterers stevedore to be employed by ship" is the only thing that can be relied on, but it is the duty of the ship-owner to load the ship. In *Sack v. Ford*, 13 C. B., N. S. 90, the Court held that the charterer has performed his duty when he has brought the cargo alongside, and in the absence of any express stipulation, the shipowner is bound to load it. These words cannot alter that duty, as they do not impose any obligation, but are only inserted for the benefit of the charterer. They merely amount to this, that if the charterer appoints a stevedore, he is to load the ship. Even when a stevedore is appointed by the charterer, he is under the control of the master, and he is to load as well as he can, and the master is to see that it is done so as not to endanger the ship.

The Court called on

Quain for the defts.—The breach is for not putting on board such a cargo as might have been put on board if a stevedore had been appointed. [WILLES, J.—The plea alleges that it was loaded in the best manner the captain could do it, but it does not say that it was done in a reasonably skilful manner.] That is rather a special demurrer objection; it ought, perhaps, to have alleged that it was done in a reasonably skilful manner as the captain was required to

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do it. That being so, the plea is an answer to the breach, and I submit that the master is not bound to appoint a stevedore unless there is a stipulation to that effect. Here the stevedore was to be appointed by the charterer, and if he does not name one, he cannot complain that more cargo might have been got into the ship. The plea and the declaration must be read together, and then the breach would be narrowed to that in the plea, that if a competent stevedore had been appointed this would not have happened.

Honyman, in reply, was not called upon.

ERLE, C. J.—The contract of the deft. is to load as much as the ship could reasonably carry. That is the ordinary duty of a shipowner chartering a ship, and I take it that in this case so much as the ship could carry was not loaded. That is a breach of the contract, and the plea is that the charterer's stevedore was to be employed by the ship, and you did not appoint a stevedore. It is clear that that is no defence; if it meant that as much was loaded as the ship could reasonably carry, it ought to have been a denial of the breach. It assumes that it was a condition precedent that the charterer should appoint a stevedore, but the stipulation was only to give the charterer the option of appointing a stevedore, and if he had exercised it the shipowner was bound to employ him; but if he did not, the shipowner was bound to stow as much as the ship could reasonably carry. For these reasons I think that the plea is no answer to the action.

WILLES, KEATINGE, and M. SMITH, JJ. concurred.

Attorney for the plt., *J. J. Solomon*.

Judgment for the plt.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Jan. 31 and Feb. 7, 1866.

WILSON v. JONES

Marine insurance—Atlantic Telegraph cable—Perils insured against—Total loss.

The plt. by a policy of insurance, the material parts of which were as follows, caused himself to be insured: "Lost or not lost, at and from Ireland to Newfoundland, the risk to commence at and from and including the lading of the cable on board the Great Eastern, and to continue until the said cable be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and vice versa, the risk on this policy then to cease and determine, upon any kind of goods and merchandises, and also upon the body, &c., of the good ship or vessel called the Great Eastern." . . . The policy then went on: "The said ship, &c., goods and merchandises, &c., for so much as concerned the assured by agreement between the assured and the assurers in this policy, are and shall be valued at 200l. on the Atlantic cable value, say, on twenty shares valued at 10l. per share; and it is hereby agreed and understood that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its lading on board the Great Eastern, until 100 words be transmitted from Ireland to Newfoundland, and vice versa, and it is distinctly declared and agreed that the transmission of the said 100 words from Ireland to Newfoundland, and vice versa, shall be an essential condition of this policy. Touching the adventures and perils which the assurers are contented to bear, and

do take upon ourselves in this voyage, they are of the seas, &c., and of all other perils, losses, and misfortunes that have or shall come to the hurt, &c., of the said goods, &c., and ship, &c., or any part thereof, &c." There was the usual memorandum found in the printed forms of marine policies at the end of the policy, concerning average losses. The Great Eastern had started with about 2200 miles of cable on board, and had laid from 1100 to 1200 miles, when a fault having been discovered, the cable was hauled in, and the strain being too great, it parted, and part went to the bottom. The Great Eastern then returned to port with the remainder:

Held, in an action on the policy, that the risk by which the loss occurred was a risk insured against by the policy, and that notwithstanding the preservation of the remaining part of the cable, the plt. might recover for a total loss.

Paterson v. Harris, 1 B. & S. 336; 5 L. T. Rep. N. S. 53, distinguished.

This was an action by a shareholder in the Atlantic Telegraph Company against an underwriter upon the policy of insurance, which appears below.

The declaration stated:

That the plt., by J. H. Joyce, his agent, by a policy of insurance bearing date the 29th day of July 1865, caused himself to be insured in the words and figures following (that is to say):—J. H. Joyce. In the name of God, Amen; as well in his own name as for and in the name and names of all and every other person to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause himself and them, and every of them, to be insured, to wit, not lost, at and from Ireland to Newfoundland, the risk to commence at and from and including the lading on board the Great Eastern steamship, and to continue until the said cable be laid in one continuous length between Ireland and Newfoundland, and until one hundred words shall have been transmitted from Ireland to Newfoundland, and vice versa, the risk on this policy then to cease and determine, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, ammunition, artillery, boat, and other furniture of and in the good ship or vessel called the Great Eastern, whereof is master under God for this present voyage, or whoever else shall go for master in the said ship, or by whatsoever name or names the same ship, or the master thereof, is or shall be named or called, beginning the adventure upon the said goods and merchandises from the lading thereof aboard the said ship as above, upon the said ship, &c., including risk of craft, and so shall continue and endure during her abode there, upon the said ship, &c., and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived at as above, upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed, and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to, and touch and stay at any port or places whatever, without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and the assurers in this policy, are and shall be valued at 200l. on the Atlantic cable value, say, twenty shares valued at 10l. per share (and it is hereby agreed and understood that this policy, in addition to all perils and casualties herein specified shall cover every risk and contingency attending the conveyance and successful laying of the cable from and including its lading on board the Great Eastern steamship until one hundred words be transmitted from Ireland to Newfoundland and vice versa; and it is distinctly agreed and declared that the transmission of the said one hundred words from Ireland to Newfoundland, and vice versa, shall be an essential condition of this policy). Touching the adventures and perils which we the assurers are contented to bear and do take upon ourselves in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof; and in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for in or about the defence, as a guard, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute, each one according to the rate and quantity of his sum herein assured. And it is agreed by us the insurers that this writing or policy of insurance shall be of as much force and effect as the surest writing or policy of

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fore made in Lombard-street, or in the Royal Exchange in London. And so we the assurers do hereby promise and bind ourselves, each and every of us, our heirs, executors, and goods, to the insurers, administrators, and assigns, for the benefit of the premises, confessing ourselves paid in due unto us for this assurance by the after the rate of 25 guineas per cent. In fact we, the assurers, have subscribed our money assured in Liverpool. N.B.—Corn, fish, and seed are warranted free from average if the ship be stranded; sugar, tobacco, hemp, skins are warranted free from average under all other goods, also the ship and freight are from average under 31 per cent, unless general, rounded. 2004. E. S. Jones, J. P. and Co. Two 29th July 1865. And the deft. for a certain sum him by the plt. subscribed the said policy name an insurer thereof to the plt. for that said Atlantic cable and premises, and the said was shipped on the said ship to be carried be laid in one continuous length between Newfoundland, and the plt. was then and thence, at the time of the loss hereinafter mentioned, said cable to the amount of all the moneys by reason, and the said ship with the said cable on its proceeding on the said voyage, and during of the said risk and before the said Atlantic one continuous length from Ireland to Newfoundland, and vice versa, the said as by perils so insured against as aforesaid, all conditions were fulfilled and all things 11 times elapsed necessary to entitle the plt. to 2004. by the deft.; yet the deft. has not paid the plt. claims 2004.

headed:

did not cause himself to be insured with the cable, and was not interested in the said cable as it was not insured by the perils insured of them as alleged. It alleged loss of the said cable was an average loss, within the meaning of the said policy, general average loss, and the said ship during was not stranded.

pleas issue was joined.

inclosed between brackets in the margin of the policy, a fact, an ordinary printed form of with blanks to be filled up opposite to touching the adventures and perils,

as tried before Martin, B., at the last inter assizes. It appeared that the older of twenty shares in the Atlantic company, and had, through Joyce, policy of insurance set out above. The sailed from Valencia on the 23rd July es of cable on board. Between 1100 s had been paid out, when, on the 2nd was discovered to exist in the part and it became necessary to recover the to remedy the fault. To effect this, backed until all strain on the cable hung right up and down, and it was the bows and slowly hauled in, the rned right about, and gently steaming ent any strain. The sea at the place ppened was about two miles in depth, on the cable caused by the suspension th of it very great. The result was, the and the part already laid went to the al attempts were made to recover it, casion it was lifted a considerable dis- weight broke the grappling iron by eing raised, and it was again lost. The afterwards returned to England with of the cable on board.

ed in the company's prospectus put e loss occurred, that the part of the ht be recovered, and that they hoped recover and utilise both it and the ained.

roker, Joyce, shortly after the loss : the shares and offered them to the

deft.'s brokers, requiring payment for a total loss; they kept them a day or two, and then returned them.

A verdict was directed for the plt. for the full amount claimed, leave being reserved to the deft. to move to enter the verdict for himself, on the ground that the loss was not by the perils insured against, or to reduce the damages on the ground that the loss was an average loss only.

Brett, Q. C. accordingly obtained a rule nisi upon the 12th Jan. to set aside the verdict and enter it for the deft. on the ground that the loss was not any loss by the perils insured against, or if any, only an average loss, and there was no evidence that it was higher than 3 per cent.; and also to reduce the damages on the ground that the loss, if any, was only an average loss.

Jan. 31.—*Temple, Q. C.* and *L. Temple* showed cause against the rule.—With reference to the question whether this was a loss by the perils insured against, it is to be observed that the policy provides for every risk and contingency attending the conveyance and successful laying of the cable from and including its lading on board the *Great Eastern* until one hundred words be transmitted. With respect to the second question, namely, whether there was a total loss or not, the policy was upon the undertaking, not upon the cable. We have tendered them the shares; we do not deny, if we are entitled to recover for a total loss, that they are entitled to them. [Pollock, C. B.—Do you contend that nothing is to be allowed for the 1200 miles of cable saved?] Yes; for even if they can make use of it in laying the communication on a future occasion, it will be a new adventure. [Martin, B.—This was like a warranty that the cable should be safely laid down on that voyage.] They cited

Paterson v. Harris, 1 B. & S. 336; 5 L. T. Rep. N. S. 53.

Brett, Q. C. and Quain in support of the rule.—This is, no doubt, a case of great difficulty from the fact that an ordinary marine policy has been adopted. This document must, however, be construed according to the plain ordinary meaning of the words; and this court will feel itself bound to follow previous decisions upon the meaning of similar words in similar documents. The insurance is on the Atlantic cable; what follows about shares is only to render the policy a valued policy instead of an open one. If the shares were what was being insured, the language should have been, "that is to say, on twenty shares therein." [Pollock, C. B.—I cannot see how the doctrine of abandonment applies to the shares; the shares are still in existence, and of a definite value. If they were of no value, and the whole undertaking had been abandoned on the first failure, it might be different.] If you make it an insurance on shares, you make it an insurance upon an uninsurable matter. How can shares be insured against the peril of the sea? They never are put on board the ship or go on the voyage. The words in the margin are merely inserted to extend the risk until the transmission of the words. Even supposing it to be a policy on shares, then I say it is an insurance against their destruction by reason of the loss of the cable through the perils insured against. Then what are these perils? The words in the margin are relied on; but they must be read as if in the body of the instrument, and then they will be general words following specific words, and, according to the well-known canon of interpretation, must be confined to risks similar in kind to those specifically enumerated. They would not, at any rate, cover an accident arising from something inherent in the

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thing insured itself, and happening in the ordinary course of an ordinary voyage. [CHANNELL, B.—Here we have general words besides those in the margin; must we not give those in the margin some further meaning?] A marine policy does not include accidents that might happen in a perfectly ordinary voyage. This did not happen through any stress of weather; it may be said to have been caused either by a defective insulation, or by want of strength, so that whether you look to the *causa causans*, or *causa proxima*, it is the same thing. Then, as to the question whether the loss was total or partial. If the policy be on the cable it cannot be a total loss. If the assured has any insurable interest in the cable, which he must have to insure, then you have the subject-matter in part brought back. It is not clear even that the part at the bottom of the sea is absolutely lost. [MARTIN, B.—The cable insured is a cable that will reach from a certain point to a certain other point; the insurance is on the entire thing, not on each link of the chain as it were, but the whole thing as existing in a fit state to perform the purpose for which it is made.] It is not an insurance that the cable will do a particular thing, but for its safe carriage. When you insure a chest of tea you do not insure each particular pound, so as on the loss of it to recover the whole sum insured. If this was suggested, a warranty upon the communication being effected and maintained a certain time, why was the ordinary form of policy used? When you are dealing with the case of an underwriter who would be accustomed to, and most likely would contemplate, the usual marine risks, there should be very clear evidence to show that such an insurance as that contended for by the plt. was intended. They cited

Paterson v. Harris, 1 B. & S. 336; 5 L. T. Rep.

N. S. 53;

Lucena v. Craufurd 2 B. & P., N. R., 269.

Cur. adv. vult.

Feb. 7.—MARTIN, B. now delivered the judgment of the court (Pollock, C.B., Martin, Channell, and Pigott, BB.) This is a rule to enter a nonsuit in a case tried before me at the last Liverpool assizes. The verdict was entered for the plt. for 200*l.*, being a total loss upon a policy of insurance. The facts are these: the Atlantic Telegraph Company were about to lay down an electric cable between Ireland and Newfoundland; the cable had been put on board the *Great Eastern* steamship, and it was intended that she should proceed from Ireland to Newfoundland, and convey and lay down the cable as she went along. The *Great Eastern* left Valentia in Ireland, on the 23rd July, with 2200 miles in length of cable on board, and on the 2nd Aug. had laid down from 1100 to 1200 miles of it. Upon that day, in consequence of the electric current not acting, some of the cable was being drawn back into the ship, and, whilst this was being done, a part of the cable which was on board broke, and the broken end fell into the sea; some fruitless endeavour was made to raise it, but ultimately the *Great Eastern* returned to Sheerness with the remainder of the cable on board, where it now is, and it is hoped by the directors that the part saved may be available for another attempt. The Atlantic Telegraph Company is a joint-stock company, and the plt. was the owner of twenty shares of 10*l.* each in it. The deft. underwrote the policy on the 29th July for 200*l.*, and the question is, whether the plt. is entitled to recover as for a total loss or any smaller sum. The contract between the parties is contained in a paper which was the common printed form of a marine policy. It states that the plt.'s agent caused himself to be insured "at and from Ireland to Newfoundland, the risk to commence at and from and including, the lading

of the cable on board the *Great Eastern*, and to continue until the cable be laid down in one continuous length between Ireland and Newfoundland and until 100 words shall have been transmitted from Ireland to Newfoundland, and *vice versa*, the risk on the policy then to cease and determine. The ship was the *Great Eastern*; the goods, &c. were valued "at 200*l.* on the Atlantic cable, value say, on twenty shares valued at 10*l.* per share; and in the margin opposite the usual clause touching the adventures and perils which the assurers were contented to bear and take upon them, &c., there was as follows: "It is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable from and including its loading on board the *Great Eastern* until 100 words be transmitted from Ireland to Newfoundland and *vice versa*, and it is distinctly declared and agreed that the transmission of the said 100 words from Ireland to Newfoundland, and *vice versa*, shall be an essential condition of the policy." The premium was 25 guineas per cent., and the deft. underwrote the policy for 200*l.* The case has been argued before us. The contract is partly written and partly printed, and the agreement between the parties is to be ascertained by the words of it. The circumstance that it is upon the printed form which is usually adopted for a common marine policy wholly immaterial if the language used and adopted by the parties shows that the insurance extends further than marine policies ordinarily do. In the present policy the risk of the insurance is declared to commence from the loading of the cable on board, and to continue until it be laid down in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted to and fro, when the risk is to cease and determine. Now, so far as these words go, they express that the subject-matter of insurance was the cable; but in the subsequent part of the policy it was declared to be agreed that, in addition to the ordinary perils and casualties insured against in the common marine policy, the insurance is to cover every risk and contingency attending the conveyance and successful laying down of the cable. It seems to us that words cannot be used more aptly to express that the underwriters contracted to insure against the risk and contingency which has happened; namely, the unsuccessful attempt to convey and lay down the cable. It seems to us that what has occurred is within the very words of the contract; it was a risk and contingency which attended the conveyance of the cable and the unsuccessful attempt to lay it down. In truth the policy is not merely on the cable, but on the adventure. The second question is, whether the loss be total or partial. We think it total. The adventure in respect of which the insurance was effected was the successful laying down of the cable which was loaded on board the *Great Eastern*, in one continuous length between Ireland and Newfoundland; it has wholly failed, and in our opinion the circumstance that one-half of the cable has been saved immaterial. The insurance was upon the adventure and even if it had been merely upon the cable, it was upon the entire continuous cable and not a portion of it. There was a case cited of *Paterson v. Harris*, 1 B. & S. 336, which is supposed to have some bearing upon the point. It really has none whatever. It was an action upon a policy in common form, and the Court held that what occurred there was not a loss by perils of the sea; it is possibly be that the loss in the present case is not a loss by the perils of the sea, but upon this it is unnecessary to give an opinion, as we think the misfortune that has occurred is distinctly within the

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within the words of the policy, and a risk and contingency against which the doft. contracted to insure. The rule will therefore be discharged.

Rule discharged.

Attorneys: Allens; Marshall and Roberts, for Lace and Co., Liverpool.

Jan. 19 and 20, and Feb. 9, 1866.

WILSON v. THE NEWPORT DOCK COMPANY.

Breach of contract—Accident arising therefrom—Causa causans and causa sine qua non—Consequential and direct damages—Remoteness.

The declaration stated that defts. were proprietors of a certain dock for the reception and docking of ships therein for reward, and that plt. was owner of a ship, and was desirous of having the same received and docked by defts. in the said dock for reward to defts. in that behalf, whereof defts. had notice, and thereupon, in consideration that plt. would bring the said ship at a certain time towards and to the said dock, defts. promised there to receive and dock her therein; and that plt. relying, &c., brought her at the time aforesaid towards and to the said dock, yet defts. upon and whilst the said ship was then so being brought towards and to the said dock for the purpose aforesaid, refused to and did not nor would then receive and dock her in the said dock, by reason whereof at the ebbing of the tide she grounded in the river there, and was thereby greatly damaged. It appeared in evidence at the trial that the cause of the dock gate not being opened was the accidental breaking of a chain, of which the plt. was informed directly as the ship arrived opposite the dock gates. The pilot was thereupon desirous of taking the ship (which was in his charge and in tow of a steam-tug) further down the river to a part where it was alleged, on the part of defts., she could have grounded in safety on the mud; or to have taken her still further down into deep water, where she could have anchored, but the captain declined to accede to either course, stating that it would ruin the ship to let it take the ground, and that she was not sufficiently ballasted to ride at anchor, especially in the storm that appeared to be gathering and which shortly afterwards arose. The learned judge asked the jury, first, was there a place of safety to which the ship could have been taken? Secondly, whose fault was it that the vessel was not taken to it, the captain's or the pilot's, and did both of them do their best, and was either of them guilty of negligence? To the first question they gave no answer, being unable to agree; and to the second they said that both the captain and the pilot did the best they could, and neither of them was guilty of negligence.

It was held, by Martin, B., that the damages resulting from the grounding of the ship under the above circumstances, were not too remote to be recovered by the plt. in the present action.

It was held, by Pollock, C.B., Channell and Pigott, BB., that on the finding of the jury, the court could not come to any conclusion rendering defts. responsible for the damages done to the vessel, within the principle of *Hadley v. Baxendale*, and that until a verdict had been taken on a larger issue than whether the captain and pilot had done their best, the case was not ripe for the decision of the court, and that therefore the rule for a new trial must be made absolute.

Wilson v. Baxendale and Smeed v. Ford, discussed and commented on.

The declaration stated:

That defts. were the proprietors of a certain dock on and communicating with a certain tidal river, to wit, the river Usk, and that said dock was used by defts. for the reception and docking of ships and vessels therein for reward to the

defts. in that behalf, and the plt. was the owner of a ship or vessel and was desirous of having the same received and docked by the defts. in the said dock for reward to defts. in that behalf as aforesaid, whereof defts. had notice; and thereupon, in consideration that the plt. would cause the said ship or vessel to be brought at a certain time on a certain day towards and to the said dock for the purpose of being so received and docked therein as aforesaid, the defts. promised then to receive and dock the said ship or vessel therein as aforesaid, and plt. says that he, relying on defts.' said promise, did cause the said ship to be brought, at the time and on the day aforesaid, towards and to and the same was being brought towards and to the said dock for the purpose of being so received and docked therein as aforesaid, and all things were done by him and all times elapsed necessary to entitle plt. to have had his said ship then so received and docked in the said dock as aforesaid, yet defts. upon and whilst the said ship was then so being brought towards and to the said dock, for the purpose aforesaid, wholly refused to and did not nor would then receive and dock the said ship of plt. in the said dock, and the said ship being, by reason thereof, left in the said river, at the ebbing of the tide there grounded and took the ground there, and was thereby greatly damaged and injured, and plt. incurred great expenses in and about having such damage and injury repaired.

Plea, payment into court of 15*l*, and averment that the same is enough to satisfy plt.'s claim.

Replication, that the said sum of 15*l* is not enough to satisfy the claim of plt. Issue thereon.

At the trial before Byles J. and a special jury at the last summer assizes at Worcester, the following appeared to be the facts of the case:—The plt., a shipowner residing at Liverpool, was the owner of the vessel in question, the *Lord Elgin*, of 850 tons register, which had been lying for some time in the graving or dry dock at Newport, for the purpose of undergoing repairs. The repairs being completed, it was desired that the vessel should leave the dry dock and be taken into the wet dock belonging to the defts. Consequently an application for that purpose was made to the defts.' dock-master on the 16th Nov., and an answer was sent back by him to the captain of the vessel that on the next morning (the 17th), on the turn of the tide, the vessel might come down from the dry dock to the wet dock, and be there received. Accordingly at about eight o'clock the next morning (the 17th Nov.), being in ballast at the time, she left the dry dock in tow of a steam-tug, and in charge of a pilot (both engaged for the occasion), and proceeded down the river to the wet dock, a distance which it took about half an hour to accomplish. Upon arriving opposite the dock gate about high water, the captain of the vessel was informed by a person at the dock in the employ of the dock company, that, in consequence of an accident having occurred by the breaking of the chains of the gates, or something of that sort, the gates could not be opened, and the vessel could not be taken in. Thereupon the pilot asked the captain what he was to do, to which the captain, who was unacquainted with the navigation of the river, said he did not know, but he told the pilot that if the ship took the ground she would be injured; and that if she were towed out to sea he was afraid she would capsize, having regard to the quantity of ballast (some eighty tons only), and the state of the weather, the barometer low and falling, which indicated an approaching storm; and according to the evidence, it was then blowing a stiff breeze, and within a few hours after a perfect hurricane. Thereupon the pilot gave orders to cast the steam-tug off, to let go the anchor where the vessel then was, both which orders were obeyed, and in about two and a half or three hours after, on the ebbing of the tide, the ship grounded in the river and was what is technically called "hogged up," and sustained injuries in consequence which cost the plt. some 2000*l*. to repair, and to recover which the present action was brought. The pilot stated in his evidence that, on the captain's saying the ship would be injured if she took ground, he asked to be allowed to take her down to West Point, a safe place about four miles down the river

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where there is soft mud, and where, in his, the pilot's, opinion, the ship could have grounded safely, or else to be allowed to tow her into deep water some two miles below West Point, both which propositions the captain declined to accede to. It had been suggested by one of the witnesses that the vessel might have been taken back, up the river, to a place called "Wilmot's Stage," near the dry dock, from which she came in the morning, but the pilot said that it was impossible to have taken her back there from the number of small vessels which then obstructed the river; and in that he was confirmed by the master of the tug. The pilot stated that the captain, knowing his vessel, was better able to judge than he (the pilot) was, as to the safety of taking her down the river to deep water. No application was made to the learned judge at the end of the pl't.'s case to nonsuit the pl't. or to enter a verdict for the defts. on the ground of want of evidence, and witnesses were called for the defence. It was contended that the evidence showed that the captain had acted improperly and ought not to have anchored where he did, but to have gone back to Wilmot's Stage, near to the dry dock or down the river to West Point, where it was alleged the ship could have grounded in safety in the mud there, or have gone further on into deep water and have anchored.

Reasons were stated by the captain why neither of these courses could be prudently adopted with regard to the safety of the ship, and it appeared also that she was not, in the captain's judgment, sufficiently ballasted to ride safely at anchor in deep water. The defts. contended that the damage was too remote and unconnected with the cause of action, on which point leave to move was reserved. His Lordship then proposed two questions for the jury: First, was there a place of safety to which the vessel might have been taken? Secondly, whose fault was it that the vessel was not taken to that place of safety, the captain's or the pilot's, and did both of them do the best they could under the circumstances, and was either of them guilty of negligence? To the first question the jury not being able to agree, gave no answer, and to the second question they said, "We consider that both the captain and the pilot did the best they could, and that neither of them was guilty of negligence." Upon that finding a verdict was directed for pl't., and the damages were agreed to be referred. Leave was given to defts. to move, and the court was to draw inferences from the facts not inconsistent with the above finding of the jury, which the learned judge reported that he did not disapprove. A rule nisi was accordingly obtained in Michaelmas Term last to enter the verdict for defts., on the ground that the money paid into court was sufficient to cover the damage legally recoverable in the action, the amount claimed for the injury by the hogging of the ship being too remote; the court to draw inferences of fact not inconsistent with the finding of the jury; or for a new trial on the grounds of misdirection in the learned judge's entering the verdict for pl't. on the finding of the jury, and of miscarriage on the finding of the jury, and of the verdict's being against the weight of evidence; and against this rule.

Mellish, Q.C., W. H. Cooke, Q.C., and Dowdeswell for pl't., now showed cause.—No doubt, by the rule laid down in *Hadley v. Baxendale*, 9 Ex. 341, 23 L. J. 179, Ex., damages recoverable for breach of contract must be more than merely consequential; and it was contended that, in the present case, they were direct. [POLLOCK, C. B.—Was the alleged misconduct of the defts. a *causa causans* or a *causa sine qua non*? If the latter only, then the damage would be consequential only, a case of damage upon damage.]

The not opening the dock gates was the *causa causans*, the direct, immediate, inevitable, and inseparable cause of the accident. It was the object of the defts.' trade of dockowners to save vessels from these very accidents and injuries; and dehs. having, as was clearly admitted, contracted absolutely to receive the pl't.'s ship at the time mentioned, were liable for all consequences arising from the breach, from whatever cause, of their contract. The damages in *Collen v. Wright*, 8 E. & B. 617; 2 L. J. 215, Q. B., were far more remote; and so they were also in

Gibbs v. The Trustees of the Liverpool Dock, 1 E. & B. 164, 27 L. J. 321, Ex.;

Randall v. Raper, 1 E. B. & E. 81, 27 L. J. 264, Q. B.;

Duria v. Garrett, 6 Bing. 617.

The finding of the jury that neither the captain nor the pilot was to blame supported the pl't.'s verdict, and showed that the accident was the natural and probable result of the defts.' conduct. They did also

Sneed v. Ford, 1 E. & E. 602, 28 L. J. 178, Q. B.; and
Bridge v. The Grand Junction Railway Company,
3 M. & W. 246.

Huddleston, Q. C., Gray, Q. C., and H. Jen contra, for defts., supported their rule.—The damage here came within the rule in *Hadley v. Baxendale* too remote. The general principle there laid down was, that they must be such as in the contemplation of the parties would naturally flow from a breach of the contract. [CHANNELL, B. refers to *Fletcher v. Tayleur*, 17 C. B. 21; 25 L. J. 65, C. P., as approving that principle.] The parties could not have contemplated as a natural result of the gate not being opened that the vessel would be "hogged" upon hard bank, any more than, if a lodger be locked out, that he should lie down in the gutter and be run over by a cab. Could it for a moment be contended that defts. would have been liable if the injury had arisen from collision with another vessel whilst anchor near the dock gate, or from being caught there by a gale of wind? The clear immediate cause of the accident was the hurricane then blowing, and the insufficient ballasting. The proximate cause was her not being removed further down the river, and that was the captain's doing, and because he had not ballast enough. It may be it would have been more prudent not to have left the dry dock. If it was to be said the dock manager should have contemplated the accident, then surely the captain should have done so, and so have put more ballast in his vessel. It was a contingency to be contemplated, if by one, then by both parties, and then the fault was the non-ballasting. Though the vessel could not get in, it did not follow that damages ensued; that was the difference between a *causa causans* and a *causa sine qua non*. There were three causes here—first, the want of ballast; secondly, the not going further down the river; thirdly, and which was the *sine qua non*, the not being taken into dock. The breach of contract is not having the gates open was a very remote cause. In every case it could be said, "If you had not done this, that would not have happened;" but that was not enough to entitle a pl't. to special damage. The question was fully discussed in *Sedgwick on Damages*, c. 3, and by Lord Campbell, C. J. in *Sneed v. Ford*, (*ubi sup.*). They referred to and distinguished *Gibbs v. The Trustees of The Liverpool Docks*, *Collen v. Wright*, and *Randall v. Raper*, cited contra. [POLLOCK, C. B. refers to *Gee v. The Lancashire and Yorkshire Railway Company*, 3 L. T. Rep. N. S. 336; 6 H. & N. 211; 30 L. J. Ex. 11.]

Curr. adv. vult.

Feb. 9.—There being a difference of opinion amongst the learned judges, their Lordships now delivered their separate judgments as follows:

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[Ex.]

LARTIN, B.—This is a rule calling on the plt. to show cause why a nonsuit should not be entered pursuant of leave reserved, or why there should not be a new trial. The declaration stated the defts. were the proprietors of a dock for reception of ships on and communicating with the river Usk; that the plt. was the owner of a ship, and in consideration that the plt. required the ship to be brought at a certain time and on a certain day towards and to the said dock for the purpose of being docked for reward to the defts., the plt. promised to receive and dock the said ship. The declaration then averred that the plt. caused the ship to be brought at the time and on the day agreed on towards and to the said dock, that he was entitled to have the ship docked in accordance with the defts.' promise; but that the defts. did not receive and dock the said ship, and by reason thereof the ship was left in the said river, and at the falling of the tide grounded and sustained damage. The plt. pleaded payment of 15*l.* into court, and said it was enough now to satisfy the plt.'s claim. The plt. replied that it was not, and thereupon the case was joined. The case came on to be tried before my brother Byles at the last Monmouth Assizes, and the facts proved are very simple and clear. On the 17th Nov. 1868, the ship *Lord Elgin* was in dry dock at Newport, and upon the morning of that day, by the direction of the dockmaster of the defts.' dock, proceeded towards it for the purpose of entering it. She was in ballast. It was a very short distance from the dry dock to the defts.' dock, and she was towed by a steam-tug stem on, and arrived at defts.' dock gate about 10 o'clock, when, in consequence of the chain of the dock gate being broken, or out of order, she could not be admitted. The captain of the *Lord Elgin* was unacquainted with the river and its navigation, and he directed the ship to be anchored in the river. In about three hours afterwards, at the ebb, she took the ground and sustained damage, and the present question is in respect of this damage. The 15*l.* was paid into court to cover the expense of bringing the ship on to the dock. There does not seem to have been any application made to the learned judge at the conclusion of the plt.'s case to nonsuit or to set a verdict for the defts. upon the ground that there was no evidence to go to the jury, and reasons were called for the defts. On the arguments before us, it was contended that upon the evidence the captain of the *Lord Elgin* acted improperly, that he ought not to have anchored where he did, that he ought to have done one of several things; that he ought to have gone back towards dry dock, or have gone down to a place called East Point, where it was said the ship could be safely grounded, or gone into deep water and be anchored. The master stated reasons why in his opinion none of these ought to have been done. He also alleged that the ship was not sufficiently loaded. According to the judge's notes, it was contended on behalf of the defts. that the damage was too remote and was unconnected with the act of action, and upon this point he gave leave reserved. He then proposed two questions to the jury: first, whether there was, in fact, any place of anchorage to which the vessel might have been taken; and secondly, whether the jury could not agree. Secondly, whether both the captain and the pilot did the best they could under the circumstances, and was either of them guilty of any negligence; to this the jury replied that they both did the best they could, and neither of them was guilty of negligence. The judge then finding the learned judge directed the verdict to be entered for the plt., the amount of damages having been agreed to be referred, and he gave leave reserved to move, with power to the

court to draw any inferences upon the facts consistent with the finding of the jury. The learned judge adds that the facts were entirely for the jury, and that he does not disapprove of their finding. I concur with him, and I think that his direction that the verdict should be entered for the plt. was right in point of law. The question of damages is of constant occurrence. It occurs in almost every action of contract, except contracts for the payment of a certain fixed sum of money, and necessarily in every action for a wrong. The ordinary cases on contracts are actions for the non-delivery or non-acceptance of goods agreed to be sold, on agreements for the sale of land, for breaches of promise to marry, for non-acceptance or non-delivery of stock or shares; and an infinite variety of others might be named. So also, in actions for wrongs, it occurs every day; for instance, in actions for injuries sustained by accidents on railways, and by collision, which now constitute a very considerable number of the causes tried at Nisi Prius; in actions for libel and slander, for assault and false imprisonment, and in numberless other cases. In some instances the measure of damages is fixed and ascertained by long established usage; for instance, for the non-delivery of goods which are the subject of common sale in the market, I apprehend that the judge is bound to tell the jury that the measure of damage is the difference between the contract price and the market price; and that, if he does not, his summing up would be liable to objection. And there are other cases in which the like long usage has fixed the measure of damages. So also, in some cases, the matter of damages has been the subject of decision in the Superior Courts, and I apprehend that when this has been so, the decision is a binding authority upon the same and other courts, in like manner and to the same extent as other decisions. For instance, the case of *Hadley v. Baxendale*, 9 Ex. 341; 23 L. J. 179, Ex., which was so frequently referred to in the argument, is a decision of this kind. The plt., who were millers, had delivered to the defts., common carriers of goods for hire at Gloucester, a broken iron shaft to be carried by them to Greenwich, and delivered to an engineer there, in order to enable him to use it as a model for making a new shaft. The defts. were told that the mill was stopped in consequence of the shaft being broken, and they promised that, if the shaft was sent before a certain hour, it would be delivered at Greenwich on the following morning. The delivery of the shaft was delayed by some neglect, and the plt. did not receive the new shaft till some days after the time they otherwise would have done, and they claimed damages for the loss of profit which they would have made had the new shaft been delivered earlier. Crompton J. left the case generally to the jury, who found a verdict for the plt. A rule was granted by the Court of Ex. for a new trial for misdirection, because they were of opinion that the learned judge ought to have told the jury to exclude the loss of profit from their estimate of the damages. This case is, therefore, an authority that, in a similar case, such loss of profit cannot be made an element of damages, and must be excluded; but it is an authority no further, and anything said by the court in delivering judgment is to be judged by its being consonant to law and reason. The decision in *Hadley v. Baxendale* is, therefore, no authority whatever in the present case, for no loss of profits is claimed; nor is it an authority that loss of profits is not a legitimate element of damages in many other cases—for instance, in a railway accident, whereby a tradesman or workman is prevented from attending to his business by the injuries which he has sustained, the loss of profits in such cases is a constant element of damages; and in a case tried the other day at

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[Ex.]

Liverpool, where so large a sum as 7000*l.* was given, in a case under Lord Campbell's Act, the sole element of damage was the loss of profits of the deceased in his profession of a surgeon, and no objection was made on this ground; and I have no doubt whatever that, if the judge had told the jury to exclude it, there would have been misdirection. In regard to the present case, there is no established rule, and no decision, and the general rule is to be applied. This rule is, that the damage to be compensated for ought to be proximate to, and not remote from, the breach of contract or the wrong, and ought fairly and reasonably and naturally to arise from them. I do not adopt the qualifications mentioned by Alderson, B. in the judgment in *Hadley v. Baxendale* as applicable to every case. They may have been perfectly right there, but they are not of universal application. "Naturally," he says, "means according to the usual course of things." But contracts are infinite in variety; and suppose, as in this case, no such claim for damages had ever been known to have been made, then no "usual course of things" exists; but the damages to be recovered by the plt. would not, in my opinion, therefore be nominal. The learned Baron then proceeds to say, "or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Now, this may properly enough be taken into consideration in the case of carriers and their customers; but in the bulk of broken contracts it has no application whatever. Parties entering into contracts contemplate that they will be performed, and not broken; and in the infinite majority of instances the damages to arise from the breach never enter into their contemplation at all. As to *Hadley v. Baxendale*, I was a party to it, and have no desire to deprecate it; but in *Boyd and others v. Fitt*, 14 Ir. Com. Law Rep. 43, the Court of Ex. in Ireland dissented from it, and approved of the views of Crompton, J. in *Sneed v. Ford*, 1 El. & El. 602; 28 L. J. 178, Q. B.; and of Wilde, B. in *Gee v. The Lancashire and Yorkshire Railway*, 3 L. T. Rep. N. S. 328; 6 H. & N. 211; 30 L. J. 11, Ex., as being sounder expositions of the law as to remoteness of damages. The general rule is, therefore, to be applied to the present case and ought, as all other general rules, to be fairly, candidly, and impartially applied. It has been said that the damage sustained here has been very great. Now, I am clearly of opinion that this ought to be no element whatever in the application of the rule, and whether the damages be 10*l.* or 10,000*l.* is immaterial. The circumstances are these. In pursuance of the defts.' contract to admit the ship into the dock at a certain time upon a certain day, the ship was brought to the entrance of the dock; the defts. could not admit her in consequence of a defect in a chain of the dock gate, and their contract is admitted to have been broken. No blame attaches to them; it was their misfortune that the chain had been broken. The ship was then left in the river, which is one emptying itself into the Bristol Channel, where the tide ebbs and flows to a very great height. The captain had to decide what was to be done under the circumstances in which he was placed. Four courses have been suggested as open to him: one, that he should have remained and anchored where he was; secondly, that he should have gone up the river to the place from whence he came; thirdly, that he should have gone down the river to West Point, where it was said that the ship, upon the ebb, would have settled upon soft mud; and fourthly, that he should have gone into deep water, where the ship would always have been afloat. Now, I think that the defts. had a right to a *bonâ fide* and reasonably sound judgment being exercised upon the matter. The captain decided upon remaining where he was.

The tide was ebbing and the weather threatening. If either of the other courses had been adopted, it might have been that the ship would have sustained no damage, or it might have been that the ship would have been totally lost; but I think this was a question for the jury, and that they have decided it; they have found that the captain did the best he could under the circumstances, and was not guilty of any negligence. The consequence was, that when the tide ebbed the ship took the ground and sustained damage; and the question that has been argued before us is, that this damage is too remote and so unconnected with the cause of action that it must, as a matter of law, be borne by the plt., so that the defts. cannot be responsible for it. I do not concur in this view; there has been damage; it must be borne by some one; neither the plt. nor his captain is in the slightest default. If the defts. had performed their contract no damage would have occurred; in consequence of their default the captain was compelled to exercise his judgment at discretion, and the jury have found that he did the best he could and was guilty of no negligence, which I understand that in deciding to remain where he was he exercised such a judgment as discretion as became a reasonable man acting prudently. His doing so was, no doubt, the immediate cause of the damage; but, in my opinion, the remaining there was, in contemplation of law, the same as if the ship had been compelled to remain there by a *vis major*. The rule is, that the damage must be proximate (not immediate), and fairly and reasonably connected with the breach of contract or wrong. As to what is so, different minds will differ, but many instances could be mentioned in which damages much more remote than the present were held to be the subject of compensation; as in *Powell v. Salisbury*, 2 You. & J. 391, and in *Bryant v. Wilson*, 15 Ir. Com. Law Rep. 332, the Court of Q. B. in Ireland upon demurrer held that damages were recoverable in that case, which were infinitely more remote than the present, for the death then was caused by reason of the dock-keeper allowing the water to come into the canal where the person was cast. There is a case of constant occurrence at Guildhall: a barge is injured by collision in the Thames; she is taken to the nearest convenient fitting place upon the shore; upon the ebbing of the tide she comes down upon a pile and sustains further damage. My own belief is that compensation for such damage has been recovered over and over again without objection, and upon referring to some gentlemen at the bar, whose experience upon this subject is the greatest in the profession, I have been informed that it has invariably been so. Such damage is precisely analogous to the present. Some possible cases we mentioned in the argument, and it was asked whether the defts. would in such and such a case have been responsible. One was, if the ship had been run down by another ship whilst at anchor: think the liability in such a case would depend upon the circumstances, and a material one would be whether the running down ship was in the wrong. Another case put was, if the ship had been upset by a hurricane while she was anchored. I think that this would raise a question for the jury whether, all human probability, the same misfortune would not have happened to the ship wherever in the river she might have happened to be. In my opinion, the discussion of instances like these is of little bearing or weight when the facts of the case to be adjudicated upon are clear and well defined. In questions of damages, each case must be determined upon its own circumstances, but I think the point is decided by authority. In *Jones v. Boyce*, 2 Stark. Ev. 3rd ed. 2963, 1b. 741; 1 Stark. Rep. 493, the plt. was a passenger by a stage coach, and a rein broke; the coach

the coach to the side of the road, and one of the legs was stopped by a post; the plt. jumped off his leg was broken, and he brought an action against the coach proprietor for damages. Lord Ellenborough said there were two questions for the jury: first, as to the deft.'s default in regard to the injury, which is immaterial to the present case; the second was, whether the deft.'s default was consecutive to the injury the plt. had sustained; if it was not so far conclusive as to create such reasonable apprehension in the mind of the plt. as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action would not be maintainable. Amongst the observations on the peculiar circumstances of the case, he said that it was for the consideration of the jury whether the plt.'s act was such as a reasonable and prudent mind would have adopted; and he added, "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the circumstances." I think the present case is analogous. The defts. did not perform their contract to admit the plt.'s ship into their dock; they thereby imposed on the captain four perilous alternatives, and he adopted one. The jury found that he did the best he could, and was guilty of no negligence, and no damage ensued to the ship. In my opinion the defts.' default directly conduced to this damage, and they are responsible for it upon the principle enunciated by Lord Ellenborough in *Jones v. Boyce*, which, in my opinion, is equally good law and good sense. For these reasons I think the damage is not remote, and that the learned judge submitted the right questions to the jury, and I concur with him in the verdict is unobjectionable. The rule therefore should be discharged.

POLLOCK, C. B.—I have to state the opinion of the learned brothers Channell and Pigott, and also my own. This case comes before us on a point reserved at the trial, namely, whether the damages are too remote; and, to assist our judgment, we are, first, the notes of the learned judge taken at the trial; secondly, the answer of the jury—"that the pilot and the captain did the best they could under the circumstances, and were neither of them guilty of any negligence;" and we have the fact that the jury could not agree on the other question, whether there was in fact any place of safety to which the vessel might have been taken?" The questions for our decision seem to be, first, ought the verdict to stand? (being, not a verdict found by the jury, but entered for the plt. by the learned judge, on the jury answering one question and being unable to agree upon another question, which we think the more important and decisive of the two); secondly, ought we to enter the verdict for the defts.? or, thirdly, ought we to direct a new trial? In deciding these questions, it is necessary to ascertain the facts of the case as found by the jury; with evidence so contradictory and repugnant, we cannot find any verdict ourselves. It is not our province. If the facts can be ascertained, then, what is the law applicable to them? We apprehend when the facts are known it is the province of the court to say for what matters damages are to be given. But the amount of damages is a question for the jury quite as much as the credit due to the witnesses. When the result of the evidence is uncertain it is for the jury to find the facts, and therefore they will often have to find whether facts fall within the rule of law to be laid down on the subject. The case of *Hadley v. Baxendale* was cited at the trial, and much commented on during the argument. That case was very much considered. The argument took place several weeks before the judgment was given, and I know that great pains were bestowed upon it. Lord Wensleydale, the late

Alderson, B., and my brother Martin were parties to it, and it is due to Lord Wensleydale and the late Alderson, B. to say that a more extensive and accurate knowledge of decisions in our law books, and a more acute power of analysing and discussing them, and, as far as my brother Martin is concerned, a larger acquaintance with the exigencies of commerce and the business of life, never combined to assist in the formation of any decision; and, certainly, it does not lessen the authority of that case that Lord Campbell, in *Smeed v. Ford*, 1 E. & E. 602, said that it merely affirmed what was to be found in Pothier, in 2 Kent's Com. 665, in the French Code, and in all the other authorities; and it may be added that Crompton, J. (against whose summing-up it was directed) in that same case said, he agreed with it as far as it went, which we consider to be agreeing with it altogether. I own, after this (I am now speaking my own opinion), that I cannot think the authority of that case is at all shaken by either of the matters that my brother Martin has cited from the Irish reports. I think the authority of Lord Wensleydale, Alderson B., my brother Martin, and Crompton J., fortified by Lord Campbell stating that that case only expressed what all the authorities, French, American, and English, as far as they went, embodied, cannot be considered as in any degree shaken by what has occurred since. That decision was not presented as any new discovery in jurisprudence, but we think it put in a clearer and more distinct light a principle which had been previously recognised in prior cases, and the want of which, in the English law, had been pointed out. The authorities are all collected in a note to *Vicars v. Wilcocks*, 2 Sm. L. C. 5th ed. 461. It is quite true, as remarked by Wilde, B., in the case referred to by my brother Martin, that that case is not applicable to, and does not decide, every case. No rule, no formula, could do that. Cases of damage differ as much as the leaves of a tree differ from each other, or rather as the leaves of different trees. No two are exactly alike, and one description cannot be applicable to all. No precise positive rule can embrace all cases, and, notwithstanding any rule of law that may be laid down, it must be admitted, after all, that the question of the amount of damages is one for the jury, and the jury only; and, provided the law on the subject be properly laid down by the presiding judge, and then the amount of damages be left at large to the jury, we apprehend a court would not interfere with their verdict because the jury had, apparently, come to some compromise among themselves, and had not strictly observed the supposed rule of law. We think that the decision of twelve jurymen, instructed from the bench in the rules of law, but exercising their own judgment on a subject connected with the business of life with which they are familiar, would, practically, lead to a result often more just and equitable than any mere rule of law would arrive at. And, that there may be no mistake as to our meaning, we may add that should this case go to a second trial, some of the jury might think the plt. entitled to recover the whole damage; others might think it the height of imprudence on the part of the master to attempt to remove a vessel from a dry dock to a wet dock about the time when the wind was blowing a hurricane (which from his evidence seems to have been the case), and from which charge of imprudence the verdict of the jury has not relieved him. The result might be a compromise, which we are confident the court would not, and which we think they ought not to disturb. We think we are not able to determine, from the materials before us, whether or not the loss was occasioned by circumstances which, according to the case of *Hadley v. Baxendale* and the other authorities, would

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make the dock company liable for the damage which the ship sustained. If the state of the weather was the efficient cause of the loss, we think the defts. are not liable. Now, as to the state of the wind; the evidence of the mate is, "Not much wind; blowing pretty stiff; a fresh breeze." The evidence of the captain was, "It was only a few hours before a perfect hurricane." James Dunster, the master rigger, says, "It was blowing so hard it would not have been safe to take her into deep water." If the weather was such that, on being excluded from the dock, she had no alternative but to perish on account of the gale or hurricane, which seems to me to have been the opinion of the master, then it may be doubted whether she ought to have been taken to the dock gates at all in such a state of the weather. And the opinion of the jury by a verdict should have been obtained on these and other circumstances, and the verdict ought to have been found by them on a larger issue than whether the master and the pilot did their best after they found the vessel could not be received into the dock, which I take to be the only finding of the jury. It is clear that the pilot thought the master was obstinate, and determined to do nothing to save the ship. We cannot find the defts. liable for this damage because the jury were disposed to relieve the captain and the pilot from the odium of a charge of negligence. The verdict of the jury ought to have gone more into the merits, in order to fix the defts. with these damages. What the jury did not find, and could not agree upon, was quite as important as what they did find; and the result of their verdict seems to be, "We cannot agree as to the liability of the defts., but we desire to throw no blame on the captain or the pilot." We are, therefore, of opinion that the jury have not found enough, in point of fact, to enable us to decide that the verdict entered for the plt. is what would have been, or (referring to the evidence actually given) ought to have been their verdict, if the entire case had been left to them to find a verdict for the plt. or for the defts. Looking at the evidence and the finding of the jury, we cannot come to any conclusion that would make the defts. responsible for the damage done to the vessel. If there was any place of safety to which the vessel might have been taken, and could have been taken (which we think is included in the learned judge's question), we think the plt. is not entitled to recover. The jury could not agree on an answer to this question. If they had found this question in the affirmative we think the plt. was clearly not entitled to recover, and we presume the judge would have directed a verdict for the defts. But, after many hours, they could not agree, and it is plain that some of the jury were of opinion in the affirmative, others might have been in the negative. It is true, they found that neither the captain nor the pilot was guilty of negligence, but we think it very uncertain what they meant by that finding. They certainly did not mean by that finding inferentially to decide the other question, or they would have found it, and not ultimately have disagreed about it. If there was a safe place to which the vessel might and ought to have been taken, a verdict for the plt. would be a great act of injustice, and we are invited to find this for the jury by a process of reasoning, when the jury would not, and apparently could not, and certainly did not, find it for themselves. As to entering a verdict for the defts. there is a similar difficulty, though perhaps not so great, because, if the plt. does not establish his case, the defts. are entitled to a verdict. But we think we cannot be certain what would have been the verdict of the jury if they had gone into, and had decided upon the whole case for themselves. We think, therefore, there ought to be a new trial.

CHANNELL, B.—Entirely agreeing as I do in the opinion which his Lordship has expressed in the judgment that he has just read, I have not thought it necessary to prepare any written judgment of my own. If no new light should be thrown upon the case by the finding of the jury before whom it will be tried again, then it is possible that the legal result may be that which my brother Martin has arrived at, in the elaborate judgment which he has read. But the question now is, whether the present verdict for the plt. is to stand, and I wish to say that I think the case is not at present ripe for decision.

FIGOTT, B.—That is my view, and that is why I concur in the judgment of the Lord Chief Baron. I do not think the case is concluded by the finding of the jury upon the one question that was submitted to them. It seems to me that they could agree upon one of the questions, and they could agree upon the other. That is inconsistent in my view, and in that state of the matter I do not think the plt. is entitled to recover the large damages which he has sought to recover in this case.

Rule absolute for a new trial.

Attorneys for plts., Marshall, Westall, and Roberts, 7, Leadenhall-street, E. C., agents for Forskham, Goodman, and Hawkins, Liverpool.

Attorney for defts., B. Hunt, 6, Gray's-inn-square, agent for Prothero and Fox, Newport.

COURT OF ADMIRALTY.

Wednesday, Nov. 8, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE MAGGIE ARMSTRONG v. THE BLUE BELL.

Foul berth—Riding at single anchor in a gale.

One ship brought up during a gale in a fair berth in the Downs, and another ship coming up, anchored within a cable's length of her, riding at one anchor. The gale increasing, drove both ships from their anchor, when the last ship came into collision with the first ship, so that the first ship had to be taken to the beach in a sinking state and beached:

Held, that the ship last coming up was solely liable for the collision, from having given the first ship a foul berth in riding so close to her at single anchor.

Deane, Q. C. and Vernon Lushington for the *Maggie Armstrong*.

Brett, Q. C. and E. C. Clarkson for the *Blue Bell*.

Dr. LUSHINGTON gave judgment in this case, which was an action by the brig *Maggie Armstrong*, 289 tons, from Shields, coal laden, for Havre-de-Grace, against the brig *Blue Bell*, 191 tons, from Hartlepool, coal laden, for Shoreham, to obtain damages for a collision between them off the South Foreland at 7 p.m. on the 18th of last January. The *Maggie Armstrong* stated the wind as S.W., and the weather as heavy gale and hazy, with rain. The *Blue Bell* represented the former as from S.W. to S.W. by S., and the latter as thick at intervals, with rain, and a hard gale. The case for the plts. was, that the *Maggie Armstrong* brought up in a fair berth in the Downs, with her port bower anchor and sixty fathoms of chain, in ten fathoms water, and rode safely until the *Blue Bell* ran back to the Downs and brought up to the S.E. of her, and within a cable's length, thereby giving her a foul berth; that the *Maggie Armstrong* was riding taut, abetted by windward of the anchor, with her helm leeward a-starboard, her mainyard braced with the port

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and her foreyard square, and the ebb taking to the westward; that the *Maggie* had her riding light duly exhibited, and look-out was kept by her anchor watch; the *Blue Bell* was then also riding sheer in the way; that at the time and under the circumstances aforesaid, the *Maggie Armstrong* and all broke their sheers, and as the *Maggie* was in the act of sheering lay with her head eastward, the *Blue Bell* came stem on into arboard midships, and with her anchor her severely in the side below the water's and also carried away her rail, bulwarks, guns, and covering board, and damaged her and stove in her boats on deck; that as vessels approached the *Maggie Armstrong* her foretopsail to endeavour to keep clear of the *Blue Bell*, but without effect. It was then that, in order to get clear, the *Maggie* set her jib, but it immediately blew away, she was obliged to slip her anchor and chain, and drove clear to leeward and away from the *Bell*, and brought up in the Margate Roads, finding she was in a sinking state, a Deal and a Ramsgate lugger, and afterwards two tugs, were engaged to get her into Ramsgate harbour, which they did in the evening of the following day, the 14th Jan., having been in the meantime to beach her, to prevent sinking in deep water. The defence of the *Bell* set forth, that she was brought up by her port bower anchor and forty-five fathoms of the side being ebb, having her yards braced wind, and her helm shored to starboard, going about W.N.W., riding to windward of her anchor, and having her anchor light up. In this state of things the *Maggie Armstrong* had been riding at the distance of three lengths from her, and on her port bow, her sheer, and drove down towards her (*Blue Bell*), rendering a collision between the two vessels imminent, whereupon those on board the *Blue Bell* hailed the *Maggie Armstrong* for her jib and taysail for the purpose of her getting clear of the *Blue Bell*; but this was not done, the *Maggie Armstrong*, with her starboard side, the foretugging, came into contact with the side cutwater of the *Blue Bell*, which was still steady to her anchor, and the *Maggie Armstrong* then caused the *Blue Bell* also to break her.

Looking at the facts indisputably proved in the case, it appears that, at the period in question, on the 14th Jan., there was a violent storm, and that the vessels having attempted to go down Channel, it was necessary to go back into the Downs in consequence of the intensity of that storm, and they ran on an anchor, and as it is represented, as near shore as they safely could do. It is admitted on both hands that the *Maggie Armstrong* was the first that put back and came to anchor. That is an undisputed fact, and if she came to a safe and anchorage, then all the other vessels that came up after her, if there was no other cause to prevent their so doing, were bound to give her a berth, and avoid giving her a foul berth. It is a main question in this case whether the *Blue Bell* gave her a foul berth or not. On the part of the *Armstrong* this is distinctly averred, and on the part of the *Blue Bell* it is as distinctly denied. The *Maggie Armstrong* brought up with sixty fathoms of cable, and the *Blue Bell* with forty-five. It is sworn, as far as hard swearing goes, on the part of the *Maggie Armstrong*, that she had a berth given her by the *Blue Bell*, and on the other hand, the *Blue Bell* says she brought up at considerable lengths from the *Maggie Armstrong*, and, consequently, did not give her a foul berth. As to whether the *Maggie Armstrong* drove or dragged her

anchors, I apprehend it to mean about the same thing, the only difference being, when you say that a ship drives, it is without an accusative case, and in the other instance you say she drags, which I suppose to be about the state of things here. With respect to the state of the wind, weather, and tide, I apprehend it to be true, that if a foul berth was given to the *Maggie Armstrong*, these two vessels might have come into collision without the *Maggie Armstrong* dragging or driving. If the collision occurred without the *Maggie Armstrong* dragging her anchor—whether she did or not, we must consider what would be the strength of the wind and tide, and which way the *Maggie Armstrong* would have gone, provided she broke her sheer. That appears to me to be one of the most important questions to consider. In order to pronounce a decree for the *Maggie Armstrong* the court must be satisfied that she was not to blame in any part of the transaction, and the *Blue Bell* was to blame. The only blame attributable to the *Blue Bell* is this, that she gave a foul berth to the *Maggie Armstrong*, and that she was riding on such a night as this with a single anchor and forty-five fathoms of cable; but this amount of blame, in the absence of any corresponding blame on the part of the *Maggie Armstrong*, is sufficient to account for the collision, for the whole consequences of which the *Blue Bell* must be held responsible, and there must be a decree to that effect.

The Court was assisted by Capt. Redman and Capt. Weller, of the Trinity-house.

Thursday, Nov. 16, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE NORTH AMERICAN v. THE WILD ROSE.

Collision—Fog signals.

Although it is incumbent on steamships (notwithstanding their desire to make all progress) to slacken speed so as to avoid every possible collision; yet this necessity does not in any way relieve sailing ships from the duty of keeping a sharp look out, and sounding such fog signals and bells as the provisions of the statute direct.

Deane, Q. C. and Vernon Lushington for the *North American*.

Brett, Q. C. and Cohen, for the *Wild Rose*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the sailing ship *North American*, 1833 tons register, against the British steamship *Wild Rose*, to obtain compensation for damage sustained by reason of the ship's coming into collision, in the river Mersey, about six a.m. on the 23rd May last. The wind was stated as from S.E. to S.S.E., and the weather as calm, but misty. The case for the *North American* was, that while at anchor, with her proper anchor lights exhibited, she having been anchored under the directions of a duly licensed pilot off Seacombe-ferry in about mid-river, the tide being about two hours flood, running from four to five knots; and those on board her being engaged in getting out her jibboom, the *Wild Rose*, which is one of the Seacombe-ferry boats, was observed about two ships' lengths distant coming on at great speed, and that shortly after, the steamer, notwithstanding hailing from the *North American*, ran on into her with great violence, the steamer's stern striking into her port side, before the mainmast, and doing great damage. It was then alleged that the

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collision was wholly occasioned by the improper navigation of the *Wild Rose* and by the negligence of those on board her, and that it was not caused by the negligence of those on board the *North American*, but was, so far as they were concerned, an inevitable accident. The defence for the *Wild Rose* represented that she is employed for the purpose of plying between Seacombe-ferry and the Liverpool landing-stage, and conveying passengers and goods between those two stations; that about 4-15 on the morning in question she left the Egremont-ferry, where she had been coaling for the Liverpool landing-stage, and that whilst so proceeding the master of the *Wild Rose* saw the *North American* lying athwart the tide, swinging to her anchor nearly in mid-river, but somewhat closer to the Cheshire side; that she reached the Liverpool landing-stage, and while remaining there the fog commenced and gradually increased and extended; that about 5-30 a.m., having left the landing-stage for Seacombe-ferry, she started from Seacombe-ferry for Liverpool, and the fog had then extended, and the *North American* was not visible to those on board the steamer; that on leaving Seacombe-ferry the master of the steamer took his station on the bridge between the two paddle-boxes, and the engineer and helmsman were at their respective posts; that the master of the steamer shaped his course so as to go south of the place where he had previously as aforesaid, on his passage from Egremont-ferry to the Liverpool landing-stage, observed the *North American* lying, and north of another vessel at anchor higher up the river; that from the time when the *Wild Rose* left Seacombe up to the time of the collision, her steam whistle was kept continually sounding, and a good look-out was maintained; that soon after the *Wild Rose* left Seacombe, the fog became suddenly exceedingly dense, and thereupon her engines were immediately stowed; that some short time afterwards the *North American* first became visible to those on board the *Wild Rose*, but at that time the two vessels were so near to one another that it was then quite impossible for the *Wild Rose* to avoid the collision; that her engines were, however, stopped at once, and were immediately afterwards reversed full speed, and her helm was put hard a-port; but, notwithstanding these precautions, the *Wild Rose* came into collision with the *North American*. The statements in the case of the *North American* were then denied, except those to which the defendants referred; and it was contended that a proper look-out was not kept on board the *North American*, that those on board that vessel did not duly hail the *Wild Rose* at a sufficiently early period; and that they improperly neglected to take any steps to avoid the collision; that, although there was a fog, they did not use and sound her bells, in accordance with the provisions of the Merchant Shipping Act Amendment Act 1862, but wholly made default in so doing; that the place where the *North American* was lying was opposite to a public ferry, and was such as to make it peculiarly incumbent on the *North American* to use all possible precautions for the purpose of warning other vessels of her position in the river; and that the collision was neither the fault of the *North American* nor the result of inevitable accident. Now, that there was on the morning of the 23rd May, that which any rational man would have termed to have been a fog existing at some time or other in the river Mersey, there cannot be a shadow of doubt, because there is evidence of facts from which that inference must necessarily be drawn: these are the entries from three of the landing places, and the fact that vessels had crossed backwards and forwards, and all of them had used the whistle. Assuming that to be a proved circumstance, but at what particular time the fog prevailed,

and at what particular part of the river it was so dense as has been represented, is another and a very different question, upon which there is much contradictory evidence. Here is a vessel of 1300 tons lying in the river Mersey at anchor, and she is run into almost, if not quite, in a straight line, by a steamer whose custom and habit it was to cross the river plying for passengers. Under these circumstances there is no doubt what is the law, viz., that the steamer must show that that collision was occasioned by inevitable accident, and circumstances she could not control, or that it was exclusively the fault of the *North American*, since it is manifest that a vessel lying at anchor is incapable of getting out of the way, or of adopting any measure which might prevent a collision, at least to some extent. In the course of the argument it was suggested, but not argued, that the fog might have been so dense that it would have been incumbent on the steamer not to have proceeded on her usual occupation because of the danger she might incur. Had the circumstances given in evidence produced such a case, the court would not, for a moment, have hesitated in saying that it would have been the duty of the court, upon these pleadings, to have taken cognisance of it, and to have considered the case upon the fact, proved or not proved. I wish to make a reference, as it is a matter of great importance, whether steamers are at liberty to follow their avocation in a thick fog, when following that avocation might produce damage to property, goods, or loss of life, to the case of the *Giralama*, decided by Sir John Nicholl. In that case the vessel was going down the river Thames in tow of a steamer, and having a pilot on board. When she started there was no fog, but a fog came on, and the learned judge laid it down in very strong terms, that it would have been the duty of the master to have superseded the pilot, and to have caused the vessel to come to anchor, rather than incur the risk of collision with other vessels. I, perhaps, might not go quite the whole length that Sir J. Nicholl went on that occasion, but the general principle I should adopt, viz., that if there be an opportunity of stopping, attempting to follow a course which would produce possible injury to life, and certainly to property, it is the duty of those who have the control of steamers, notwithstanding the state of convenience and urgency of passengers, to hold their hand. Looking at the steamer's own description of the state of the morning, and the density of the fog almost immediately after she quitted Seacombe, it was a case in which the utmost vigilance was requisite and necessary, and she ought to have had the very best look-out; and not only so, but to have gone at that rate which would have enabled her, if taken by surprise, or coming in contact, or apparently in contact, with another vessel, to avoid collision. Taking into consideration the nature of the morning and the risk run, were all proper measures of precaution adopted on board the steamer, and, having regard to the size of the *North American*, was that ship deservingly the steamer in due time, and whether or not, despite no bell having been rung on board the *North American*, might she not have been seen in time so as to avoid the collision? If so, the steamer is wholly to blame. If, on the other hand, the weather was so foggy that the *North American* ought to have rung a bell according to the statute, and did not, the *North American* would be in default. Upon the whole of the evidence the court was of the latter opinion, and must hold that the *Wild Rose* was not to blame for the collision, and there must be a decree accordingly.

The Court was assisted by Capt. Redman and Capt. Neabitt.

Tuesday, Nov. 21, 1865.

(the Right Hon. Dr. LUSHINGTON.)

PROCEEDS OF THE BONNE AMELIE.

the registry—Payment of claims not strictly necessities.

vessel having been sold in a damage suit, suit (for necessities) was instituted against it of the proceeds of the sale of the vessel:

the master's claim for expenses of a person in the defence of the suit did not contain for necessities; but

owners having executed an act of abandonment vessel, the Court decreed payment of the

the Amelie, a schooner belonging to French owners, came into collision with an English vessel named the Siren, and was arrested at the instance of the owners of the latter vessel, and the Amelie was not bailed, and having been sold alone to blame for the collision, was sold in satisfaction of the decree in

the present suit, in respect of necessities and expenses, was then instituted; and, after payment of the claims against the vessel in respect of the damage suit, there remained a balance of

the balance did not appear in this suit also, but the master in the damage suit had entered a claim for the payment of the proceeds, and the court upon them for his costs in that suit.

the court was now moved to direct payment of the balance in him (the particulars of which sufficiently appeared by the judgment) out of the above balance.

motion for the plts.

LUSHINGTON.—This is, in point of amount, a small sum, but it behoves the court to be cautious in exercising the power of directing sums demanded as to be paid out of the proceeds. Now there are two kinds of claims: one claim for necessities such as money advanced for the purchase of butcher's meat and articles of that kind for the maintenance of the crew, and I have decided before, and again decide, that this is within the terms of the Act of Parliament as to the payment of the proceeds, and that money advanced, not to pay necessities where a debt for necessities has been incurred, but in order to enable the master to defend the vessel, constitutes a valid claim. With respect to the other part of the claim, it is for two-thirds of the expense of the harbour-master in London from Newcastle during the time the vessel was in the harbour, and the damage suit in order to assist the vessel or the master's interest in defence of the vessel and the other for the costs of his coming to attend the trial. Now in no case can I consider these to be necessities within the purview of the statute, but if not entered, and if the owners in France had received the proceeds which remain in the hands of the court, they would have very much inclined to have granted his motion, and for this reason, that by France the abandonment of the ship releases the owners from all personal responsibility, that, therefore, by that act the plts. are in a position in respect of this, which is a just claim, and has been extinguished. As the case stands, all I can do is to pronounce for so much as relates to what I have described as necessities. With regard to the other part of the claim, I have mentioned I make no order.

Subsequently the court was satisfied that the French owners had executed an act of abandonment, and that the caveat was withdrawn, and it, therefore, decreed payment of all the items claimed.

Thursday, Nov. 23 1865.

(Before the Right Hon. Dr. LUSHINGTON and TRINITY MASTERS.)

THE ALEPPO.

Collision—Evidence—Admission in the answer.

Evidence of an order as to the lights given twelve hours before the collision is admissible, but not of conversation with respect to them.

A steamer steering N.E. $\frac{1}{2}$ N., and a schooner close hauled on the starboard tack, and heading W., came into collision. The answer on behalf of the owners of the steamer alleged that the schooner was seen three-quarters of a mile off on the starboard bow, but that she had no lights, and was mistaken for a vessel going the same way as the steamer. All the crew of the schooner were drowned, and the evidence for the plts. consisted of one witness as to the state of the schooner's lights some hours before the collision. The defts. called no witnesses:

Held, that the plts. were not bound to call witnesses from the defts. vessel.

And that, from the admissions in the answer, the schooner was seen in ample time for the steamer to have avoided her, and that therefore the steamer was alone to blame for the collision.

This was a cause of damage in respect of a collision which occurred on the 24th Aug. 1865, about eight miles to the westward of the Bardeia Island, between the schooner Charles Edward, bound from Duddon to Cardiff with a cargo of iron ore, and the screw steamer Aleppo, bound from Malta to Liverpool with a cargo of grain.

Milward, Q. C. and Cohen appeared for the plts.

Brett, Q. C. and V. Lushington for the defts.

On behalf of the schooner it was pleaded that she was close-hauled on the starboard tack (heading W. with the wind from N.N.W.) with her proper lights exhibited, and a good look-out; that she kept her reach and was run into by the steamer, and that the collision was caused by the Aleppo and those on board thereof in not having a good look-out, and in not slackening and reversing her engines, and generally in not keeping out of the way of the Charles Edward.

On behalf of the owners of the Aleppo it was alleged that she had her proper lights exhibited and a good look-out, and the 5th article of the answer was as follows:

In these circumstances a vessel which afterwards proved to be the schooner Charles Edward was observed a little on the starboard bow, distant about three-quarters of a mile. No lights could be seen on board her, and it was conceived that she was going the same course as the Aleppo, and the Aleppo's helm was starboarded to give her a clear berth. Shortly afterwards the strange vessel was made out to be standing across the bows of the steamer, and the steamer's helm was thereupon put hard a-port. The engines were also slowed and stopped; but, nevertheless, a collision took place, the stem of the Aleppo striking the schooner on the port quarter whereby the schooner was sunk and lost.

All the crew of the schooner were drowned, and in support of the plts.' case James Coppack was called, who deposed that he was master of the Lady Caroline, which, with the Aleppo, put into Holyhead on the Saturday previous to the collision. Both vessels remained there till 2 p.m. of the Tuesday following. The witness also stated that he was on board the schooner just before she sailed, and was then

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THE ALEPPO.

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asked by *Milward* whether he heard any order given by the master of the schooner as to her lights, whereupon

Brett, Q. C. objected.—The order was given so long before the collision that it must be immaterial, and it was given behind the back of the defts.

Dr. LUSHINGTON.—If the learned counsel had asked what was said in common conversation I could not allow the question to be answered; but an order is a different thing, as it may be a fact as well as a declaration. Whether the question is immaterial or no must depend upon the answer.

The question was then put, and the witness stated that the master ordered the boy to get the lamps and clean them, as the schooner was going to sea that night and would want them. The witness also stated that both vessels put to sea together the same afternoon, and about six o'clock he saw the schooner's lights fixed and burning, and as late as ten o'clock saw ship's lights from the direction in which he believed the schooner then was.

No other witness was called for the plt., and the defts. declined to call witnesses.

Dr. LUSHINGTON, in addressing the Trinity Masters, said:—Now, Gentlemen, we are in a state of difficulty in this case. It is perfectly true, as Mr. Brett has said, that the determination to which we may come must not in any degree be affected by sympathy for those who have had the misfortune to be losers by the collision. We have no right to say that, because, by a great calamity, the lives of the crew and the property of the owners of the vessel have been sacrificed, therefore we should come to any other conclusion than that which the evidence justifies and the law requires. On the other hand, because the evidence of those on board the schooner is lost, I cannot think there was any obligation upon her owners to resort to witnesses from on board the *Aleppo* in order to illustrate their case. It is perfectly true that such testimony might have been resorted to; but it is so contrary to all our practice, and to all fair probability of attaining a just end, that I never could hold there was any obligation so to do; but, before we can come to a decision in the plt.'s favour, we must nevertheless be satisfied somehow or other that there is legal evidence to warrant the conclusion. Now, the plt.'s case may be proved not only by the evidence adduced, but by the admissions in the cause; and I begin by stating that I discard entirely from my consideration every fact in the petition which is not admitted in the answer, or the defts.' preliminary act. What, then, are those facts? A small schooner, the *Charles Edward*, the property of the plt., had the misfortune to come into collision with the vessel arrested in this cause, a large steamer, proceeding at the rate of, according to the defts.' own statement, about nine knots an hour, with her topsails set, and steering by the standard compass N.E. half N. Now, the fifth article of the answer is this. [The learned Judge then read the fifth article, cited above, and observed that the same account was given in the preliminary act, and proceeded:] Admitting, therefore, that the schooner had neglected to comply with the Act of Parliament, and was sailing without lights, still, if she was seen at the distance of three-quarters of a mile, it must have been a very clear night, a fact which is directly deposed to by a witness, Coppack; and, assuming for a moment (and this is entirely for your consideration) that she was seen at the distance of three-quarters of a mile without lights, was there not ample time for the steamer to have discovered the true course of the schooner, and to have taken proper measures, and in due time to have avoided

the collision? And you must also bear in mind that it is not alleged, so far as I can understand, that the schooner altered her course, but she continued it, whatever it was, and was seen at a little on the starboard side of the steamer. Now it is said, on the other hand, and very powerfully argued by Mr. Brett: "Yes, that may be true, but by being seen a little on the starboard side and without lights, the necessary probable inference is, that the schooner was going on the same course as the steamer, and therefore the latter vessel was starboarded, and it was only when the error was discovered that it would be deemed necessary to port." The question, then, that I put to you is this, was there not, notwithstanding that the schooner was seen without lights upon the starboard bow, ample time and opportunity for the steamer, if she had been upon the starboard bow, and not proceeding at too rapid a rate, to have discovered how the schooner was going, and to have got out of the way? That is the question, and the important question, for your decision. Whether or not there were lights on board the schooner is of no consequence in my view of the case, stands thus: unquestionably there is no direct proof that her lights were burning at the time, and it is averred in the answer that no lights were seen, and you have had much discussion as to whether that is not tantamount to an averment that there were no lights at all. Be it so; but, do you think that, under the circumstances, anybody could do more than say that no lights were seen on board the schooner? And you must also bear in mind that no evidence has been produced on the part of the defts. to show what was the state of things when the schooner was first seen, or what manœuvres beyond those adopted in the answer were adopted on the part of the steamer in order to avoid collision. It may be a very prudent measure to keep back from the question of all the testimony which might be given on the part of the defts.; but where this is the case I think the defts. are not entitled to any inference from that, which fairly arises from the plea itself, and certainly to no favourable consideration as to points which might have been elucidated by that evidence. Now really this is the whole case. It is not necessary to trouble you further because the preliminary act and the averments in the fifth article of the answer entirely agree the one with the other, and I have already stated what appears to me to be the fair statement of facts with respect to them. I therefore ask your opinion upon two questions: first, whether you are of opinion that, it being admitted that the schooner was seen three-quarters of a mile off, a little upon the starboard bow, the night being certainly very clear, it was a just and fair inference on the part of those on board the steamer to suppose that the schooner was in the same course as the steamer; and secondly, whether it would not have been practicable to have discovered the schooner's course in ample time to have taken proper measures to have avoided her.

The learned Judge and the Trinity Masters then retired, and, after consultation for a few minutes, returned, when

Dr. LUSHINGTON said:—As this is a peculiar case I shall deviate from the usual custom and read the advice which I have received from the Trinity Masters. Had the *Aleppo*, when she first saw the schooner, put her helm a-port, the collision would not have taken place. Had the *Aleppo*, when she saw that the schooner was standing across her bows, gone on full speed and kept her helm hard a-starboard as it had previously been, she would have gone clear. It was the indecision of the *Aleppo* in changing her helm which caused the

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THE BANDA AND KIRWEE BOOTY.

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tion. Even if there had been no light on the schooner, still there was ample time for *Alpena*, after seeing the schooner, to have avoided the collision.

Alpena alone to blame. Decree accordingly.

Monday, Jan. 8, 1866.

(Before the Right Hon. Dr. LUSHINGTON.)

THE BANDA AND KIRWEE BOOTY.

Booty of war—Right to begin—Practice.

most of booty of war the actual captors, though they may institute the suit, are *plts.* only in name, as the burden of proof rests with those claiming a right to share in the booty. In such cases those who have the burden of proof have also the right to begin.

This was a cause of booty of war, and had been referred to the court under the provision of 3 & 4 c. 66, s. 28, and of an Order in Council bearing date the 16th June 1864.

The booty had been captured at Banda and Kirwee in India, in the year 1858, by a force called the *Madras column*, under the command of Sir G. C. Collier, K.C.B., and it having been referred to court to declare who are the parties entitled to the booty and in what proportions. The suit was instituted on behalf of the Madras column, and on the issue of a citation calling upon all parties to appear in the suit, who claimed to share as captors, a petition was filed by the *plts.* claiming, as captors, to be exclusively entitled to the booty. Answers and answers were also filed on behalf of the officers and men of various forces who claimed to be also entitled to participate as having constructively assisted in the capture.

The Attorney-General, the Queen's Advocate, Prentiss, and Ayrton appeared for the *plts.*

Adv. Q. C., Cotton, V. Lushington, Bovill, Q. C., Dr. Lushington, Q. C., V. Harcourt, Q. C., Brett, Q. C., Cohen, Solicitor-General, Pritchard, Coleridge, Bullar, E. C. Clarkson, Price, Q. C., Kemplay, James, Q. C., Denman, Q. C., Bayford, Karslake, Collier, Cole, Q. C., Piffard, Hughes, Pollock, Q. C., J. Paterson, F. Kelly, Hume Williams, Dr. Twiss, Dr. Tristram, and Goldsmith, for various *defts.* claiming as joint captors.

The right of the *plts.* as such to open the case was put on behalf of the *defts.*, and a discussion ensued.

The Attorney-General.—This case is *sui generis*, in that it is the first case of military booty that has been referred to the court at all under the Act of Parliament, and it is also *sui generis* in another respect, and because, instead of a simple question between the actual captor on the one side and persons claiming to be captors by construction upon the other, we have a large number of *defts.* who must be reduced into less than ten or eleven distinct cases, all of which depend upon the view which may be taken of the effect of each of the various operations in the general design which is said to have existed. The right *primâ facie* seems everywhere to all *plts.* to open the case to court, and if it were denied in this instance by one of the *defts.* would have, in the first instance, to open his case, and the *plts.* answer at eleven cases at once. And then after the *plts.*

been heard there would be eleven replies at all. In principle, and in point of convenience, the issue of the case, and the time of the court, would be settled by the *plt.* opening his case, dealing

with it upon the merits, which are as much known upon the present occasion to one party as to another, and a single reply would follow from the *plts.* in the usual manner. There is no rule of practice applicable to this court at all which can in the slightest degree interfere with it. Prize cases are not precedents for this purpose, nor is the *Deccan* case, for in that there were only one *plt.* and one *def.*

Dr. LUSHINGTON.—There were more parties than those in the *Deccan* case.

The Attorney-General.—The only parties heard besides those whom I have mentioned were the East India Company; but your Lordship will recollect that they claimed, not as captors, but on quite a distinct footing. It would, under the circumstances of this case, be a positive injustice to the *plt.*, under the pretence of recognising in him a *primâ facie* right (because he is admitted at all events to have some interest), to deprive him of the usual right of *plts.* in all courts to make out their own case, and to have a general reply.

Adv.—It would be contrary to the ordinary course of procedure, and contrary to the convenience and justice of the case, if the *plts.* were now to begin. It is not in all cases the rule that the *plt.* begins; those upon whom the affirmative of the issue is thrown are the parties who have to begin. They are usually the *plts.*; but upon whom does the affirmative of the issue rest in the present case? Clearly upon the *defts.*, as the *res.* to the *plts.* in this case, to establish that they are entitled to share with Sir George Whitlock's column in the booty taken at Banda and Kirwee. What would be the case if they did not begin? It is utterly impossible, the *plt.*'s title being admitted, that he should meet the points which are raised by the *defts.* He will have to do that for the first time in his reply; new points will be put forward by him and pressed against us in his reply, and we shall have no means whatever of meeting those answers which may be given to our case. Whoever begins, it will be absolutely indispensable that some reply—whether one or more is another question—must be given to that reply to our case which the Attorney-General of course at some time or other must give. We rely first upon the universal practice, and next upon the fact that the universal practice is consonant to the convenience and justice of the case. There is no case in which an actual captor claiming the whole of the prize, and claiming to exclude some portion of the fleet, has actually begun, but, to use an expression more or less accurate, the constructive captors always begin.

The Solicitor-General.—In the report of the *Deccan* case, the following discussion took place:—Dr. Lushington: "Your Lordships will permit me to make one observation. Your Lordships were pleased to say the other day that the counsel for Sir Thomas Hislop were to commence. I humbly submit to your Lordships whether, as this is to be assimilated to a regular prize cause, where the commencement is on those who claim as joint captors, we ought not to begin." Mr. Harrison: "All our documents have been in the hands of the other side a considerable time, but we have heard nothing of joint capture." Earl of Liverpool: "I think it would be desirable that we should decide that now, would it not?" Dr. Lushington: "I should think it would, my Lord. Your Lordships will permit me to state that the ground upon which I humbly contend it would be more regular that we should commence, is simply this, that in every case within my experience in which a claim is made to share as a joint captor,

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THE FLORA.

[ADM.]

the claim of the actual captor being admitted, in all those cases it has been customary for the joint captor to state his case, and to begin in the first instance; and I apprehend that is consistent with universal principles—that the *onus probandi* lies on him. He who has actually effected the capture cannot be expected to go on, for it will be impossible for him to know the grounds on which the case is to be put." The general rule of the Admiralty Court was followed in that case. Take the well-known case where an action of ejectment is brought by the heir-at-law, and the question to be tried is whether the heir is entitled or the devisee. The heir is the plt., but it is the well-known practice of all the courts, and in fact not disputed, that if the deft., the devisee, chooses to admit the *prima facie* title of the heir, he is entitled to begin. The same rule prevails in every case in common law in which the affirmative issue is on the deft., with the exception of one or two cases in which the damages are unliquidated; but they do not apply here. That being the ordinary rule certainly of the courts of Common Law and of the Admiralty Courts also, why is this case to be an exception? The principle is the same whatever may be the number of the joint captors, and the joint captors on whom the *onus probandi* lies should begin, otherwise the plt. will have in a great measure to prove a negative. He proves that he has captured; but that is not enough for him to do; he must also prove a negative against each of us.

Dr. LUSHINGTON.—It was impossible for me to have read these papers without anticipating that in all probability this very question would arise, and that I should have in the first instance to determine what course was best to adopt in order to attain the great end that is in view, namely, the due administration of justice. Now, the determination of the court depends partly upon what has been the established practice in questions of this description, and partly upon the consideration of upon whom the *onus probandi* lies, and lastly upon what course will be best to attain the end of justice. Now, with regard to the practice, there has been no practice, so to speak, with respect to booty taken on land. There has been an established practice with respect to vessels captured at sea, and with respect also to conjoint operations of the army and navy. In both those cases, without any exception, the rule has been that those who claim to share in the joint capture began to state their case, and afterwards were entitled to reply. I believe that no instance can be brought forward, either in the Court of Admiralty or in the Court of Appeal, in which this course was not pursued. If, therefore, practice is of importance, practice would induce me to adopt the course which has been followed in so large a number of instances. Now, with regard to the *onus probandi*, and to the fact that upon the present occasion the actual captors are the plts., in truth and in fact they are plts. in name only; they are made plts. upon the present occasion only for the purpose of calling into the arena those persons who might have set up a claim to the booty in question. I do not know that this was precisely the best course which could have been pursued. Another course might have been pursued had it been deemed necessary so to do, but this was clearly the most expedient. With regard to the *onus probandi* I apprehend that whenever the *onus probandi* is fixed upon a party it is the duty of that party to begin and to produce proof in order to establish his case. There is no *onus probandi* upon the Attorney-General's party; they are the actual captors, and unless another case can be made out which shall show that other parties are entitled to share with them, they are entitled to take the whole of the booty. Now,

according to my knowledge, and so far as I can pretend to give an opinion upon the subject, in all cases appurtenant to the present where the *onus probandi* has been imposed upon a party, they are entitled to begin in order to fulfil that duty. Now, I believe it has gone so far as this: that even in cases where the *onus probandi* in the original instance did not attach upon a party, yet, if in the course of the proceedings the *onus probandi* shifted, and did attach upon a party, they were bound to produce the evidence. If my memory does not fail me, I think that even in the great trial in the *Deccan* case that was the principle that was adopted. And looking at all those matters, it appears to me with regard to the Attorney-General's proposition, that although it is true that some inconvenience might be avoided, and much probable delay might be saved, yet that it militates against practice and against principle, and I apprehend that it is my duty, whatever may be the result which this case may occupy, whatever labour there may have to undergo, to choose that course which is most adapted to attain the end of justice and most consonant with past practice. Therefore, the proper course will be for the other claimants to begin.

Tuesday, Jan. 16, 1866.

THE FLORA.

Collision—Second arrest—Practice.

The jurisdiction which the court undoubtedly possesses to order a second arrest in respect of the same cause of action should be cautiously exercised.

Application for such an arrest should be made to the court itself.

This was an application for a *supersedeas* to the order of a second arrest of a vessel in respect of the same cause of action, and to condemn the plt. in the costs and damages occasioned by the second arrest. An action in respect of damages had been commenced in the sum of 1000*l.* against the vessel and her cargo.

Bail had been given in the sum of 1000*l.* and the property released, and it being desirable afterwards to increase the amount of the action to 3000*l.* the proctor for the defts. agreed to the increase, and sent to the plts.' proctor the names of the property; subsequently, however, the owners of the vessel refused to give bail, and the plt. arrested her.

V. Lushington moved for a *supersedeas* and contended that the court only could order a second arrest in respect of the same cause of action, and that the cargo could not be arrested, as no freight had yet become due.

Dr. LUSHINGTON.—Surely, in all cases of damage, the plt. has a right in the first instance to arrest the cargo, as the presumption is that freight is due until the contrary is shown.

Brett, Q. C. and Clarkson contended that if the application for a second warrant had been made to the court it would have been granted, and therefore the defts. had no cause of complaint. At common law, in order to increase the amount of damages, a second suit is instituted and the first one discontinued, and that is in effect what has been done in the present case.

Dr. LUSHINGTON.—The court has no doubt that it has the jurisdiction to order a second arrest, but it is a power which should be cautiously exercised; and, unless under exceptional circumstances, only after an application to the court itself. Unless it

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stances, I shall allow the second arrest, either party any costs. The present bail 100*l.* must be delivered up to be cancelled.

Tuesday, Feb. 13, 1866.

THE PAUL.

Salvage—Appraisement—Costs.

entitled to the costs of a commission of sale when it appears that there is a substantial difference between the appraised value and that alleged by the

a salvage suit against the brig Paul and her services rendered in the month of September by the screw steamer Betera, belonging to the Egyptian Steam Navigation Company

*s. filed an affidavit alleging the cargo to be wholly partially damaged, and to be of the value 479*l.* 3*s.* 2*d.* The plts. were dissatisfied with the estimate, and issued a commission of appraisement under which the cargo was valued at 2248*l.* 6*s.* more than the defts.'*

en's Advocate and the Admiralty Advocate court to condemn the plts. in the costs of the appraisement.

Commodore, Spinks' Ecc. & Adm. Rep. 175, n.

C. and Butt, for the plts., opposed the defendant's claim that the defts. be condemned in the costs.

*The case of the Commodore is clearly distinguishable, for in that case the difference between the appraised and appraised value, was only 15*l.* In the value as appraised is nearly half as much as that stated by the defts:*

Commodore, 1 W. Rob. 827;

Commodore, 5 L. T. Rep. N. S. 162.

LUSHINGTON.—I am of opinion that the result of this appraisement has been shown by the facts.

As a general rule the defts. are called upon to prove the value of their property, and if they are dissatisfied with the estimate they may demand a commission of appraisement, and if it be ordered that the defts. have not stated the value of the cargo, the plts. are entitled to the costs of the appraisement. This is the general, though I by no means the universal rule, but in this case there is such a substantial difference between the appraised and appraised values, that the plts. are clearly entitled to the costs of the appraisement.

Feb. 13 and 20, 1866.

By the Right Hon. Dr. LUSHINGTON.)

THE FLORA.

Arrest for freight not due—Release.

ward a ship, to blame for a collision, can only be released to obtain payment of the freight due to the charterers, and therefore, if no freight has accrued, the court will decree a release of the cargo.

igned to Hamburg was shipped on board a bark which came into collision with a ship off Cornwall, the bark was put into Plymouth, and was with her crew arrested there, and remained under arrest. The consignees of the cargo declined to accept it at Plymouth, and the bark was subsequently held to answer for the collision.

decree a release of the cargo without costs.

20th Nov. 1865, the bark Flora and the

ship Allan came into collision off Cornwall, and the Flora in consequence put into Falmouth, where the vessel, "her tackle, apparel, and furniture, and the freight due for the transportation of the cargo laden on board the said vessel," were arrested. The owner of the Flora ultimately declined to give bail, and the consignees of the cargo, which was destined for Hamburg, refused to accept it at Plymouth and insisted upon its being delivered at Hamburg in compliance with the terms of the charter-party. The charter-party contained no stipulations for payments on account of freight.

On the 1st Feb. 1866, the Court heard the principal cause, and was of opinion that the Flora was alone to blame for the collision, and the Flora and her owners, and the freight due, were condemned in the damage.

Milward, Q. C. and V. Lushington, for the defts., moved for a release of the cargo arrested on account of freight.—Cargo on board a wrong-doing vessel cannot as cargo be arrested by the owners of the other vessel: (The Victor, 1 Lush. 72.) It may indeed be seized for freight, but then only for such as has accrued, which in this case is none, as nothing has been paid or agreed to be paid on account, and the consignees decline to accept the cargo at a port short of its destination and pay pro rata freight. If the seizure be sanctioned the shipowner may be compelled to pay money which he may never be reimbursed, as the goods might be lost during the remainder of the voyage, and the freight prospectively paid would then never become due. The plt. has a remedy over in personam against the defts., if the res is not sufficient to answer the claim. No case can be cited in which the owner of the cargo has been compelled, in order to obtain the release of his cargo, to pay anything not actually due:

The Leo, 1 Lush. 444; 6 L. T. Rep. N. S. 58;

The Rendoberg, 6 C. Rob. 142;

The Diana, 5 C. Rob. 60; 7 L. T. Rep. N. S. 897;

The Vrouw Catharina, 6 C. Rob. 269.

But if the shipowner abandons the cargo the owner of it must either lose his property or pay a freight, for which, if the goods should be subsequently lost, he would never have been liable.

Brett, Q. C. and E. C. Clarkson for the plts.—This is an application, not by the owner of cargo, but by the shipowner, the wrong-doer, and his object in asking for release of the cargo is that he may be enabled to earn freight, and not be liable to account for it to the plts. It is by the defts.' own default that the cargo has not been delivered at its port of destination, and the defts. are therefore bound to carry it on though at an additional loss. The shipowner's lien upon the cargo continues throughout the voyage, so as to enable him to earn the freight, and to that lien the plts. have now a right to succeed.

Milward, Q. C. in reply.—According to the contention on the other side, the plts. would now succeed to the defts.' lien upon the goods, in order that the defts. may still carry on the goods, and so earn the freight. The right must be transferred with all its incidents, but the plts. do not propose to carry on the cargo.

Dr. LUSHINGTON.—It is clear that the owners of cargo on board a vessel which has occasioned a collision are in no respect responsible for the damage, as they have no right of interference or control over the ship, and therefore cannot be to blame. But it is also clear that all the property which is on board the ship, and is the property of the shipowner, is liable, and therefore the cargo is usually arrested by the plts. in order to obtain payment of

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THE REPEATER v. THE BRAGA, OF KRAGEROE.

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the freight to which the shipowner would have been entitled. But the rights of the shipowner to which the plts. succeed extend no further, and therefore, if no freight is actually due, no right of arrest attaches upon the cargo. In this case the cargo was to be delivered at Hamburg, and has been carried to Plymouth only, and there is no stipulation in the charter-party for payment on account of freight, and no acceptance of the cargo at Plymouth. No freight, therefore, is due, and though the master, as agent of the shipowners, may tranship the cargo and carry it on to the port of destination, and so earn the freight, yet this right, even if it had been asked for by the plts., could not have been transferred to them by reason of the collision. Under the circumstances, I must release the cargo, but without costs.

DUBLIN.

Saturday, Dec. 16, 1865.

(Before Judge KELLY.)

THE REPEATER v. THE BRAGA, OF KRAGEROE.

Rules of the road and foreign ships.

Norwegian ship held to be liable in damages and costs for having come into collision with a British ship through breach of the 11th article of the Admiralty Regulations as to rule of the road, such regulations being binding by convention on Norwegian ships, whether the collision take place outside or within British jurisdiction.

The Queen's Advocate, Dr. Todd, and Dr. Boya appeared for the Repeater.

Dr. Townsend, Dr. Elrlington, and Dr. Coorigan appeared for the Braga.

KELLY, J., in giving judgment in this case, said:—About eight o'clock on the morning of the 27th Sept. last (1865), a British barque, the *Repeater*, of Sligo, 298 tons, her master and ten hands, at the time about 300 miles off the Banks of Newfoundland, was on her voyage from Gorston, for the port of Liverpool, to Quebec, with coals, close-hauled on the port tack, a light breeze from S.W. by W., with a lifting fog, and going about three knots through the water, her course being then N.W. by W. $\frac{1}{2}$ W., when she observed a sail emerging from the fog about two cables' length off, and about half a point on her starboard bow, nearly end on. That sail was a Norwegian barque, the *Braga*, of Krageroe, 439 tons, her master and twelve hands, proceeding on her voyage from Quebec to Cork with timber and deals, heading about E. by S., about four points free, the wind a-beam and, according to her, S.S.W.; her rate of going about five knots, and she very nearly at the same time and distance sighted the *Repeater*, about one half point on her starboard bow, coming towards her W. by N. $\frac{1}{2}$ N. Under such conditions as these, two vessels, one of them going free, were thus placed, steering nearly opposite courses, end or nearly end on to each other, with a conjoint velocity of eight knots, and less than a quarter of a mile distance between them. The masters of both of them seemed perfectly and most correctly aware of their duty, and, therefore, of the propriety and necessity of each at once putting his helm to port in order to avoid a collision. The evidence upon the part of the *Repeater* (the petitioner in this suit) is, that her helm was immediately put hard up, that is to port, and that she at once began to fall off, but that the *Braga*, instead of porting likewise, put her helm to starboard, followed round after the *Repeater*, when the master of the *Repeater* seeing the *Braga* within one hundred and thirty or forty yards

coming down on him rather on his starboard bow, and that a collision had become inevitable, in order to diminish its violence, put his own helm hard a-starboard, and had already come up a little when his barque was struck with great force by the *Braga* a little before the starboard cathead, the starboard bow of the *Braga* coming into violent contact with that of the *Repeater*. By that collision the bowsprit, jibboom, headstays, with sails and gear attached of the *Repeater* were broken and carried away, the cutwater broken, forecourse torn to pieces, the planks on the starboard bow stove down to the water's edge, and the covering board and deck ripped up, her state being such that master and crew felt obliged to abandon and burn her; and under the humane permission of the master of the *Braga*, who kept by them, to take refuge on board his vessel. From that collision the two vessels went clear almost immediately, the entire occurrence from their first sighting each other and its disastrous termination occupying, at the very highest calculation, but three minutes and a half. In all the important details of this evidence, the master and crew of the *Repeater*, both in their direct and their cross-examination, are quite consistent and corroborative of each other. On the other side, the evidence on the part of the *Braga* is, according to her master, that she did port, and ported half a minute earlier than the *Repeater*, and that he did not give the order to starboard until after the *Repeater* had starboarded, when, if he had not done so, but kept his port helm, the *Repeater* would have come into his port bow, and the collision would have been three times worse than it was. The case of the *Repeater* then is simply, that she alone ported, and that finding the *Braga* did not port, but starboarded, she, in order to avoid the consequences of that mistake of the *Braga*, was obliged to starboard also. The case of the *Braga* is a little more complex, it being that she not only did port, but was the first to do so, and that she did starboarded after the *Repeater* had done so, and to avoid the consequences of that error. It is to be observed upon the view of these two cases, but that while that of the *Braga* admits that the *Repeater* ported, the case of the *Repeater* totally denies that the *Braga* ported at all; and, secondly, two issues are knit by them—the first, and the most important one, namely, whether the *Braga* ported or not; secondly, if she did port, which vessel was the first to starboard. Now, the case of the *Braga* having distinctly tendered these issues, negatived altogether by the corroborative evidence of the *Repeater's* witnesses and case, it becomes necessary to examine details in the evidence of the *Braga's* case, and to decide how far these may be consistent and uniform with each other. Now, then, to test the accuracy of the master's evidence. His statement was, that he had ported half a minute earlier than the *Repeater*; but he has also stated that when first coming on deck he saw the *Repeater* falling off, and sent the mate aft to see how his helm was, and knew the shift of his helm only upon the mate coming back and reporting it to him. How, then, can he be considered a reliable witness as to having ported before the *Repeater* had, when by his own admission he did not know how his own helm was, when he was looking at the *Repeater* already under a port helm? Again, he states that he had opened the three masts of the *Repeater* fifty seconds after he had ported, and kept them in view for half a minute before he starboarded, thus making his time under a port helm to be just one minute and a half, whereas the man at the wheel, who should be best informed on that point, makes it but three quarters of a minute—just half the time. Again, the master states that his vessel answered her port helm

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luffed up about one point; but Hampton, who was on deck with him at the time, says that he (Hampton) could not see the *Braga* was under the influence of a port time. Again, the master's evidence is, the *Repeater* luffing up before he gave the order to starboard; but Hampton, on the other hand, states that when he gave the order to starboard he saw the *Repeater* coming up. These may appear to be (at least) minute criticisms, but borne in mind that such must necessarily be—minutes—even half-minutes—are of no value in the investigation of a transaction first to last, occupied but three minutes besides, they test the accuracy of the four witnesses produced on the part of the *Braga*, three are thus contradicting each other on the points at issue; and upon the evidence (the court should be slow to rely) on account of the simulation of the *Repeater* in order to be examined in that respect, the witness ignorant of the English language, Court, however, having called for, and read from it the *Braga's* log, will now read from it the occurrence, and prefacing it so doing in the language of Lord Stowell, when, in the *Eleanor*, that great judge was about to testify of witnesses by the entries in the log, he said: "Witnesses, when they fact, may, perhaps, be aware it has point of consequence, and may qualify its of past events so as to give a colour to it. But the journal (the log) is in the hands of, and by persons unacquainted, with any intention of fraud, and may be securely relied upon, whenever it is not the prejudice of its authors." Now, the question is as follows: "On the 27th of the month, at seven o'clock a.m., put a man on board, and about eight o'clock the man on board called out, 'Hard a-port'; and as the ship at breakfast, came out in a hurry on the part of the stranger in sight on starboard bow, when we got to see the stranger, it seemed to me that she was falling off, but in a moment bore down on us, and we then resolved to put the helm hard to starboard, if possible, to prevent the collision; but the *Repeater* was too close to each other, and it was impossible to escape the collision. The *Repeater* struck her bow on our starboard bow, which our waterstay martingale, and got our anchor adrift, and split some of the plating on our starboard bow. We saw the mastsprit and jibboom break away after the collision, which was only a moment, and we were left in a state of confusion." The entry just read establishes beyond doubt the following most important facts, that the look-out had been only just a few minutes before the collision occurred, that the *Braga* being that she sighted the *Repeater* at half-past seven; secondly, that when she was sighted she was already under her mainmast and falling off; thirdly, that the *Braga* had the evidence of Kane, the man at the helm, that the *Braga* had not ported at all, and that the *Repeater* not only falling off, but also, off her own starboard bow; and, fourthly, that the log is not only silent upon it, but also, and saving point, but only and we then determined to hard a-starboard, and under their weather or starboard helm; that she not only kept a-starboard whilst the *Repeater* was off her starboard bow, but put hard to starboard; and so it is thus truly stated in the log, that the *Braga* turned with her bow on our starboard bow. The clear conclusions from the previous

observations and from these entries is, that the *Braga* sighted the *Repeater* too late to port with any effect, and in order, to use the words of her own log, "to escape" (not lighten) the collision, put her weather helm hard a-starboard and never ported at all. If the court had entertained any doubt on this, it has been altogether removed by the opinion formed all through by the learned assessors who assisted the court, and who hold that, had the helm of the *Braga* been ported, as stated by her witnesses, and then starboarded, as also stated by her witnesses, the collision could not have taken place upon the starboard bow of the *Braga*, but must have occurred upon her port bow. Under all these circumstances, and with the full concurrence of my assessors, I pronounce the *Braga* to be solely in fault for this collision, for not having ported her helm, in compliance with the 11th article of the Sailing Rules, to which her country's ships are subject, whether within British jurisdiction or not, by convention between the King of Norway and our British Queen. I therefore make my decree accordingly, and with costs of suit.

The Court was assisted by Capt. Miller, of H.M.S. the *Royal George*, and Capt. Crosby, R.N.

UNITED STATES DISTRICT COURT OF ADMIRALTY.

Reported by E. D. BENEDICT, Proctor and Advocate in Admiralty.

SOUTHERN DISTRICT OF NEW YORK.

THE MORNING STAR.

Savage—Corporation formed for salvage purposes—Quantum meruit.

A steamer valued with her cargo at 290,000 dols. ran aground on Deal Beach, about forty miles from New York city. A company formed expressly for the purpose of carrying on the business of wrecking and salvage, but employing masters and crews on regular wages and giving them no share of whatever compensation they received, applied to the owners of the steamer for the job of getting her off. They were asked what would be the cost of sending the assistance, and answered 2000 dols. or 2500 dols., whereupon they were employed, and sending down two schooners with heavy anchors and cables they, in about twenty-four hours work, got the vessel off and claimed 15,000 dols. salvage:

Held, that such a corporation could not have the characteristics of a salvor:

That if their compensation were to be given as salvage, they could only have the owners' share of what would be proper salvage:

That the compensation should be a quantum meruit.

Decree for 2500 dols.

The *Morning Star* was bound on a voyage from New Orleans to New York with a valuable cargo worth 140,000 dols., including 60,000 dols. in specie. Early on the morning of July 1, 1868, the wind being light and the sea smooth, but the atmosphere being misty and obscure, she grounded on the coast of New Jersey, near Deal Beach. The ship without her cargo was valued at about 150,000 dols. She went on the beach with so much force as to be unable to be got off without help. The libellants were the Coast Wrecking Company, a corporation incorporated by the laws of the State of New York, having authority by their charter to hire or own vessels manned and equipped, to be employed in towing, aiding, protecting, and raising vessels and their cargoes wrecked or in distress, whenever such wreck or distress occur, and to receive compensation

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tion or salvage therefore in like manner as private persons, and entitled to like liens and remedies.

The location of their business was in New York city, between thirty and forty miles from the place of the wreck of the *Morning Star*, but in familiar communication with the cruising localities of the vicinage. Their business was conducted exclusively by vessels, equipments, and materials paid for out of the corporate funds, and the officers and men on board those vessels did not participate personally in losses or gains springing out of their employment, but received payment in *solido* out of the funds of the corporation, as in ordinary cases of hiring. An agent of the libellants learning of the grounding of the steamship, applied to the master to employ the libellants to get her off. Other applications to the like effect were made by other parties. About noon of the same day, Mr. Merritt, another agent of the libellants, called upon Mr. Hubbard, the secretary and treasurer of the company, which owned the ship, at their office in New York, and solicited the employment of the libellants to get her off, giving the strongest assurances of their ability and readiness to perform the work promptly. Mr. Hubbard made some inquiries of other parties as to the sufficiency of the libellants. He testified, on the trial, that he had inquired of Merritt what would be the cost of sending down the relief vessels, and that Merritt told him that he could not tell the cost, but the president of the company could tell him, and that accordingly he went to the libellants' office, where he saw the president, or some officer having charge, who told him it would cost 2000 dols. or 2500 dols., and assured him that they had every apparatus for doing the work quickly and well, &c. Mr. Merritt and the president of the libellants' company both testified that they had no recollection of these conversations of which Mr. Hubbard testified. On Mr. Hubbard's return from making his inquiries he gave to Merritt a letter of introduction to the captain of the vessel, informing him that the libellants had been employed to get the vessel off.

Mr. Merritt accordingly, after dispatching two schooners with heavy anchors and cables to the place, went himself overland, arriving at the wreck before dark and delivered his letter to the captain. The passenger and crew had all been landed and the 60,000 dols. specie, which latter Mr. Merritt advised the captain at once to send to the city by express, and this the captain did. The schooners arrived during the night, and the next morning the work was commenced, the officers and crew of the *Morning Star* aiding with all their power, and on the next morning the vessel was got off, and being found to have sustained no serious injury, got up steam and came up to the city by her own power. The libellants claimed salvage for services, claiming 15,000 dols.

Hand (with whom was *Marvin, J.*), for the libellants, after arguing the questions of fact as to the employment of the libellants, argued that the main question was as to the amount of salvage. That the great increase of the commerce of the port, and the increase in the value and size of the vessels employed, have given rise to the necessity of having on hand greater facilities for saving vessels which get ashore in the neighbourhood. The libellants respond to this necessity of commerce. Anchors and cables of ordinary size, common ships' pumps, common tug-boats, and other ordinary instrumentalities, can no longer be relied on to get off from the beach ships of the immense size now built. Anchors and cables of extraordinary size and strength are needed, with the proper facilities for carrying them out. Steam-pumps throwing 30 and 80 barrels of water a minute are now employed by this company. It is submitted

that the court should respond in like manner to the exigencies of commerce, and give reasonable encouragement to the company by its award of salvage. The case contains every element of very meritorious salvage services, entitling the salvors to the favorable consideration of the court. First, the ship was of no value where she lay. She was in imminent danger of total loss by the action or washing of every tide. Secondly, she was got off in the shortest possible time by the use of anchors and cables of extraordinary size, and by the exercise of the best professional skill of professional salvors. Thirdly, the salvors are a company organized for the purpose of rendering salvage services, having their capital invested in vessels, anchors, cables, steam-pumps, hoisters, and other apparatus built and kept on hand at large expense ready at all times for use with the necessary agents, servants, and crews. The court cited the case of the *Delphos*, 1 Newberry Ad. Rep. 412, in which on a valuation of 50,000 dols. the District Court of Louisiana awarded 45 per cent. and the case of the *Independent*, 2 Curtis Rep. 330, in which 7500 dols. was decreed on a valuation of 201,000 dols. to a tow-boat for towing a vessel out of a dangerous position in twelve hours.

E. C. Benedict and R. D. Benedict, for the claimants, argued that the agreement was made for not more than 2500 dols. The libellant is a corporation *not* individual; it cannot of itself be an actual salvor; it cannot go to sea or command a schooner. It cannot have any humanity, any activity, or any zeal. It cannot pull and heave, or pump or risk its life and health. The most it can do is to own property which can be used in performing salvage services. The men who worked in getting this vessel off are the actual salvors if there be any. But they, no matter how skilful and faithful, were not salvors in any proper legal sense. They were, every one of them, the hired servants of the libellants, working for wages and nothing else, and expressly agreed not to be entitled to salvage compensation. There was not a person connected with the undertaking who had the characteristic qualities of salvors. There was no zeal, spurred by self-interest, no temptation to risk, or daring, or hunger, or toil, or exposure. They were only hired by the month or year to do a fair day's work for a fair day's wages. When parties so arrange their business that there are no living acting parties who can earn a contingent compensation, there can be no salvage to divide. They must then all be content with their wages, and reasonable compensation for the use of their implements, and for this the 2500 dols. would be an allowance at extravagant rates. Or if the court may give salvage, at least the libellants would not be entitled to recover the shares due to the individual salvors, but only the share usually given to owners of saving vessels. The case of the *Delphos* cited by libellants, is just such a case, the court decreeing to the owners one-third of the 45 per cent.

By the COURT.—As to the question whether any rate of compensation was named to Mr. Hubbard, the positive testimony of one witness to the transaction must outweigh as proof in the cause the non-recollection of the libellants' witnesses only alleging their want of any recollection of the fact. Moreover, there is an inherent probability in the circumstances that Mr. Hubbard's testimony is entitled to credit in the relation he gives of his interview with the agents of the libellants. They, in all their treating for the employment of their instrumentalities on the part of the *Morning Star*, despatched *expressly* upon the special adaptation of the libellants' equipments for that particular service. Their agent had, moreover, *valued* the

Star after she grounded; they knew her well, and the description and quantity of which would be required for her relief, of the coast, the tides and currents there, and they were strenuous suitors for employment. It would in such case be most apt that the owners of the ship would be charged for the undertaking; and equally that the libellants would be not less prompt to furnish an answer to the inquiry. And it be remarked that no evidence has been produced in court, after a sharp litigation in the cases, to demonstrate that 2000 dols. or 2500 was not an adequate compensation for the services actually rendered by the libellants. In addition to those considerations, the claimants furnished gratuitously their entire ship, officers, crew, and equipments, to the libellants, in aid of the wrecking operations, during the whole period the work was in progress. It is furthermore a circumstance of weight, evincing that the alleged salvors did not regard their services as purely of a salvage nature, that they, on arrival at the beach with the vessels to commence their work upon the wreck, advised the master of the *Morning Star* to send by the Express Company to New York the 60,000 dols. of specie, part of the cargo of the wreck, to avoid the danger of its loss if remaining with the ship, which would be a very unusual proceeding if the libellants regarded their operations to be a salvage of the ship and cargo. I am persuaded accordingly that the undertaking in its inception, as manifested by the conduct and intercourse between the parties, was upon the understanding that the compensation for the services to be rendered was upon the basis of a *quantum meruit*, under a limitation that the reward was not expected to exceed 2500 dols. It is quite competent for parties interested to agree upon a stipulated sum as a salvage reward for salvage services: (Marvin, Wreck and Salvage, 128, s. 119.) The agreed compensation is binding upon the salvors, and remains salvage, although limited to an amount agreed and stipulated between the parties. When an agreement is to perform labour upon a vessel in distress for a compensation to be paid at all events, whether the vessel be relieved thereby from peril or not, such agreement displaces a claim of salvage purely (*The Whitaker*, Sprague's Decisions, 282); and a *quantum meruit* is recoverable for the services. In that position of the arrangement the libellants, had their efforts to save the vessel been fruitless, would not have lost their labours and expenditures, but could have resorted to the equity of the proposition made by them to the claimants, and accepted by them, or receive the reasonable worth of the labour and disbursements made by them on the business. The corresponding acts of the parties were in fair accord with such reasonable meaning. The several parties met in his relation. The libellants had visited the stranded ship, made themselves acquainted with her exact position by inspection, and through their business, calling, and pursuit, fully understood the character and degree of help she needed, and requested to be employed in performing the service. The claimants asked what would be the cost of her work, and the libellants replied from 1000 dols. to 2500 dols. Upon that statement the claimants immediately placed the ship in the hands of the libellants' agent, who performed the job without loss or accident in a few hours' labour at the daytime, after he had reached the ship. These contracting parties, personally wholly strangers to each other, as it seems, transacted the business treated about in the most direct and summary manner; very much, I apprehend, as if it was regarded between them to be a direct bargain, con-

clusively closed by the few words interchanged between them at the time of interview; no difference of relations between them being contemplated after the ship was so placed in charge of the libellants, until their services were finished, and I consider that their rights towards each are now precisely as they would have been had the libellants literally fulfilled their agreement by going to the wreck at the time stipulated, and performed what they represented they would do (and actually did, two days afterwards), fastened their towing apparatus to the stranded vessel and drawn her harmless off the bank where she lay grounded. I consider therefore (as it appears by the proof) that the vessel was placed by the claimants in charge of the libellants, and was accepted by the latter as a bailment, for their labour to be performed by the latter, and thus consummating the contract *in presenti* by mutual delivery and acceptance between the agents of the respective parties. The libellants insist that the property being then in a state of wreck went into their possession in that condition, and was held by them under obligation of her owners implied by law, that the libellants should be recompensed for its rescue and restoration conformably to the principle recognised and enforced in cases of salvage at sea. On the contrary, the claimants maintain that the libellants together with others were suitors for the same job, and that it was notorious at the place of the disaster that the matter of furnishing relief to the steamer aground was subject of pursuit and solicitation between different applicants, and that the business had been allotted to the libellants. But I am not called upon to declare that the negotiation on the subject between the agents of the parties resulted in a formal contract which was capable, in case of any failure of either to carry it into execution not proceeding from his fault, of being pleaded and enforced as absolute against the other; not but that, in case the fulfilment of the arrangement on either side had been prevented by inevitable accident, the court might not administer the engagement as equitably one of a *quantum meruit* character, and afford relief to the libellants in proportion to the benefit bestowed by their labours and judicious conduct in the undertaking, though ultimately fruitless in its results. This would be quite compatible with the arrangement preliminarily adopted between the parties, considering it not regarded by either as absolutely of a salvage character. Then the interpretation of the proposition made by the libellants' agents to the agent of the claimants, and accepted by the latter, to pay 2000 dols. expenses for services to be rendered, and up to 2500 dols. if so much was earned, would enable the court to secure each one a reasonable remuneration out of the enterprise, and take from it the hazard of a total loss of labour and expenditure by a failure of complete success in the whole undertaking. The conduct of the libellants during the transaction indicates they did not regard their standing therein to be that of technical salvors; they accepted the injured steamer, her master, officers, crew, equipments, apparatus, engines, &c., as gratuitously contributed to the common service; they assented to, and, indeed, advised, that the claimants, before the forces provided for the relief of the stranded ship commenced operations upon her, should take from her the 60,000 dols. part of her lading on board, and send it from the place of the wreck by the express company to New York, which proceeding very little comported with a consciousness of holding the right of an inchoate salvor upon that value of cargo on the ship at the time of her wreck; and so also did the fact that the relieving vessel, the moment she had drawn the *Morning Star* from the sandbank, and her fires could be lighted and steam

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raised, delivered her up to her captain and crew, by whom she was navigated to her own berth at the New York docks. The counsel for the libellants urge most strenuously the great value and costs of the salvor vessel and her equipments and appliances employed by them in the services rendered on the occasion in question as a particular entering into the augmentation of the recompence to which the libellants are entitled, under the rules of evidence governing allowances to salvors by admiralty tribunals. That principle has been invoked as pervading and largely influential in favour of suitors throughout the administration of salvage laws in European and American jurisprudence, emphatically in encouragement of the modern practice followed by these libellants of putting in use vessels and crews of large and expensive completeness and fitness for the special business of saving vessels and cargoes by giving them open countenance through a distinctive grant of extra compensation, because of the remarkable completeness of their apparatus and ship's crew, and their energy and faithful conduct in perfecting the salvage of the *Morning Star*. They thus ask to have imputed and appropriated to this corporation, by the way of enhanced rewards imposed upon the wrecked, all moral and physical merits and personal gallantry and hazard, recognised in the books as justifiable causes for inflated compensation to individual salvors for services of high value and personal merit, and hazard on special exigencies. But I perceive no legal reason or justification for applying the rule referred to, however sanctioned in respect to individual salvors in cases of personal exposure of life or property, to corporate bodies having a figurative vitality imparted by positive law, and giving aid only on fixed wages. However much of commendable worth and heroism may have been displayed in fulfilling their stated services, the actors therein, on fixed wages, however faithful to their duties, would not be entitled in distribution out of the gratuities asked for from the judgment of the court, to one tittle of reward personally, but the bounty must be exclusively allotted to the corporators typified by positive law to be actual owners and actor in the transaction, and imbued with the sentiments and emotions of the liveliest humanity, but in reality actuated by no higher or other merit in acts of a salvage character than the fire insurer is in paying up his forfeited policy of insurance. Subordinate courts of admiralty jurisdiction will be apt to await the declaration of such rules of decision by tribunals of ultimate authority before pronouncing such to be the established law of salvage recompence, in respect to the distributive rate of reward to the owners of property used in effecting a salvage service. It can scarcely be assumed as a presumption of law that stock shares of a corporate body are imbued with faculties and emotions, moral or intellectual, of a higher order than the inert material whose value they represent by positive statute in a distributive dividend. In my opinion, had the engagement between the parties in this case been, as alleged in the libel, a plain contract for salvage services, the measure of compensation to be distributed to the libellants would be none other than the proportion legally pertaining to the property put in hazard by the service; and no fiction of law can be invoked vivifying the symbolical corporation into an assemblage of vital salvors, exercising the motions and faculties of living men consummating a meritorious salvage achievement, and thus becoming individually entitled to a fitting reward therefore. My conclusion upon the whole case is, that the employment of the vessel, her crew and apparatus, was in the first instance obtained by the importunity of the libellants for their own pecuniary interest, and with the same knowledge in all particulars, respecting the

subject of negotiation, as was possessed by the claimants. That the services proposed to be performed by the libellants were for a consideration limited to 2500 dols.; and if upon equitable considerations, or on subsequent alterations of facts in relation to the subject of the bargain, great changes had occurred in the nature of the services to be performed, rendering it onerous and inequitable for the claimants to enforce such limitation of the sum to be paid to the libellants, yet there is no proof given in the cause showing that any such alteration did afterwards occur, or that the libellants are entitled to more for their labours and hazards than the sum upon which they were offered and undertaken. Wherefore a decree must be entered for the libellants for 2500 dols., with interest from Aug. 3, 1863, and costs of suit. The interest and costs of suit might have been barred by the claimants had they tendered satisfaction of the bargain at the price upon which it was undertaken by the libellants.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SALTERS, Esqrs.,
Barristers-at-Law.

Friday, June 1, 1866.

SOMES AND OTHERS v. JENKINS.

Ship—Freight—Broker—Principal.

T., a shipbroker, engaged shipping room in the *pls.* ship for goods. *T.* sent on the *pls.* usual advertising card for freight to *def.*, with a note of the quantity of freight he had engaged for. *Def.* then shipped the goods and took the mate's receipts with *def.*'s name as the shipper. *Def.* sent these receipts to *T.* with a set of bills of lading in his usual form, in which his name appeared as shipper of the goods. *Pls.* then procured the captain's signature to the bills of lading and returned them with a freight-note to *T.*, debiting *def.* as the shipper with freight. *T.* sent on the bills of lading to *def.* without the freight-note, but making out another freight-note. *Def.* afterwards paid *T.* the freight.

By the custom of the port the shipowner may retain the bills of lading until payment of the freight, when the freight is made payable there, or may part with them, and then the shipper has two months' credit from the sailing of the ship.

After the payment to *T.*, and before the two months' credit had expired, *T.* stopped payment:

Held, under the circumstances that *def.* was liable to the *pls.* for the freight.

This action was brought to recover 108*l.* 5*s.* 7*d.* for freight of 330 hogsheads of beer from London to Bombay, per ship *Star of India*, and primage thereon.

The *pls.* are shipowners of London, and the *def.* is a brewer at Lambeth, trading as Goding, Jenkins, and Co., who had contracted with the Indian Government to supply beer at Bombay, Kurrachee, and Madras.

On the 14th Sept. 1863 a shipowner and broker named Thomson agreed with the *def.* to provide ship room for the conveyance of the beer at 2*s.* per tun of four hogsheads and 5*s.* primage, payable in London at two months after the sailing of the vessel.

The *pls.* did not know of that agreement, but believed Thomson was acting as broker for the *def.* in the usual way.

Part of the beer was carried in ships belonging to Thomson and part in ships in which he engaged ship room.

On the 5th July 1864 Thomson engaged shipping

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room in the *Star of India* for 330 hogsheads of beer at 25s. tun, freight payable here. He sent to the deft. the plts.' card as to the sailing of the ship without informing him of the rate of freight, but intimating the number of hogsheads he had engaged room for.

When freight is payable here the shipowner may require settlement of the freight before parting with the bill of lading for the goods shipped, if he be not satisfied with the credit of the shipper.

On the 11th July the deft. shipped the 330 hogsheads of beer, and took the mate's receipts for them, which were forwarded by the deft. to Thomson. They stated the goods to have been shipped by the deft.'s firm.

A set of bills of lading in a printed form stating the shipment to be by the deft. were sent by deft. to Thomson, who having filled up the blank, sent the same to the plt.'s brokers for signature by the captain.

The captain's signature was procured and the brokers made out the freight-note :

Lion	591	150 hhd.	Tons.	25s.	103 2 6
(G. J. & Co.)	740	180	82		5 3 1
Various.					

GODING, JENKINS, and Co., £108 5 7
Per Thomson and Co., Order.

The bills of lading so signed and the freight-note were taken up by Thomson and exchanged for the mate's receipts which were handed by him to the plt.'s brokers.

Thomson then forwarded the bills of lading to the deft.

The ship sailed and duly arrived at Bombay with the cargo, and the beer was delivered to the indorsees of the bills of lading from the deft.

On the first Saturday after the two months from the ship's sailing, application was made to Thomson for the freight, and as he did not pay afterwards to the deft., who refused to pay on the ground that he had paid the amount of the freight note to Thomson.

The freight note sent by the plts.' brokers to Thomson, was not sent on by him to the deft., but instead thereof another made out by Thomson as follows:

Messrs. Goding, Jenkins, and Co.,
London, 16th July.

Drs. to freight, &c., per ship *Star of India*, Capt. Holloway, for Bombay.

330 hhd. beer, 8½ tuns, at 28s. 115 10 0
Primage 5 15 6

£121 5 6

Bombay contract, No. 2, due 17th Sept.
PATRICK THOMSON and Co.

The deft. paid that freight to Thomson on 1st Aug. 1864, but plts. had no knowledge of this.

Bovill, Q. C. (T. Jones with him) for the plts., and

Mellish, Q. C. (Cohex with him) for the deft. :

Greaves v. Legg, 2 H. & N. 210 ;

Sweeting v. Pearce, 5 L. T. Rep. N. S. 79.

BLACKBURN, J.—I am of opinion that the plts. are entitled to recover this freight from the deft. If Thomson had in point of fact been acting as broker, and the deft. was his principal, there could be no doubt about the plts.' right to recover. But in Sept. 1863 there was an agreement between Thomson and the deft., by which Thomson engaged to find shiproom at the rate of 28s. per tun for a quantity of beer to be supplied by the deft. The fact of this agreement having been made was not known to the plts. when Thomson agreed for sending out the beer by the ship in question. The deft. then shipped the beer in plts.' ship, and took the mate's receipts. After that he sends the mate's receipts and bills of lading in which his name appears as the shipper of the goods to Thomson, who fills up the

rate of freight he had contracted for, and sends them on to the plts.' brokers to procure the captain's signature. The bills of lading with the captain's signature and a freight-note are then sent to Thomson; but that freight-note is not brought home to the knowledge of the deft. By the usage of London, when freight is payable in London, the shipowner is not bound to give up the bills of lading, but may retain them until the freight is paid if he be not satisfied with the credit of the shipper, or he may part with them, and then two months' credit for payment of the freight is allowed. It was said that the deft. was not cognisant of this usage. It is not, however, necessary to decide whether that circumstance is material or not, because by law the shipper of goods at a particular port is to be held to deal with the shipowner according to the usage and custom of the port, and the shipowner has a right to treat the shipper as if he knew the usage and custom. It would be most inconvenient to hold otherwise, and the business of a shipowner could scarcely be carried on if he had a right to charge those persons only who might know, and not those who did not know of the custom and usage of the port. The deft. took back the bills of lading in this case, and paid the freight to Thomson without making inquiry of Thomson about the matter. As it turned out Thomson stopped payment. Under the circumstances, I think the plts. have a right to say to the deft. that they parted with the bills of lading to him, taking his promise that he would pay the freight, and, therefore, that they are entitled to recover.

MELLOR, J. concurred.

SHEE, J.—I am also of opinion that the plts. are entitled to recover. The learned judge recapitulated the facts, and said that it was quite consistent with all that appeared that Thomson was acting merely as the agent of the deft. in the shipment of the goods by the *Star of India* ship; and being of opinion that he so acted as agent, the plts. were entitled to recover.

Judgment for the plts.

COURT OF COMMON PLEAS.

Reported by W. MAYN and W. GRAHAM, Esqrs.,
Barristers-at-Law.

Feb. 9 and 16, 1866.

SEAGRAVE v. THE UNION MARINE INSURANCE COMPANY.

Marine insurance—Insurable interest—Broker taking bill of lading in his own name—Amendment.

The plt.'s firm, brokers and commission agents at Liverpool, shipped goods, the property of D. and Co. of Liverpool, for whom they were in the habit of selling, in the *Ann* and *Isabella*, for Londonderry. The goods were intended for M. of Londonderry, but in consequence of certain letters which had passed between the plt.'s firm and M., and in which a question had arisen as to the price, the plt.'s firm took a bill of lading in their own name which they forwarded undorsed to the plt., and who was then in Ireland. The plt. saw M. on Saturday the 7th March, when they had some conversation about the goods. On Sunday the 8th March the *Ann* and *Isabella* was totally lost, and on Monday the 9th the plt. and M., before they had heard of the loss, entered into what they described as the final contract for the sale of the goods, and M. gave the plt. a bill for the price which has since been satisfied. The plt. and M. had both insured the goods, and M. subsequently brought an action against his underwriters and recovered the value of the goods, it being held that the

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letters passed the property to him. The plt. in this action alleged interest in himself and sought to recover an amount which was made up of the following items, viz., 50*l.* of the verdict obtained by M., and not paid, 49*l.* extra costs in the action brought by M., 104*l.* the difference between the interest M. recovered and what he had to pay his own bankers in order to raise money, and 20*l.* travelling expenses.

The plt. had never had the goods in his possession except for the purposes of shipment. At the trial the Judge told the jury, as a matter of law, that the plt. had an insurable interest as an unpaid vendor with a bill of lading making the goods deliverable to him or his assigns, and the jury having found that the final contract with M. was made after the loss, a verdict was taken for the plt. :

Held, that the above was a misdirection; that the plt. had no insurable interest, and that he was not entitled to amend the declaration by alleging interest in D. and Co., his principals, as the action was brought for M. and not for D. and Co., who had been paid.

This was an action on a policy of insurance on guano valued at 1150*l.* in the ship *Ann and Isabella*, from Liverpool to Londonderry. The policy, after reciting that George Seagrave and Co. had represented to the defts. that they were interested in the insurance thereinafter mentioned, &c., witnessed that, in consideration of the premises and of the sum of 5*l.* 15*s.*, "the said company promises and agrees with the said Geo. Seagrave and Co., their executors, &c., that the said company will pay and make good all such losses and damages hereinafter expressed, as may happen to the subject-matter of this policy, and may attach to this policy in respect of the sum of 1150*l.*," &c.

The adventures and perils were stated to be "of the seas, men-of-war, fire, enemies, pirates, rovers, &c.," and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matters of this insurance or any part thereof."

The declaration was as follows :

That by a policy of insurance, bearing date the 4th March 1863, made between the plt. and the defts., they the defts., in consideration of certain premiums payable to them by the plt. in that behalf, promised the plt. to pay and make good all such losses and damages as might happen by perils of the seas on a voyage from Liverpool to Londonderry, to certain guano valued at the sum of 1150*l.* warranted free from average unless general, or in consequence of the ship being stranded, sunk, or burnt, in the ship called the *Ann and Isabella*, beginning the adventure from the loading of the said goods on board the said ship at Liverpool aforesaid, and continuing until the said goods should be discharged and safely landed at Londonderry; and the said ship with the said goods on board sailed on the said voyage, and the plt. was then and thence until and at the time of the loss hereinafter mentioned, interested in the said goods to the amount of all the moneys by him insured thereon, and whilst the said ship with the said goods on board thereof was proceeding on the said voyage, and during the continuance of the said risk, the said goods were by the perils insured against wholly lost, and before suit all conditions were fulfilled, &c., necessary to entitle the plt. to be paid the 1150*l.* by the defts., yet the defts. have not paid the same.

Pleas, non assumpsit, and that the plt. was not interested in the goods or any part thereof as alleged, and issue thereon.

At the trial before Martin, B., at the last Spring Assizes at Liverpool, it appeared that the plt. was a merchant at Liverpool carrying on business in partnership with his two brothers under the style of George Seagrave and Co., as brokers and commission agents. A Mr. McCarter, a merchant at Londonderry, had been in the habit of purchasing large quantities of guano from the plt., and it had been their custom to arrange the price at the beginning of the season, which regulated the price for the whole year. On the 14th Feb. 1863 McCarter wrote to the plt.'s firm as follows :

Gentlemen,—I duly received yours of the 11th inst. and feel obliged by your attention. I had twelve tons of your guano

on hand, and will not require any before 1st May; but it serves you in any way to ship 100 tons soon, payable on the above date, you may do so, providing freight does not exceed 6*s.* 6*d.*—Truly yours, Wm. McCarter.

To this the plt.'s firm replied as follows :

Dear Sir,—In accordance with your favour of the 14th Feb. we have now the pleasure to inform you we have succeeded in fixing the schooner *Ann and Isabella*, of Arbroath, to carry about 115 tons at your limit of 6*s.* 6*d.* per ton. We expect to have the cargo on board by the middle of next week. We presume we may value upon you at six months from the date of shipment, calculating it as a cash payment at the rate of 10*l.* per ton on the 1st May, i. e., charging you interest from this latter date till the due time of the bill. You will have learned from the analysis the continued improvement in the intrinsic value of the phospho, which now, according to Dr. Apjohn, places it beyond comparison as the best manure for price in the market, and as you were one of our first customers in Ireland, we hope you will succeed in taking full advantage of the increased popularity which is sure to be caused by the more extensive use of the phospho guano this year.—We are, &c., Geo. SEAGRAVE and Co.

P. S.—Please say if you purpose effecting insurance at your end.

On the 2nd March McCarter instructed a Mr. Joyce to effect an insurance on the cargo for 1200*l.*, and Joyce, in pursuance of his ordinary course of business, gave him a memorandum of which the following is a copy :

Marine Insurance Agency, Belfast Bank.

Derry.—March 2, 1863.

Memorandum.—Wm. McCarter, Esq., is insured for 1200*l.* per *Ann and Isabella*, from Liverpool to Derry, by a declaration on an open policy per ship or ships for 10,000*l.* effected at Lloyd's, London, and dated 13th Jan. 1863, on guano valued at 1200*l.* at 10*s.* per cent. J. J. JOYCE, Agent.

On the 3rd March McCarter replied to the letter of the 26th Feb. as follows :

Gentlemen,—I am favoured with yours of the 26th and 27th Feb. You say "We presume we charge you 10*l.* a ton net cash on 1st May, and interest on draft from that date." I really cannot understand this when I know that Mr. Lawson supplies your guano in Scotland at 9*l.* 15*s.* net there to dealers; besides, I look on heretofore for the special allowance made to me at the origin of our transactions, and now that you are making some changes it may be as well that I should know how we are to get on for the future. I should be sorry indeed to appear unreasonable in my demands, but you will admit that there is no one in this country has a prior claim on you. I thank you for the mushroom spawn. If your Mr. Geo. Seagrave could send me half a dozen nice flowering shrubs, including verbena, in charge of captain, I'll do as much for him.—Ever yours, W. McCarter.

Messrs. G. Seagrave and Co.

The plt.'s firm received this letter on the 4th March, and, having shipped the cargo on the previous day, obtained from the captain a bill of lading, making the guano deliverable at Londonderry "unto the order of George Seagrave and Co. or their assigns," and on the same day they made out an invoice on a printed form as follows :

Liverpool, 4th March 1863.

Particulars of phospho guano delivered to account of W. McCarter, Esq., Londonderry, by George Seagrave and Co. Liverpool.

Terms net cash.

Per *Ann and Isabella*, of Arbroath.

The *Ann and Isabella* sailed on the 5th March. The bill of lading was sent to the plt., who was at the time in Ireland, and who arrived at McCarter's house on a visit on the 7th March.

On that day they had some conversation about the guano, and on the Monday morning, 9th March, they walked together to McCarter's office, where they had some further conversation, and the plt. then handed the bill of lading to McCarter, who accepted a bill of lading for the price, and told the plt. that he had effected an insurance on the cargo. On the same day they learned that the *Ann and Isabella* had been totally lost on the evening of Saturday the 7th.

The plt.'s firm were acting as agents for Messrs. Dixon, of Liverpool, who were the owners of the guano, and it was never in the possession of the plt. except for the purposes of shipment.

An action was subsequently brought by Joyce, as agent for McCarter, on the policy effected by

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McCarter, on which the underwriters contended that there had been no complete bargain between the plt. and McCarter so as to pass the property to the latter; the jury in that case returned a verdict for the plt., which was upheld in the Court of C. P. (see *Joyce v. Swann*, 17 C. B., N. S., 84); but in that case the plt. was not called as a witness, and McCarter said that he and the plt. concluded the bargain on Saturday the 7th March.

On these facts it was submitted, on behalf of the defts., that the plt. had shown that he had no insurable interest, on two grounds: first, that Messrs. Dixon were the owners, and that there was nothing on the facts to show that the plt. had an insurable interest; and secondly, that the goods were sent by Messrs. Dixon to the plt.'s firm, and not to the plt. in his own name. It was also objected that the declaration did not set out the policy correctly.

Martin, B., in summing up, told the jury that he was prepared to hold that the plt. had an insurable interest by virtue of the bill of lading, and left to the jury the question whether there was before the 9th March any complete contract between the plt. and McCarter for the purchase of the guano, which the plt. could have hostilely enforced against McCarter in the ordinary case of goods sold and delivered, and goods bargained and sold. The jury found that there was not, and a verdict was thereupon entered for the plt. for 220*l.*, a sum agreed upon between the parties, which it was understood included 50*l.* which McCarter had failed to recover from an underwriter, extra costs in the action of *Joyce v. Swann*, and other incidental expenses.

It was agreed that it should be open to the defts. to move on any point except as to the amount of the damages.

Temple, Q. C. in Hilary Term obtained a rule for a new trial, on the grounds, first, that the judge misdirected the jury in telling them that the facts proved established a sufficient insurable interest in the plt.; secondly, that there was no sufficient evidence of an insurable interest in the plt. to entitle him to recover; and thirdly, that there was a material variance between the policy as set out in the declaration and the policy proved, in this, that the declaration alleges the insurance to be absolute and unqualified, whereas the policy contains the qualifying words following, "such losses and damages hereinafter expressed as might happen to the subject-matters of the policy, and might attach to the policy."

Brett, Q. C., Mellish, Q. C., and Potter now showed cause.—The issue was, whether McCarter was interested in the goods, and the judge properly left the question to the jury whether the final contract was made before or after the loss. The jury found that it was after the loss, and therefore that the letters did not pass the property. The court is not called upon to overrule the decision in *Joyce v. Swann* (*ubi sup.*), as, though the contract is the same, the parties are different and the evidence is different. Two persons may have an insurable interest, and it does not follow that because one has another has not. In *Joyce v. Swann*, Seagrave was not called, and the evidence was that the contract was made on the Saturday night; but here Seagrave has been called, and the jury have found that it was made on the Monday morning after the loss. Assuming that there was a contract with McCarter that would give him an insurable interest, it does not follow that there was none in the plt. The plt. is a commission agent, and has guano sent to him to sell; he proposes to sell to McCarter at 10*l.* a ton, and McCarter, in his letter of the 3rd March, objects, and proposes 9*s.* 15*s.*, and asks for an allowance; therefore, as a proposition of law, those letters make

no contract. The goods are shipped by Seagrave, and he takes a bill of lading in his own name, and makes himself liable for the freight, for the very purpose of reserving to himself the right of dealing with McCarter, and the jury have found that the contract was not made till the Monday morning, when it is admitted that the ship was lost, and the cargo was not in existence. Even supposing that the contract was made before the loss, it would be satisfied by sending any guano, and this was shipped on account of Seagrave and Co., not for McCarter. [WILLES, J.—*Brown v. Hare*, 3 H. & N. 484, would be rather against you on that point.] Then I won't enter into it. The contract is made by Seagrave in his own name; he is the shipper pledging his own credit, and he takes a bill of lading in his own name, and makes himself personally liable for the freight. A factor who makes himself personally liable on the contract has a right to insure:

1 Arnould on Insurance, s. 119, 2nd ed. 801;

1 Phillips on Insurance, s. 311, 3rd ed. 177.

But it is enough for me to show that he is an agent who deals with the goods in his own name and makes himself personally liable for the freight. As trustee he would have an insurable interest, and it would be very inconvenient in a mercantile point of view if it were not so. As to the variance, that was disposed of at the trial. [WILLES, J.—It has been already stated by the court that we shall not dispose of this case on a formal matter.]

Temple, Q. C., C. Russell, and Cohen in support of the rule.—The case of *Joyce v. Swann* is clearly in point, and I submit that here there was no insurable interest. If Seagrave was a consignee at all, he was a consignee without any insurable interest; and though the bill of lading would be *prima facie* evidence of interest, on these facts there was none. It is plain that, when the goods were put on board the ship and Seagrave took the bill of lading, they were considered as sold, and the letters from McCarter confirms this, as there are several little features which are only consistent with the supposition that he thought the goods were coming. [WILLES, J.—There is a case in the 2 Q. B. which supports what you are laying down; it was there held that the fact of not answering was an assent to the course taken. Here there was the letter of the 26th Feb., and no answer till the 3rd March: see *Richardson v. Dunn*, 2 Q. B. 218.] If there was any insurable interest it belonged to Dixon and Co. or McCarter. I do not argue that there need be no insurable interest to enable a trustee to insure. The cases in which it has been held that such a trustee could insure are cases where no one who had the beneficial interest could have insured: (*Lucena v. Crawford*, 2 N. R. 268.) There Lord Eldon says that there must be a right in the property, or a right derivable out of some contract about the property, and at p. 324 he points out that there are different sorts of consignees. Here the goods appear to have remained in the hands of Dixon and Co. till the time of shipment, and it does not appear that the plt. had any storehouse or place where he could receive them as a factor, but he was a mere agent or broker. It is said that he is liable for the freight, but I do not see how the preservation of the goods can affect the question of freight. If the goods are lost as soon as the ship leaves Liverpool there is no freight, and if they arrive the master has his lien. Though personally liable for freight he would not suffer any loss by the goods being damaged. The only insurable interest was in McCarter, and this action is brought for his indemnity. It is said that there is a distinction between the evidence at the two trials, but the only difference is that the witness said that the final bargain was made on the Monday.

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[WILLES, J.—“Final” implies that there had been a bargain before.] Just so, and I was going to submit that, though there might have been a final bargain on the Monday, there might also have been a previous bargain which would pass the property in the goods, and I contend that the bargain was in the letters. [WILLES, J.—It is clear that there may be a sale and delivery without fixing the price.] Just so, and the question is not when the final bargain was made, but was it the intention of the parties that the property should pass; and the decision in *Joyce v. Swann* must be taken as conclusive on the letters, and there was no fact proved at the second trial which could alter their effect. Seagrave had no insurable interest, and this is a much stronger case than if he had been acting for any one abroad. He never had the physical control and possession of the goods, and he was not a consignee at all, but a mere conduit-pipe to direct where the goods should be sent: See

2 Duer on Insurance, 106;

De Forest v. Fulton Insurance Company, 1 Hall's Rep. (American), 84;

Wolf v. Horncastle 1 B. & P. 316;

Conway v. Gray, 10 East, 586;

Blackburn on the Contract of Sale, 126;

Sparks v. Marshall, 2 Bing. N. C. 761.

What is insisted on in the case would amount to this, that any person who is allowed by the owner of goods to put his name to the bill of lading has as insurable interest in the goods: see

1 Arnould on Insurance, 2nd ed. 167; and

1 Phillips on Insurance, 176.

Cur. adv. vult.

Feb. 16.—WILLES, J. now delivered the judgment of the court (Willes, Keating, and M. Smith, JJ.).—This was an action upon an insurance of guano valued at 1150*l.*, on board the *Ann and Isabella*, from Liverpool to Londonderry. The declaration averred interest in the plt. George Seagrave only; the pleas denied, first, the policy, upon which nothing turns; and, secondly, that the plt. had an insurable interest. At the trial before Martin, B., at the last winter assizes at Liverpool, the plt. had a verdict for 200*l.*, and the last term the deft. obtained a rule for a new trial upon various grounds, which came on for argument at the sittings after term, before Keating and Montague Smith, JJ., and myself, when we took time to consider. It appears, that, in the year 1864 McCarter, of Londonderry, suing in the name of Joyce, recovered in this court against Swann and other underwriters, upon an insurance upon the same cargo for the same voyage, the sum of 1200*l.*, of which he received 1150*l.* McCarter's interest was alleged to be that of a buyer of the guano before its loss from the now plt.'s firm; so that one set of underwriters has already paid the whole amount at which the guano was valued and insured in the policy now sued upon. The details were as follows:—Upon the 14th Feb. 1863 McCarter, who had from time to time bought guano of or through the now plt.'s firm, wrote to them, stating that if it suited them to ship soon 200 tons of guano at 6*s.* 6*d.* freight, to be paid for the 1st May, they might do so. Upon the 26th Feb. the plt.'s firm wrote to McCarter, stating that they had engaged the *Ann and Isabella* to take about 115 tons at 6*s.* 6*d.*, and that they expected to have the cargo on board about the middle of the next week, and proposed to draw upon him for it at 10*l.* per ton. McCarter must have made up his mind to take the cargo thus offered, for he did not write to countermand it; and, upon the 2nd March, he effected an insurance through one Joyce of this very cargo per *Ann and Isabella* for 1200*l.* Upon the 3rd he wrote complaining that the price charged was 10*l.* a ton, when it was only 9*l.* 1*s.* net in Scotland, but not refusing it; on

the contrary, stating that he expected the usual allowance, which was a matter of course. Upon the 4th March the cargo was shipped at Liverpool under a bill of lading, making the goods deliverable “to the order of George Seagrave and Co. (the plt.'s firm), or to their assigns.” The invoice was made out the same day, describing the guano as “delivered to the account of McCarter” according to the letter of the 26th Feb. Then the plt.'s firm having upon the 4th March received the letter of the 3rd, effected with the present defts. the policy upon which this action is brought, upon the cargo, valued at 1150*l.*, to which extent from that time there were two insurances. The plt. at that time was at Belfast, and intended to visit Londonderry; and the invoice and bill of lading were forwarded to him, to be handed there to McCarter. Upon the 7th March, in the evening, the plt. arrived at McCarter's private house upon a visit, and informed him of what had been done; to which McCarter had no objection. Afterwards upon that night the ship and cargo were lost. Upon Monday the 9th, before the loss was known, the plt. and McCarter went to the office of the latter, and there, without more, the bill of lading was indorsed by the plt. and handed to McCarter, with the invoice, and he accepted a bill for the amount. They learnt of the loss the same day; but, so far as appears, neither did McCarter ask to have back, nor did the plt. offer to return the bill; indeed, that would have been inconsistent with all that had passed, and especially with McCarter's tacit assent upon the Saturday evening before the loss, and the payment upon the Monday accordingly. Further, upon hearing of the loss, McCarter asked, not for his bill, but for the policy effected by the plt., which the latter declined to give, and referred McCarter to his own underwriters. Both parties, therefore, treated the purchase as being between themselves effectual and binding, which it could not have been unless completed before the loss. Accordingly McCarter brought the action in the name of Joyce against the underwriters, and principally upon his own evidence with that of the documents, but without calling the now plt. as a witness, he established in fact to the satisfaction of a London jury under the direction of Erle, C.J., and afterwards in law to the satisfaction of this court, that what the parties, buyer and sellers, had agreed to act upon was the true construction of the transaction, and that the sale was complete by the letter of the 26th Feb., acted upon by the sellers by shipping on account of McCarter, and by McCarter by not rejecting the offer, by insuring upon the 2nd March (the goods being at his risk as well as on his account), by the letter of the 3rd March, which in this court was considered as a reluctant assent to take the cargo, by his assent and acquiescence upon the evening of the 7th March, when Seagrave (the plt.) informed him of what had been done, by taking the bill of lading, and paying upon the 9th without any new terms, showing that the transaction was complete at latest upon the Saturday, and by acting upon the sale as valid after news of the loss: (*Joyce v. Swann*). The non-indorsement of the bill of lading before the loss did not, it is scarcely necessary to remark, exclude that conclusion: (*Care v. Hardin*, 4 East, 211; *Browne v. Hare*, 4 H. & N. 822; 39 L. J. 6, Ex.) McCarter, the buyer, thus obtained judgment for 1200*l.*, and he has been paid 1150*l.*, the whole amount at which the guano was valued in the policy now sued upon, and he paid the sellers as upon a successful adventure; so that the sellers got all they could have got if the cargo was safe, and thus both buyers and sellers were indemnified against any risk which was insured against by the defts.; and it might have been supposed that the insurers had heard the last of the matter. I

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appears, however, that McCarter was dissatisfied with the amount which he recovered in the name of Joyce as to the following particulars detailed by him at the trial, viz., 50*l.* of the former verdict not paid, 49*l.* extra costs, 104*l.* difference between the interest which he recovered and the interest which he had to pay his own bankers in order to raise money, 20*l.* travelling expenses, not alleged to have come within the suing and labouring clause, or to have had anything to do with the insurance. The mass of these items was irrecoverable under any circumstances against the underwriters upon either policy; and no one of them could by any proceeding be justly claimed against the present defendants. McCarter, however, took a different view of his rights; and it appears now plainly that, by arrangement between him and the plaintiff, the present action was brought in effect to enforce payment of the enumerated items, though, under good advice, a verdict was not sought for the whole 1150*l.*, a measure which, if resorted to, would, we believe, have so demonstrated the impropriety of the claim as to prevent the actual result of a verdict in the plaintiff's favour. At the trial of this cause, the case was launched upon his own evidence, which was to the same effect as that given by McCarter, upon the trial of *Joyce v. Swann*, with these exceptions: first, that after the examination by counsel was over, in answer to a question put by the learned judge (being the question for decision), the plaintiff made the following statement, "I made the sale to McCarter on 9th;" secondly, that the plaintiff stated that, instead of being principal in the actual or intended sale, his firm were only commission agents (not *credere*) of Dixon and Co., of the same town. And although the objection on the score of insurable interest was urged early in the case, the plaintiff's only account of his interest was, that his firm were brokers, not factors; nor did it appear that the guano was ever in their possession as bailees, nor that they had any lien. The evidence was quite bare upon this point; and it is consistent therewith that the guano went straight from the stores of Dixon and Co. to the ship, and that the name of the plaintiff's firm was put in the bill of lading in accordance with a not uncommon practice of brokers to carry on business in their own names, and not because they had any other interest in the transaction. And it appears to be the reasonable conclusion from the evidence of the plaintiff, who gave no further account of his interest than that he acted as broker and agent for Dixon and Co., coupled with the fact that he sought to recover nothing upon his own behalf, but all for McCarter. The last additional fact as to which the plaintiff was examined was as to the payment of the bill given him for the price of the guano. At first he stated, "It has not been paid; 200*l.* or 300*l.* is still unsatisfied." "The bill is not been satisfied to a considerable extent." "Messrs. Dixon have suffered a loss." But upon cross-examination he said: "McCarter dishonoured the bill at first. It was satisfied by mutual arrangement. We were put to expense by the dishonour and delay"—not, be it observed, by the loss of the goods. Now, the only way of reconciling these contradictory statements is, to suppose that the 200*l.* or 300*l.* spoken of by the plaintiff represent the 200*l.* or 300*l.* made up of the items already enumerated as claimed by McCarter, and which are, by agreement with McCarter (who is probably a good customer), to be allowed or not allowed to him, according to the event of the present action. Upon the evidence, without calling McCarter, the plaintiff relied; whereon certain objections were taken for the defendants, some of them founded upon mere formal variances, which we attach no importance, and one which is the main question, viz., that Dixon and Co.,

who had been indemnified by payment, and not the plaintiff, were the persons interested in the policy, and that the plaintiff had not proved any interest in the subject-matter of insurance. The learned judge overruled these objections; and the defendants called McCarter (the real plaintiff) as a witness. McCarter, like the nominal plaintiff, gave evidence to the same effect as in the former cause of *Joyce v. Swann*, with these exceptions, that after the examination by counsel was over, he, in answer to a question put by the learned judge (being the question for decision), made the following statement, viz., "The purchase by me was on Monday morning the 9th." As to the bill in payment of the guano, McCarter stated, "It is paid or satisfied." As to the items of claim already set forth, he added, "I expect to be made good this loss out of the policy now sued on." Such being the evidence, the learned judge told the jury that, upon McCarter's evidence, it appeared to him clear that there was no contract before the 9th March, at Londonderry, after the goods were lost, and upon that point he took the opinion of the jury, who adopted this direction, and found a verdict for the plaintiff. No other question was left to them. With respect to the point of insurable interest, the learned judge ruled as a matter of law that the plaintiff had an insurable interest "as an unpaid vendor, and with a bill of lading making the goods deliverable at Londonderry to him or his assigns." The damages were agreed to be 200*l.* (representing the items already mentioned, or some of them), in the event of the plaintiff being entitled to retain the verdict. In the last term a rule was obtained for a new trial upon several grounds, amongst others a miscarriage in that the learned judge ruled as matter of law that the plaintiff had an insurable interest; and, the matter having been fully argued, and time taken to consider, we are of opinion that the rule for a new trial ought to be made absolute. In considering the case, three prominent points present themselves: first, that both McCarter's and the plaintiff's policies were for the value of the guano only, and not for such extras as McCarter detailed in evidence; secondly, that this action is for McCarter's benefit; thirdly, that McCarter has already received from his underwriters, through Joyce, the whole amount at which the goods are valued in the plaintiff's policy. It was argued, therefore, that according to the case of *Bruce v. Jones*, 1 H. & C. 769; 32 L. J. 132, Ex.; 7 L. T. Rep. N. S. 748, there was a complete answer to any further claim. We need not, however, consider this further at present, as there is no plea to raise the question, and if such a plea be added, it may, if necessary, be discussed upon a future occasion. Next it appears that the direction of the learned judge in point of law, and the finding of the jury in pursuance of that direction, are in conflict with the verdict in *Joyce v. Swann*, and the judgment of this court thereupon, of which verdict and judgment McCarter has already reaped, and now retains, the benefit. Nor was the evidence as to the question upon which the verdict passed substantially different from what was offered upon the trial of the former action, save in the answers given to the mixed questions of law and reasoning upon facts proposed to the nominal and to the real plaintiff, and which was the very question to be decided by the court. Whether such a result can be deemed satisfactory it is at present unnecessary to consider; and the rule hardly raises the point with sufficient distinctness as an objection to the verdict. Thirdly and lastly, the report of the learned judge is distinct, that he thought "the plaintiff had an insurable interest as an unpaid vendor, and with a bill of lading making the goods deliverable at Londonderry to him or his assigns." In this statement of law we

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are, after much consideration, unable to concur. In point of fact, the now verdict finds that the plt. was not "vendor," because it finds that there was no valid sale, and no sale until after the loss. In point of fact also, the evidence of the plt. and of McCarter shows that payment was made by bill, which has been paid or settled; so that, if the plt. was a vendor, he was not an "unpaid vendor." This ground failing, and with it the argument that there might be an interest in respect of commission, which probably, like the price, was settled between the parties as upon a valid sale, it remains to consider what is the effect of the plt. being named as shipper and consignee in the bill of lading. That this as a matter of fact is *prima facie* evidence of interest, we entertain no doubt; but the question is whether, as matter of law, it is conclusive that there is an interest, even though the facts should show that the nominal shipper and consignee is a mere agent, having no lien upon the goods for advances, commission, or otherwise, nor the possession or custody of them as carrier, factor, warehouseman, or other bailee, nor any liability to account for their loss by the perils insured against, such as sustained the insurance by a carrier (*Crowley v. Cohen*, 3 B. & Ad. 478); by a warehouseman declaring himself a trustee (*Waters v. Monarch Life Assurance Company*, 5 E. & B. 870; 25 L. J. 102, Q. B.); a bankrupt or insolvent in possession of after-acquired property by permission of his assignees (*Marks v. Hamilton*, 7 Ex. 323; 21 L. J. 109, Ex.); a ship carpenter having a lien for repairs (*Tasker v. Scott*, 6 Taunt. 234; 1 Marsh. 556); a person having an equitable assignment (*Wilson v. Martin*, 11 Ex. 684; 25 L. J. 217, Ex.) The evidence did not bring the plt. within any of these categories; and the loss which took place was a loss of the goods to the intended seller or the intended buyer, according as the sale was complete or not, and not a loss to the mere intermediate agents. It was argued that the liability for freight as shipper made an interest; but by the loss of the goods on the way the freight was also lost; and, if the goods had arrived, the interest was in the shipowner's enforcing his lien, not in the goods themselves. It was further argued that the bill of lading gave a remedy against the master, and was as against him an estoppel; but, even as against the master, the bill of lading was not conclusive, if Dixon and Co. chose to interfere and to insist upon delivery to them; and such delivery would have been an answer to any claim by the plt., as was decided in the case of *Sheridan v. The New Quay Company*, 4 C. B., N. S. 618; 28 L. J. 58, C. P. The persons, if any, interested in the policy were Dixon and Co., and not the plt. The property was theirs. The temporary possession of it was that of the ship's master, as bailee; the plt., if there was a valid sale, was interested at the outside to the extent of his commission, if it was at risk, which it was not, for it was earned by the fact of sale, and there would be no lien for it against the buyer; and if there was no valid sale, he was a mere agent, who suffered nothing and incurred no liability by the loss, for he had discharged his functions, save that he held the shipping documents subject to the orders of his employers. We are not aware that it has ever been held that a mere agent, without possession or lien, has an insurable interest to the extent of the value of the goods, simply because his name appears in the bill of lading instead of that of his principal; and the general rule is clear, that, to constitute interest insurable against a peril, it must be an interest such that the peril would by its proximate effect cause damage to the assured. We are, therefore, after much consideration, of opinion that the learned judge was wrong in ruling as matter of law, even on the state of facts found by

the jury, that there was an insurable interest in the plt. We were asked to amend the declaration by inserting a statement of interest in Dixon and Co.; and undoubtedly, if Dixon and Co. had sustained a loss, they might have adopted and recovered upon this policy; but we are of opinion that no such amendment ought to be allowed in this case, because the action is in our judgment brought for McCarter, not for Dixon and Co., who have been paid, and such an amendment might tend to frustrate, and could not tend to promote, the decision of the question which this action was brought to try. As to the formal objections raised to the declaration, they may be cured by amendment if and when the plt. thinks it worth while. We give the deft. leave to add a plea or pleas within eight days, upon condition that the plt. may within eight days thereafter enter a *stet processus* and cancel the policy. For these reasons, and with these directions, the rule for a new trial is made absolute; and we hope we are not outstepping our province if we add a suggestion that, in the event of the matters of law decided by the court upon this or the former occasion being again contested by either party, the more convenient course will be that such party should be put to raise his objection by bill of exceptions, and thus obtain the benefit of reviewing our decision before a superior tribunal.

Rule absolute.

Attorneys for plt., Upton, Johnson, and Upton.

Attorneys for defts., Field and Roscoe.

Wednesday, April 17, 1866.

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Action by indorsee of bill of lading—Short delivery—Fraud of shipper—Evidence—18 & 19 Vict. c. 111, s. 3.

The indorsee of a bill of lading sued the captain, who had signed it, for the value of four bales not delivered. The evidence was, that the goods were shipped by certain persons acting as agents for the actual shipper, and that when the goods were put on board there was a dispute with the mate as to the number of bales shipped. He made a memorandum of the fact, but by mistake put down in the bill of lading sixty-nine bales instead of sixty-five, and had since died. Sixty-five bales were delivered:

Held, that there was evidence to go to the jury that the misrepresentation as to the amount shipped was "caused wholly by the fraud of the shipper" within the terms of sect. 3 of 18 & 19 Vict. c. 111.

Declaration:

That after the 14th Aug. 1855, in parts beyond the seas, to wit, at Constantinople, M. M. Katnakis delivered, to the deft., and the deft. received from the said M. M. Katnakis, certain goods, to wit, bales of skins, to be by the deft. carried and conveyed in a certain ship of the deft. from Constantinople to London under a certain bill of lading signed by the deft., whereby the deft. agreed to carry the said goods and deliver the same at the port of destination (certain perils and casualties only excepted) unto the order of the said M. M. Katnakis, or to his or their assigns, for certain freight payable for the said goods; and the plt., say afterwards, and after the said 14th Aug. 1855, the said M. M. Katnakis indorsed the said bill of lading to the plt. in order to pass the property in such goods to the plt., and that thereupon and by reason of such indorsement the property in the said goods passed to the plt., and the plt. say that before action brought all conditions had been fulfilled, and all things had been done, and all times had elapsed necessary to entitle the plt. to have the said bill of lading performed by the deft., and to sue him for the breach of contract herein after mentioned. Yet the deft., although not prevented by any of the excepted perils or casualties, made default in delivering a portion of the said goods agreeably to the bill of lading, whereby the plt. have lost the value of such goods, and been greatly damaged. And the plt. also sue the deft. for that the deft. converted to his own use, or wrongfully deprived the plt. of the use and possession of the plt.'s goods, that is to say, bales of skins.

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said M. Katinakis did not deliver, nor the deft. said goods as in the said first count alleged. It is the indorsement as alleged.

It is default in delivery.

It is that the goods were the plt.'s goods.

It is that the goods were brought by the plt's., merchants, as indorsees of a bill of lading signed by the master of the steamship *Brenda*, at Constantinople, for certain bales of lambskins. The bill of lading, which is set out *infra*, stated that 119 bales had been shipped, and contained a memorandum for four bales more were in dispute, but, if they were to be delivered. Upon arrival, the bales were delivered, and the plt. in consequence estimated the value of the short delivery. It is alleged that the plt's. were indorsees for the bill of lading within the provisions of the

Lading Act, nor that 115 bales only were delivered at the port of discharge. Three questions were put to the jury, viz., Were the goods shipped? Was there any default by the deft.? and was the loss wholly caused by the fraud of the shipper? The jury found each question in favour of the deft. At the last point the deft. had leave to move. The witnesses called for the defence were the mate and two of the crew. The deft. stated that he signed the bill of lading on the faith of the mate, and that he knew nothing of the contents of the goods. The mate was dead, and the other witnesses merely proved that the mate was as true as to the number of packages, but nothing whatever to suggest any fraud on the part of the shipper. The declaration by the mate was to the effect that he had received the goods on board and there had been a dispute as to whether they were sixty-four or sixty-nine, in consequence he had added the memorandum thereon on the bill of lading.

At the last Mr. M. Katinakis, a correspondent at Constantinople, purchased a quantity of goods, to be shipped on board the steamship *Brenda*. Accordingly the vendor of the goods sent the goods on board the vessel, and Mr. Katinakis then received from the deft. the following bill of lading: The goods are in London are Smith, Sundias, and Co., 17, Fleet-street.

K. 69

L. 18

B. 32

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more in dispute, if on board to be delivered.

It is not answerable for damage arising through loss of strength in packages.]

In good order and condition by Mr. M. M. Katinakis upon the steamship called *Brenda*, whereof is the present voyage James Boyland, or whoever as master in the said ship, and now lying in the Constantinople, and bound for London, with liberty to

and — land cargo — passengers at Gibraltar and or or

any other ports whatever, and in any rotation, to sail with or without pilots, and to tow and to be in all situations, 119 bales skins being marked red as in the margin, and to be delivered in the deft. and well conditioned, at the aforesaid port of discharge, at the rate of 41 per ton of 20 cwt. gross weight, and damage whatsoever from machinery, steam navigation, or from perils of the seas or from any act, neglect, or default whatsoever of the ship, or mariners, being excepted, and the owners are to be liable for any consequence of the causes aforesaid, unto order or to his or their assigns. Freight for goods payable in London on delivery in case, at the rate of 10 per cent. per ton of 20 cwt. gross weight, and average accustomed. A whereof the master or agent of the said ship is to sign three bills of lading, all of this tenor and of which bills being accomplished the other to

Constantinople 27th June 1865. Weight, length, value unknown, and not answerable for leakage, loss, or mortality, damage by heavy weather or rolling of the vessel, inherent deterioration or

defective packages, or wrong delivery caused by error, indistinctness, illegibility, or deficiency in the marks or numbers. The goods to be taken from the ship by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed or put into craft by the master at the merchant's risk and expense. All fines and expenses, or losses by detention of vessel or cargo, caused by incorrect or insufficient marking of the packages, or by incomplete or incorrect description or weight (or any other particulars required by the authorities at the port of discharge), upon either the packages or the bill of lading, shall be paid by the shipper or consignee of the goods, and the shipowner has a lien upon the goods until the payment of all such costs and charges. In the event of the steamer being placed in quarantine at the above port of delivery, the goods will require to be immediately taken away and transferred to another vessel or depot, to perform quarantine at the expense and risk of the shippers or consignees. Goods must be distinctly marked with the name of the port to which they are consigned, or the ship will not be held responsible for the due delivery of the same, nor for errors in, or insufficiency or deficiency of marks on the packages.

JAMES BOYLAND.

Deliver to Messrs. Mairo, Basily, and Co.

Or order

M. M. Katinakis,

Mairo, Basily, and Co.

Presented at Suir Wharf in favour of Messrs. Mairo, Basily, and Co.

For delivery to Culverwell, Brooks, and Co.

Subject to the usual conditions.

WALTER FLACK.

The action was brought to recover damages in respect of the four bales marked K in the margin of the above bill of lading, being four out of the sixty-nine which formed a part of the 119, the plt. having, in fact, only received 65 bales marked K. The amount of the claim 43*l.* 1*s.* 2*d.* was at the rate of 11*l.* 5*s.* per bale, from which a deduction of 1*l.* 18*s.* 10*d.* was made for freight.

Sect. 3 of 18 & 19 Vict. c. 111, enacts that

Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or other part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board. Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or some person under whom the holder claims.

The cause was tried before Byles, J., in London, after Hilary Term, when a verdict was found for deft., with leave to the plt. to move to enter it for 43*l.* 1*s.* 2*d.* for him.

Sir Geo. Honyman now moved accordingly.

ERLE, C. J.—I think there should be no rule in this case, and that there was evidence to go to the jury that the mistake in the bill of lading was caused "wholly by the fraud of the shipper." Messrs. Katinakis, or persons acting with them, brought down the bales, and the persons who brought the bales alongside were guilty of the fraud. The mate said there were sixty-five, while they said there were sixty-nine bales; I think he was compelled to sign for sixty-nine bales. There was evidence to go to the jury that the person who had counted them as sixty-nine, when there were only sixty-five, was willing to overreach, and I think he knew that he had only shipped sixty-five, and that he knowingly took advantage of the mistake, and is guilty of fraud under the statute, and that the captain is exonerated.

M. SMITH, J.—I am of the same opinion. The persons who shipped the goods and took the mate's receipt are the parties guilty of the fraud in question. There may have been an honest dispute as to whether the mate's receipt was given for sixty-five bales or more; but whoever shipped the goods must have known that they were not shipped without dispute. The word "wholly" in the statute is

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clear, and the mate or other person signing the bill of lading must not be mixed up with the fraud.

BYLES and KEATING, JJ. concurred.

Rule refused.

Thursday, May 24, 1866.

CARR AND ANOTHER v. THE WALLACHIAN PETROLEUM COMPANY (LIMITED).

Charter-party—Substituted contract—Freight—Guarantee.

The plts. chartered a ship to the defts. to proceed to I. and take in a cargo for London. On the arrival of the ship at I. the defts. were unable to provide a cargo, and the plts. agreed to cancel the charter on the defts. guaranteeing them "900l. gross freight home, the vessel to be placed on the most profitable charter or trade procurable, and to carry 300 tons. The vessel shipped a cargo of 300 tons, the freight for which would be 556l. 14s., and was totally lost on her voyage to London. In an action to recover the difference between 556l. 14s. and 900l. guaranteed,

Held, that the liability of the defts. arose at the port of lading on the ship's sailing away with a cargo that would not earn 900l. freight, and was not affected by the loss of the ship.

This was an action to recover the sum of 686l. 12s., under the following circumstances:—The plts. were the owners of two vessels called the *Botassis* and *Izamados*, which they chartered to the defts. in Aug. 1864, the ships being then in the Danube. By the terms of the charter they were to proceed to Ibraila, and there load a full and complete cargo of petroleum oil and deliver the same in London on receiving 4l. 4s. per ton freight payable in London. The ships duly proceeded to Ibraila, but previously to their arrival there the defts.' stores had been destroyed by fire, and they were unable to provide cargoes. The defts. thereupon applied to the plts. to cancel the charters, and after some negotiations a Mr. Housden, on the part of the plts., attended a meeting of the directors of the defts.' company on the 7th Sept., and a verbal arrangement was come to, the following minute of which was made in the books of the company.

It was proposed by the directors that the company should guarantee the above-named vessels (the *Botassis* and *Izamados*) a sum of 900l. each gross freight home on the following understanding: That Messrs. Carr and Co. place the vessels named at once on the most profitable charter or trade procurable; the vessels will carry 300 tons each of whatever cargo they may take on board, or should they not take 300 tons each, that a proportionate reduction of the guarantee should be made for any lesser quantity of cargo they may take. That the charter-parties dated the 9th and 10th Aug. last respectively for the vessels named be cancelled.

A copy of this resolution was forwarded to the plts. in a letter requesting them to cancel the charters, which they accordingly did. The vessels being unable to obtain any other cargo, loaded two cargoes, of 300 tons each, of barley on account of the plts., and proceeded on their voyage to London. According to the current rates of freight for barley at that time, the vessels would have earned 556l. 14s. The *Izamados* arrived in London, but the *Botassis* was totally lost on the voyage.

The plts. brought this action to recover two sums of 343l. 6s., being the difference between the two sums of 556l. 14s., which the vessels would have earned had they both reached London, and the sums of 900l. each guaranteed by the defts. A verdict having been entered for the plts. for 686l. 12s.,

W. Williams subsequently obtained a rule to reduce the verdict by the sum of 343l. 6s., on the ground that the defts. were not liable to pay that sum, the *Botassis* having been totally lost.

Sir G. Honyman now showed cause.—The simple question is, what is the effect of the loss of this vessel. This is not the case of a person merely becoming surety for freight. If the cargo of petroleum had been loaded according to the charter we could have insured it, and the defts. having failed to load we had a right of action for a much larger sum than this, but instead of that we take this agreement. I submit that the defts. guaranteed that cargo which would pay 900l. freight should be put on board, and as soon as the vessel sailed away with less than that amount they became liable to pay us the difference. [BYLES, J.—Is not the contract, that they will put you in the same position as if you had a 900l. freight on board which you would not earn unless the ship arrived? No; as here we could only insure about 560l. freight, and under no circumstances could we get more than 600l.: (*Yeames v. Lindsay*, 3 L. T. Rep. N. S. 855.) The agreement is, if you will cancel the charter we will enter into an entirely new contract. [BYLES, J.—If the other side are right you would have had an insurable interest to the extent of 900l., as I suppose they say it was guaranteed freight, 900l.] I submit not, as we could only insure freight for the goods we had on board, and not what we should get on a collateral contract. This agreement was substituted for the original charter, which would have been broken when the defts. failed to load a complete cargo, and I contend that they became liable under that agreement on our failing to procure a cargo which would pay 900l. freight.

W. Williams in support of the rule.—This is a question as to the amount of damages, and the contract was made before breach of the charter: (*Stey v. The Bank of England*, 6 Bing. 754.) If they had brought an action on the charter-party we might have pleaded a new arrangement: before breach. We agree that they shall have a freight of 900l. and to assume that they could not insure that sum is begging the question. I submit that they were carrying this cargo at 900l. freight. If this is an engagement that if they got a full cargo they should have 900l. freight, that would give an insurable interest to the extent of 900l. It is like the case of a merchant saying, "If you will put your ship on a certain line I will pay you 900l. gross freight home," and he might wish to have the goods carried at merely nominal freights; surely in such a case the shipowner would be entitled to insure 900l. and would not have to depend on the solvency of the merchant. Here the cargo is, in point of fact, carried free of freight, and they give us credit for the current rates, but I submit that we are not to be called upon to pay the difference unless the ship arrives and earns freight.

ERLE, C. J.—I am of opinion that this rule should be discharged. The question turns on the meaning of the guarantee. The defts. guarantee to the vessel 900l. gross freight home; that was a substituted contract, and is to be construed by reference to the original contract contained in the charter-party, and that is that the vessels are to take home cargoes of petroleum at 4l. 4s. a ton. Therefore it is a contract to pay about 1200l. a ship, and the defts. substitute a contract that the plts. may load any other cargo, and the guarantee is 900l. gross freight; that is, that at the time of loading the freight shall be worth 900l., as it would under the original contract have been worth 1200l.; and if the defts. had only put on board 200 tons of petroleum instead of 300, their contract would have been broken at the port of loading. Here they guarantee that the goods put on board shall be worth 900l. freight, and the contract is broken when goods to that amount are not put on board. The whole difficulty in this case has been caused by the use of the word freight.

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WILLES, J.—I am of the same opinion. I think the substituted agreement was a mere settlement of amount, and that was to stand as the original contract, and the liability came to a head at the same time as it would have done if the cargo had not been loaded. When the vessel weighed anchor it is clear that she had not a freight which could earn 900*l.*, and therefore the defts. were liable, and they are not the less liable because one of the vessels was lost. It is impossible to say if the loss would have taken place if the original contract had been fulfilled, and therefore we must look at the contract without considering that, and see when the liability accrued, and I think that was when the ship sailed away without a sufficient cargo to earn 900*l.*

BYLES, J.—I am of the same opinion. The guarantee is, that there should be freight worth 900*l.*; and it seems to me that the contract was broken at the port of loading.

M. SMITH, J.—I am of the same opinion. The liability under the guarantee must be determined by the amount of cargo put on board.

Rule discharged.

Attorneys for the plts., *Thomas and Hollams.*

Attorney for the defts., *A. E. Tower.*

Tuesday, May 29, 1866.

MACANDREW AND ANOTHER v. CHAPPLE AND OTHERS.

Charter-party—Deviation precedent—Delay—Deviation.

A charter-party contained the following clause: that the ship *E.*, "being tight, &c., shall with all convenient speed (on being ready), having liberty to take an outward cargo for owner's benefit, direct, or on the way, proceed to Alexandria," and there load a cargo of cotton, &c. At the time the charter was made the ship was at Newcastle taking in her machinery. She left Newcastle for the purpose of taking her trial trip, and, as there was some risk in crossing the bar of the Tyne, proceeded to London instead of returning to Newcastle. She was detained in London six weeks repairing machinery, during which time she took in cargo, and then proceeded to Constantinople, which is not "on the way" to Alexandria, and thence to Alexandria. It was found by the case that going round by Constantinople only caused two or three days' delay. On her arrival at Alexandria the charterers refused to load a cargo:

Held, in an action by the shipowners against the charterers for not loading, that the above stipulation only operated as an agreement, for the breach of which an action would lie, and not as a condition precedent the breach of which would entitle the charterers to throw up the charter-party.

This was an action brought by the plts. against the defts. for the recovery of damages for the loss sustained by the plts. by reason of the defts. having made default in shipping a cargo on board the plts.' vessel *Ephesus* under the circumstances hereinafter mentioned, and by consent of the parties, and by the order of Martin, B., dated the 2nd Aug. 1865, pursuant to the 46th section of the Common Law Procedure Act 1853, the following case (so far as is material) was stated without any pleadings.

The plts. are shipowners carrying on business at Liverpool and London under the style and firm of Robert MacAndrew and Co., and were before and at the time of the transactions hereinafter mentioned, and have ever since continued to be, the owners of the steamer *Ephesus*.

The defts. are merchants and shipowners carrying on business at Liverpool under the style and firm of Chapple, Dutton, and Co.

On the 15th Oct. 1864 the said steamer *Ephesus* was launched at Newcastle, a great portion of her engines and machinery having already been put in her, and was immediately afterwards placed in the hands of Messrs. Randolph, Elder, and Co., engineers, for completion ready for sea.

About the 1st Dec. 1864 negotiations were opened between the plts. and defts. for the purpose of the chartering of the *Ephesus* by the defts. These negotiations were conducted by Mr. Nance, a shipbroker, on behalf of the plts., and by Mr. Pothonier, a shipbroker, on behalf of the defts.

On the 7th Dec. 1864 the aforesaid negotiations were concluded by a charter-party being made by and between the plts. and the defts., and signed by or on behalf of the said parties respectively, which said charter-party was as follows:

London, 7th Dec. 1864.

Charter-party.

It is this day mutually agreed between Messrs. Robert MacAndrew and Co., owners of the good ship or vessel called the *Ephesus*, of the measurement of 1634 tons or thereabouts, now at Newcastle, and Messrs. Chapple, Dutton, and Co., of Liverpool, merchants, that the said ship being tight and staunch and strong, and every way fitted for the voyage, shall, with all convenient speed (on being ready), having liberty to take an outward cargo for owner's benefit direct or on the way, proceed to Alexandria, Egypt, or so near thereunto as she may safely get, and there load from the factor of the said freighters in the customary manner a full and complete cargo of cotton in square bales, both in the hold and upon deck, the captain being at liberty to take other usual cargo (on freight) for ballast only, and to render customary assistance with boats and crew; in loading which the said merchants bind themselves to ship not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to London or Liverpool direct as ordered on signing B. lading, or so near thereto as she may safely get (cargo to and from, alongside, and at merchant's risk and expense), and deliver the same on being paid freight as follows:

Three farthings per pound for cotton, in full of all port charges and pilotage (the act of God, the Queen's enemies, restraints of princes and rulers, and fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage, always excepted); the vessel to be addressed to the charterers' agents free of commission, and to have a lien on cargo for all freight, dead freight, and demurrage; captain to sign bills of lading at any rate of freight, without prejudice to this charter. Freight to be paid on unloading and right delivery of the cargo in cash, less (if required) for ship's use at Alexandria 500*l.* to be advanced on signing B. lading, subject to 3 per cent for insurance, and all charges, twenty-five running days to be allowed the said merchant (if the ship is not sooner dispatched) for loading at Alexandria and discharging in England; and ten days on demurrage over and above the said lying at 70*l.* per day; penalty for nonperformance of this agreement, estimated amount of freight.

In the course of the negotiations Mr. Pothonier was informed by Mr. Nance that the plts. would not guarantee the time within which the vessel would be finished, and that he should, therefore, insert in the charter-party the words "on being ready," and these words were inserted accordingly.

After the making of the said charter-party the plts. urged Messrs. Randolph, Elder, and Co., from time to time, to complete the fitting-up of the *Ephesus* with as much dispatch as possible, and did all that was in their power to expedite the completion of the vessel fit for sea.

Between the time of the launch and the sailing of the ship from Newcastle, as hereinafter mentioned, several casualties occurred in the finishing of the engines and machinery, but Messrs. Randolph, Elder, and Co., were not guilty of any unreasonable delay in proceeding with the completion of the work. It is usual for steamers to make a trial trip before starting on their first voyage, and in order to have a satisfactory trial trip at Newcastle it is necessary for steamers to put out to sea, having to cross and recross the bar at the mouth of the Tyne—an operation accompanied by some risk in the case of

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a steamer of the size of the *Ephesus* at that period of the year.

About the middle of the month of Dec. 1864 the plts. proposed to the builders, at the request of Randolph, Elder, and Co., that the vessel should make a trial trip to sea and back over the bar; but this was objected to by the builders, and thereupon it was arranged that the vessel should make her trial trip from Newcastle to London instead of returning to the Tyne, and that the deficiencies of her machinery, if any, should be made good in London.

Accordingly, on the 12th Jan. 1865, the ship left Newcastle for London with 1400 tons of coals.

Before leaving Newcastle the ship, in order to avoid delay at Alexandria, loaded sufficient ballast to enable her to bring back a cargo of cotton from Alexandria, but no delay at Newcastle was occasioned by her so doing, or by the shipment of the coals.

The ship met with accidents to her machinery between Newcastle and London (where she arrived on the 15th Jan. 1865), and was detained in London repairing the same for about six weeks, but such repairs were executed there as speedily as they could have been done at Newcastle.

While in London the ship took on board goods for Malta, Syra, Constantinople, Smyrna, and Alexandria, but no delay was thereby occasioned, the goods being shipped before the repairs to the machinery were complete.

She sailed from London on the 1st March 1865, and again met with accidents to her machinery and put into Plymouth, and was kept there a few days repairing the damage done, after which she sailed on the 9th March 1865 from Plymouth for Malta, and after touching and unloading cargo there and at Syra, Constantinople, and Smyrna, arrived at Alexandria on the 29th April 1865.

The ship, when she sailed from Newcastle, was not complete and ready for the chartered voyage.

There is no usage of trade by which vessels bound from Newcastle or London to Alexandria are justified in taking goods to Syra, Constantinople, or Smyrna, if the geographical position of the various ports does not warrant such a course.

The question for the opinion of the court is, whether under the aforesaid circumstances the plts. have a right of action against the defts. for refusing to load the *Ephesus* at Alexandria, as aforesaid.

The court, or court of appeal, is to be at liberty to draw all such inference of fact as a jury would be entitled to do.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plts. for 4133*l.* 3*s.* 9*d.*, and costs of suit.

If the court shall be of opinion in the negative, then judgment of *nol. pros.*, with costs of defence, shall be entered up for the defts.

Mellish, Q. C. (Cohen with him) for the plts.—The question is, if there was such delay in bringing the ship to Alexandria as to relieve the defts. from their obligations under the charter-party. There is no warranty as to the condition of the vessel when the charter was made, or as to the time it would take to get her ready. The words "on being ready" clearly imply that she was not ready when the charter was made, and therefore the ship is not represented as a complete ship practically ready for sea. It is found in the case that the plts.' agent told the defts.' agent that he would not guarantee the time when the ship would be ready. It is objected that that is not evidence; but I submit that it is admissible to show that the defts. were informed of the condition of the ship, and though it cannot alter the meaning of the charter, it is one of the surrounding circumstances. It may be said that there are two breaches of the charter,

first, that the ship was not every way fitted for the voyage to Alexandria when she left Newcastle; and, secondly, that she did not proceed to Alexandria direct, but went to ports beyond what she was allowed to go to in order to take cargo. I submit that, according to the authorities, these are not conditions precedent, the non-compliance with which would entitle a party to throw up the charter; and the reason is, that they are stipulations which may be broken in every variety of way, and if they were held to be conditions precedent, the effect would be that if a ship was not ready on the very day, or if in the course of a long voyage there was an improper delay for one day or one hour, that would entitle the charterers to throw up the charter. Some of the cases which decide that such stipulations are not conditions precedent give this qualification, that if, by reason of the delay, the object of the voyage is frustrated, the charterers would be entitled to throw up the charter; but it is difficult to form a clear idea of what is the meaning of the objects of the voyage being frustrated. [*WILLES, J.*—Where the ship is so unworthy that she cannot carry the cargo, and the charterer has to charter another ship.] Possibly, but this ship was clearly seaworthy when she arrived at Alexandria; and I submit that going to London for a cargo was not a breach of the charter-party. That depends on the construction of the words "on the way." I contend that London is on the way, and that this is just what was intended by the stipulation, that as only a cargo of coal and iron could be procured at Newcastle, it might be desirable to take in a light cargo at some other port; and running up the river to London cannot be considered an unauthorised delay, this being a steamship which would go up in a few hours. Though a nominal breach of the charter, the result of the facts is that it did not cause delay, and it is clear that it did not frustrate the object of the voyage so as to justify the defts. in throwing up the charter: (*Clipsdon v. Vertue*, 5 Q. B. 265.) [*SMITH, J.*—In that case *Wightman, J.* seemed to think that the plea only showed the cause of delay.] Just so; and so here, the charter was never abandoned, and going to London was perfectly *bonâ fide*. The case of *Tarrabochia v. Hickie*, 1 H. & N. 183, is directly in point, except that here the ship purposely went to London to repair. *Freeman v. Taylor*, 8 Bing. 124, is the case in which the doctrine is laid down that the delay must not be such that the object of the voyage is frustrated. There the Chief Justice told the jury that, inasmuch as the freighter might bring his action against the owner and recover damage for any ordinary deviation, he could not, for such deviation, put an end to the contract; but if the deviation was so long and unreasonable that in the ordinary course of mercantile concerns it might be said to have put an end to the whole object the freighter had in view in chartering the ship, in that case the contract might be considered at an end. That ruling was upheld, and here I say that the deviation in going to London was only the means *bonâ fide* adopted for getting the ship off quickly, and going round to Constantinople is found to have caused only two or three days' delay, which is immaterial:

Behn v. Burness, 1 B. & S. 877;

Dimech v. Corlett, 12 Moore, 199.

E. James, Q. C. (Watkin Williams with him) for the defts.—Whether or not this is a condition precedent depends upon the intent of the parties as gathered from the contract itself, and not on matters subsequent. If it is a condition precedent, and the plt. has been guilty of a violation of it, the extent of the damage which the deft. has sustained is immaterial, the condition must be fulfilled. The

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oyage is from Newcastle to Alexandria, and the shipowner undertakes that he will proceed direct. "may leave out the words "on the way," as it is admitted that Constantinople is not on the way. by a concession of the charterer, and for the benefit of the shipowner, he may take a cargo, but he must proceed direct. If that is merely a stipulation the ship might have gone to Hamburg. The contract is entered into on that condition, that the ship shall sail direct. If she had gone to Edinburgh on her trial trip, and had then returned to Newcastle, my friend's contention might be right, as he might say that there was no unreasonable delay in sailing, but here there is a breach of a condition of the charter. In *Cliphams v. Vertue* there was no condition or undertaking to go on the voyage "direct." The question is, whether this is a condition, and that cannot depend on whether the vessel was quick or not, or whether it took a long or short time to go to London. If the shipowner had said that the vessel should leave on a particular day, that would have been a condition; but here, instead of that, he undertakes that she shall proceed direct. *Bela v. Burness* confirms what I have said, that you must look to the intention of the parties at the time of making the contract.

KELL, C.J.—In this case the charterer has not performed his part of the contract, and he contends that he has a defence to this action on the ground that there is a condition precedent on the part of the ship, which has been broken, and it is clear that a charter-party may contain that which is a stipulation, and binds as an agreement for the breach of which an action will lie, or that which is a condition precedent or subsequent, and which, if broken, will entitle the other party to put an end to the contract. The question if this is a stipulation for the breach of which an action merely will lie, or if it is a condition for the breach of which the party may say that he is exonerated, depends on the construction of the instrument. The charter-party says that the ship *Ephesus* being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed (on being ready), having liberty to take an outward cargo for owners' benefit direct, or on the way, proceed to Alexandria; and that part of the charter-party is relied on by the deft. as being a condition precedent on the breach of which the charterer would be entitled to throw up the charter. The ship went to London, and then on to Constantinople, and that is a breach of the condition if it was a condition. I think it is perfectly clear that this is a stipulation only, and not a condition that the vessel shall not deviate ever so little out of her course. I agree that if it were a condition the charterer would be exonerated, but I do not think that it is a condition. That being the construction of the charter-party, it is useless to go into the authorities. There is nothing to show that the object of the voyage was frustrated in this case. My judgment is founded on the construction of the contract, and this stipulation is merely an agreement to go direct to Alexandria, and if the shipowner omits to do that, it is a breach of the agreement for which an action will lie, but not a condition precedent.

WILLES, J.—I am of the same opinion. The defts. seek to answer this action by setting up a deviation in sending the vessel to London and Constantinople. It is settled that delay by deviation is the same as delay from any other cause, and deviation and delay having the effect of depriving the charterers of the benefit of the contract, or going to the whole root of the contract, and entirely frustrating the objects the charterers had in view in engaging the ship, would be an answer to an

action for not loading a cargo; but a mere deviation falling short of that gives a right of action for damages, but does not defeat the charter-party to the extent of being an answer to an action for not loading. *Boone v. Eyre*, 1 H. Bl. 273 (n.); *Ritchie v. Atkinson*, 10 East, 295; and *Davidson v. Gwynne*, 12 East, 381, are cases which are not new, but cases in which the principle laid down in *Boone v. Eyre* has been applied. It is necessary to observe that it is impossible to read this case without seeing that the vessel was not engaged for a particular cargo, but that it was a speculation by the defts., and that is quite sufficient to justify the proposition stated that freights had been falling for some time, and that a few pounds difference in the freight is all the damage the late arrival caused to the charterer. Therefore, I think that this is not a case in which the charterers can resist an action for not loading.

BYLES, J.—I am of the same opinion. The principle is laid down by Erie C. J., in *Seeger v. Duthie*, 8 C.B. N. S. at p. 64, that "the construction to be put upon contracts of this sort depends upon the intention of the parties, to be gathered from the language of the individual instrument. Whether particular stipulations are to be conditions precedent or not must in all cases solely depend upon that intention as it is to be gathered from the instrument itself;" and that is the result of all the cases here is the ordinary and express stipulation that the ship shall proceed with all convenient speed to Alexandria. The condition, if condition it be, is not express but implied, and we are to see if construing it as a condition would cause inconvenience. If we decided that it was a condition it would defeat if not a majority, certainly a very large number of charter-parties, and the law is clear that it is a stipulation and not a condition precedent. The implied stipulation is not to deviate unless permitted, and in this case the ship went to Constantinople, which is out of the permitted limits. In the case cited by Mr. Mellish (*Cliphams v. Vertue*) there was a delay of six weeks, but still it was held not to be a deviation. Here the vessel merely went to London for her trial trip, and as to the vessel going to Constantinople, that is merely an actionable breach, and does not exonerate the defts. from performing his part of the contract.

M. SMITH, J.—I am of the same opinion. There is only one question as to the construction of this charter: whether the stipulation that the vessel shall go to Constantinople with all convenient speed—that is, with no more delay than is necessary for taking out a cargo—is a condition precedent? I am of opinion that it is not a condition precedent, but merely a stipulation. If the deft. has sustained damage, he can recover in an action on the contract; and that being so, the question as to what would be the consequence if the whole object of the charterer had been frustrated does not arise; therefore I think that our judgment should be for the plts.

Judgment for the plts.

Attorneys for the plts., *Field, Roscoe, and Co.*

Attorneys for the defts., *Cotterill and Sons.*

[Ex.]

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[Ex.]

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Monday, April 30, 1866.

CLARKE v. BURN.

Contract to load vessels—Action for breach of—Plea, refusal of plt. to pay for previous loadings—Condition precedent—Pleading.

Declaration, that it was agreed that plt. should purchase of deft. 30,000 tons of coal, and that deft. should ship the same on board certain vessels for a period of six months from 1st Aug., and should load each vessel within twenty-four hours after notice that the said vessel was ready to be loaded at the T. docks.

Averment, that all conditions were performed necessary, &c., yet deft. broke the said agreement in this, that he did not load a certain screw steamer as agreed within twenty-four hours after the same was ready; and afterwards further broke the said agreement, and absolutely refused to perform the same, or to ship any more goods at all for plt. as agreed.

Plea to the second breach, that before deft. absolutely refused as alleged, plt. absolutely refused to pay, according to the said agreement, for certain coals that had theretofore been shipped for and delivered by deft. to plt., although requested by deft. to pay for the same according to the said agreement, and although everything had happened and been done necessary to entitle deft. to such payment, wherefore deft. refused to load until such payment was made, as he lawfully might:

Held on demurrer to be a bad plea.

Declaration:

That it was agreed by plt. and deft. that plt. should purchase of deft. certain goods, to wit, 30,000 tons of coal, and that deft. should ship the same on board of certain vessels from 1st Aug 1865, and for a period of six months from that day, and that deft. should load every such vessel within twenty-four hours after the said vessel was ready to be loaded at the Tyne docks, the deft. having due notice thereof, and that all conditions, &c. necessary to entitle plt. to have the said agreement performed by the deft., yet deft. broke the agreement in this, that he did not load a certain screw steamer, called the *S. M. Strachan* and other screw steamers, as well as a certain sailing vessel called the *Columbine* as agreed, within twenty-four hours after the said sailing vessel and steamers were respectively ready to be loaded; and afterwards further broke the said agreement, and wholly and absolutely refused to perform or to carry out the same or to ship any more goods at all for plt. as agreed, whereby plt. &c. (allegation of damage). Claim 3000l.

Plea 6, to the second breach:

That before deft. absolutely refused as therein alleged, plt. absolutely refused to pay, according to the said agreement, for certain coals that had theretofore been shipped for and delivered by deft. to plt., although requested by deft. to pay for the same according to the said agreement, and although everything had happened and been done necessary to entitle deft. to such payment, wherefore deft. refused to load until such payment was made, as he lawfully might.

Demurrer and joinder in demurrer to said plea.

Plt.'s points:—1. That it does not appear upon the record that payment in full for the coals as delivered is a condition precedent to the plt.'s right to have the contract performed by deft. 2. That deft. should have set out the terms of the contract relating to payment for the coals to be delivered by deft. to plt. 3. The nonpayment by plt. for certain coals theretofore delivered by deft. to plt. does not justify deft.'s refusal to perform the contract on his part.

Def't.'s points:—That it sufficiently appears upon the pleadings that the payment for coal shipped for and delivered to plt. was a condition precedent to plt.'s right to insist upon a further shipment, and that, under the circumstances stated in the plea, the deft. was justified in refusing to ship any more coal till the coal already delivered had been paid for.

Gates, for plt., in support of the demurrer to the plea.—There was nothing to show that it went to the whole contract, and nothing that might not be compensated in damages. It did not appear on the record how plt. was to pay for these goods, nor that payment on delivery of each shipload was a condition precedent to the performance of deft.'s contract. If deft. relied on any breach of contract by plt. as a justification of his own misconduct, he should have set it out. In note 3 to *Fordage v. Cole*, 1 Wms. Saund. 320 c., it was said: "Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the deft. without averring performance in the declaration;" and the well-known case of *Boon v. Eyre*, 1 H. Bl. 278, note (a); 2 Black. Rep. 1312, was there referred to. [MARTIN, B.—The declaration states the contract to load certain vessels, and then goes on to aver a breach in not loading a certain steamer; and that is all right. It then proceeds: "and deft. afterwards further broke the said agreement, and wholly refused to perform the same, or to ship any more goods at all for plt. as agreed." Have you authority that that is a good breach?]

Hochster v. Delatour, 2 El. & B. 678; 22 L. J. 455, Q. B.; and

Xenos v. The Danube and Black Sea Railway, &c. Company, in error, affirming the judgment of the C. P., 13 C. B., N. S., 825; 31 L. J. 284, C. P.,

were to that effect. *Withers v. Reynolds*, 2 B. & Ad. 832; 1 L. J., N. S., 30, K. B., was also in plt.'s favour. There was nothing in the present declaration to show each shipload was to be paid for on delivery, and plt. was clearly within the judgment of *Patteson, J.* in that case. He cited also

Davidson v. Gwynne, 1 East, 381.

Beresford contra, for deft., supported the plea and contended it was a good plea to the breach to which it was pleaded. The declaration said nothing about how the goods were to be paid for, and it must, therefore, be taken that each load was to be paid for on delivery. Where a large quantity of goods had to be delivered, extending over a long period of time, the vendor, in the absence of express agreement to the contrary, was entitled to be paid on each delivery, and that was the proposition established by *Withers v. Reynolds*, cited contra. The plea amounted to a traverse of ready and willing to deliver.

MARTIN, B.—I am of opinion that this is a bad plea. It does not, in my opinion, sufficiently state the circumstances. I can conceive circumstances existing which would justify a man in refusing to go on, but here we cannot say what the contract really is. I do not think it is within *Withers v. Reynolds*, and that case was not put upon payment of past loads. Our judgment must be for the plt.

BRAMWELL, B.—I am of the same opinion, and a general principle also I think this a bad plea. My brother Martin has said, it is not within *Withers v. Reynolds*. In my opinion Mr. Beresford's view is not law. Now, I can see no inconvenience in holding that each delivery is to be paid for at moment, but much the other way. It seems to me to be clearly a bad plea.

POLLOCK, C. B. concurred.

Judgment for the
Attorneys for plt., *Wilkins and Blyth*,
Swithin's-lane.

Attorneys for deft., *Shum and Crossman*, 4,
road, Bedford-row.

[ADM.]

THE WILHELM.

[ADM.]

COURT OF ADMIRALTY.

Tuesday, July 25, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE WILHELM.

*Liability of ship for deferred delivery of cargo—
Detention by frost.*

The master of a ship, whilst waiting for cargo, omitted to take in sufficient stores and provisions for his voyage, and whilst subsequently taking in such provisions and stores the frost set in, and the ship was frozen in port and detained from the beginning of October until the breaking up of the ice in the ensuing year :

Held, that the owners of the ship were responsible to the owners of the cargo for any loss accruing from such detention ; it being, by maritime law, the duty of the master to convey the cargo to its port of delivery with all expedition ; and if by neglecting to avail himself of all fair opportunity the voyage is delayed and damage accrues to the owners of the cargo, the owners of the ship are liable to make good the sum.

Deane, Q. C. and Murphy for plt.

Brett, Q. C. and E. C. Clarkson for deft.

Dr. LUSHINGTON gave judgment in this case, which was an action brought on behalf of Messrs. Fontaines and Wilson, merchants of London, as consignees of 584 barrels of tar, part of the cargo of the brig *Wilhelm*, against the owners and master of that ship, to recover for the loss arising from the non-delivery of the tar. The petition set forth that by a charter-party dated in London the 1st April 1862, between the master of the brig and the plts., the brig, then in the Baltic, proceeded to Archangel on the 11th Aug., and on the 16th the master gave notice to the plts.' agent that he was ready to commence loading ; that a full cargo was ready to be shipped immediately, but that the shipment thereof, through the negligence or default of the master, was not completed until the 19th Sept., when the brig got under weigh and proceeded down the river on her intended voyage ; that the master, instead of putting to sea, as he could and ought to have done, shortly after leaving Archangel, brought the brig up off Modon Kerle, where he remained without making any effort to prosecute his voyage, although the navigation was perfectly open and free from obstruction, until the middle of October, when the river was closed by ice, and the brig, with the plts.' cargo on board, was detained there until the breaking up of the ice in the following spring. It was then alleged that, if due diligence had been used by the master in loading the brig and proceeding on his voyage, the brig, with the plts.' cargo on board, would have arrived in England before the beginning of Nov. 1862 ; but that, in consequence of the negligence, mismanagement, or other default on the part of the master, the brig did not reach England until the 18th July 1863 ; that such negligence, mismanagement, and default were a breach of duty and a breach of contract on the part of the master, and by reason of such breach of duty and of contract the plts. had sustained considerable loss. The answer for the deft. pleaded that, by a charter-party dated the 1st April 1862, it was mutually agreed between the master of the above-named brig *Wilhelm*, then in the Baltic, to leave to take a cargo from Memel to Archangel, and the plts., that the brig, being tight, staunch, strong, and every way fitted for the voyage, should, with all convenient speed, sail and proceed to Archangel, or as near thereunto as she

might safely get, and there load from the factors of the plts. a full and complete cargo of tar in barrels, and about 1000 mats ; ship to be provided with a deck cargo of tar which the plts. bound themselves to send or cause to be sent alongside the vessel at her port or place of loading aforesaid, and to be taken from alongside the vessel at her place or port of discharge free of expense to the master, and being so loaded should proceed therewith to Bristol, London, Newcastle-on-Tyne, Sunderland, or Hartlepool, as ordered on signing bills of lading, or so near thereunto as she might safely get (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind soever, during the said voyage, always excepted), and by the said charter-party it was agreed that twenty-eight running days should be allowed to the plts. for loading the ship and discharging ; that the *Wilhelm*, after completing her voyage from Memel to Waterford with all convenient speed, sailed and proceeded to Archangel, where she arrived on the 11th Aug. 1862, but was not able to obtain a berth whereat to discharge her ballast until the 13th ; that on the 14th and 15th the ballast of the *Wilhelm* was discharged, and on the 16th the *Wilhelm* was ready to take in cargo, and her master on that day gave notice thereof to the agents of the plts. at Archangel, and made the necessary arrangements with the view of taking in her cargo ; that the plts. neglected to furnish the cargo of the *Wilhelm* in accordance with the aforesaid charter-party, and notwithstanding the requests and representations of the master, delayed furnishing the cargo, and in consequence of such neglect and failure, and not through any negligence or default of the master, the shipment of the cargo was not completed until the 18th Sept. following ; that on the 19th the *Wilhelm* left Archangel and proceeded to Modosko Roads for the purpose of proceeding over the bar, but owing to strong winds and the shallowness of the water on the bar, the *Wilhelm* was unable to pass over the bar, and she remained detained by strong winds and bad weather until the 8th Oct., when the *Wilhelm*, requiring provisions before proceeding to sea, was taken to Lupomoko Roads, and her master proceeded to Sollenburgh to obtain such provisions, and on the next day the ice set in, and the *Wilhelm* was taken to Lupomoko harbour, and although every endeavour was made to get her to sea, she was unable to proceed to sea, and became and remained frozen up, and was unable to reach England until July 1863. It was further pleaded that the *Wilhelm* was prevented by the dangers and accidents of the seas, rivers, and navigation, and by the negligence and default of the plts., from proceeding to sea before she became so frozen up, and that the master was not guilty of any breach of duty or breach of contract. The merits of the case were in a very narrow compass. As regarded the plts. the court think that the lapse of four days after the running days could be imputed to them as blame, or for the recovery of damages if otherwise entitled. As regarded the defts., it is satisfactorily shown on the contrary, that having got into the Modosko Roads on Sept. 22nd, they were unable to pass the bar from that day to Oct. 8th. After the vessel had been taken to Lupomoko harbour, it was impracticable for the vessel to proceed to sea. It was equally clear that, on the 8th or 9th Oct., if the *Wilhelm* had remained in the Modosko Roads, she might have crossed the bar and proceeded on her voyage. The question for the decision of the court was whether the alleged want of provisions which prevented the master's departure from the Modosko Roads did not amount to such as is contemplated by the Admiralty Court Act 1861, and

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[ADM.]

gave the plts. a just right of action. It was the duty of the master to convey the cargo to the port of delivery with all due diligence and expedition, and if, by unreasonable delay or neglect to avail himself of the means in his power, the voyage was delayed and damage accrued to the consignees of the cargo, the owners were responsible. Amongst the duties to be performed by the master, the due provisioning his crew was one of the most apparent and most indispensable. This duty was especially stringent in a case like the present—of a voyage from a northern port at a late period of the year, where the opportunities of getting out into the open sea were necessarily rare, and the loss of an opportunity might lead to the detention of a vessel and her cargo for a whole winter. It was clear that the interests of commerce strictly regarded obedience to these rules, for upon the due arrival of the cargo might entirely depend the success of the adventure. It was true, it might be said in this case that it was the interest of the master to complete his voyage with all celerity. Such assertion might be true, but it was no answer to the complaint, if proved, for it only showed what was of frequent occurrence, that even self-interest would not insure due diligence. If the master wanted provisions he was most culpable in having neglected to have a proper supply. If the provisions required were merely fresh provisions, articles not of necessity but of comfort, for the purpose of obtaining them the master was not justified in quitting the Modosko Roads. The Court was of opinion that the delay in prosecuting this voyage, and consequent loss to the plts., was to be attributed to the negligence or want of due diligence on the part of the master, and that, consequently, the plts. were entitled to a decree for the damage, with costs.

Saturday, Aug. 5, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE THOMAS POWELL v. THE CUBA.

Collision—Inevitable accident.

In order to constitute an inevitable accident it is necessary that the accident should not have been capable of being prevented by ordinary skill and diligence—not extraordinary skill or extraordinary diligence—but that degree of diligence and skill which is generally to be found in persons who properly discharge their duty.

Milward, Q. C. and E. C. Clarkson for the *Thomas Powell*, and Brett, Q. C. and Vernon Lushington for the *Cuba*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the screw steamship *Thomas Powell*, 401 tons, against the Cunard company's steamship *Cuba*, 1534 tons, to obtain compensation for the loss arising from the two ships coming into collision in the river Mersey about half-past seven p.m. of the 19th Feb. last. The *Thomas Powell* stated the wind as N.N.W., and the weather as blowing a gale, and clear but dark. The *Cuba* represented the wind as N., and the weather a gale. The case for the *Thomas Powell* was, that on the 17th Feb. she had arrived at Liverpool with a cargo of coal, and proceeded into the Huskisson Dock to discharge such cargo into a steamship called the *City of Baltimore*, which was then in that dock; that in the afternoon of the same day the *City of Baltimore* left the Huskisson Dock and proceeded into the river Mersey, and there brought up, and that the *Thomas Powell*, which had discharged a part only of her cargo, followed the *City of Baltimore*, and made fast alongside her and continued to discharge her cargo into the *City of Baltimore*

until the afternoon of the following day, 18th Feb., when, in consequence of the weather, she was compelled to cast off and steam away; that at the time and on the day in question the *Thomas Powell* was lying at anchor in the river Mersey in a proper berth between Seacombe and Egremont; that the tide was ebb, and of the force of about six knots an hour, and that the *Thomas Powell* had a bright globular light on her foremast, and another on her mizen-boom, both of which were burning brightly and a proper watch was being kept on board her; that in this state of things the *Cuba*, which had come in from sea, and had passed up the Mersey above the *Thomas Powell*, owing to the negligence or want of skill of her owners or those on board, came into collision, and with her stem carried away the bowsprit of the *Thomas Powell*, and then fell alongside her on her port side, and did her a great deal of damage, and remained in contact with her until about eight p.m., when she went clear. It was then alleged that the helm of the *Thomas Powell* was ported before the collision, in order, if possible, to avoid it; that the collision was wholly the default of the defts. or their servants, and that it was not in any way occasioned by the *Thomas Powell* or those on board her. The defence for the *Cuba* was, that on the day in question she was on her homeward voyage from New York with mails and passengers; was off the port of Liverpool, but that, in consequence of the heavy weather, no pilot was able to board her until off Waterloo, in the Crosby Channel, when Thomas Lewis, a duly licensed pilot, succeeded in boarding her, and assumed the command; that about seven o'clock the *Cuba* was brought to an anchor with her best bower and seventy-five fathoms of chain, in about mid-river, off Seacombe, as it was not practicable for the vessel to proceed to her usual anchorage higher up the river; that the sea was so heavy that the tender could not come alongside to take the mails; that the tide was about two hours ebb, and running at the rate of five knots an hour; that the berth so taken up by the *Cuba* was a perfectly clear berth, and in particular was well clear of the steamer *Thomas Powell*, which had been observed whilst coming to anchorage, and which lay a considerable distance to the north-west of the *Cuba*; that the *Cuba* carried the Admiralty regulation lights duly exhibited and brightly burning, and also a white light on the signal staff, her steam was kept up, a good look-out was being maintained, and the pilot continued on deck and in charge; that in consequence of the heavy gale blowing against the tide, the *Cuba* would not ride quietly to her anchor, and in about half an hour from the time of anchoring broke her shear, and drove to the east side of the river, dragging her anchor, and approached the Waterloo-pier; that in doing so the *Thomas Powell* was observed following the *Cuba* across the river, and about 7.30, having no steam up, she drove into the *Cuba* with her stem, striking the *Cuba's* stern; that by this collision, and in clearing, the *Thomas Powell* suffered some damage; that the *Cuba* sustained little or no damage by the collision, and afterwards steered across the river and dropped a second anchor, and the next morning proceeded to her proper anchorage. It was then alleged that the collision was not caused by any negligence of those on board the *Cuba*, but was an inevitable accident; that if the collision was in any degree caused by those on board the *Cuba*, it was occasioned by the pilot, who was employed by compulsion of law, and that the collision was caused by the negligence of those on board the *Thomas Powell*. On these pleas the first thing to be considered was the averment made on behalf of the *Cuba*, that the collision was an inevitable accident. To constitute an inevitable accident it was necessary that the occurrence should

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have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence. We were not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty. The evidence agreed with the preliminary act, that it was a very tempestuous night, and that the wind was blowing with considerable severity. Looking at all the circumstances, and considering where the vessels were anchored, the questions to be decided were, whether the collision was or was not the result of an inevitable accident, or whether any fault was imputable to the pilot of the *Cuba*, or whether, in the fair discharge of his duty, there was either a want of skill or gross negligence to which the blame of the collision could fairly be attributed? It had been said that the collision might have been avoided if the *Thomas Powell* had had steam power. As a fact there could be no doubt whatever that she had not steam power in a proper and usable condition; but whether that was neglect (looking at the circumstances of the case, and considering she was anchored in the state of the night), and an absence of reasonable precaution, are open questions. If the evidence of the pilot of the *Cuba* is to be believed, it was the *Thomas Powell* that came down upon the *Cuba*, and not the *Cuba* upon the *Thomas Powell*; but, on the other hand, it was but fair to observe there was the evidence of the mate of the *Thomas Powell*, who deposes just as strongly that the *Thomas Powell* never did break her shear, and that the collision was occasioned by the *Cuba* breaking her shear and coming down upon her. Under all the circumstances of the case, and on full consideration of the evidence on both sides, the court was of opinion that the *Cuba* was to blame for the collision, and that the blame was imputable to the pilot of the *Cuba*.

The Court was assisted by Capt. Were and Capt. Weller.

Monday, Nov. 20, 1866.

(Before the Right Hon. Dr. LUSHINGTON.)

THE HANNAH PARK AND THE LENA.

Collision—Admiralty regulations as to rules of the road.

7th, 18th, and 19th regulations: "Every vessel overtaking any other vessel shall keep out of the way of the vessel being overtaken, and where by such rules the one ship is to keep out of the way, the other ship shall keep her course, due regard being had, in the observance of both these rules, and their observance being subject, to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from such rules necessary in order to avoid immediate danger."

Yea: "That a steamer overtaking a sailing vessel could not comply with the first of the above regulations in consequence of the state of the weather, and the neglect on the part of those on board the sailing vessel to take proper precaution to avoid a collision."

Told, that the proof of such a plea was entirely on the steamer, who must make out in her defence that it was impracticable for her, in consequence of the state of the weather, to have seen the sailing ship in time to have avoided her; and that the steamer was pursuing her course at a reasonable speed, such weather considered.

Deane, Q. C. and E. C. Clarkson appeared for the *Hannah Park*.

Brett, Q. C. and Vernon Lushington for the *Lena*.

MAR. CAS.—VOL. II.

Dr. LUSHINGTON gave judgment in this case, which was an action brought against the owners of the steamship *Lena*, 875 tons, from Cronstadt for London, by the owners of the late brig *Hannah Park*, 259 tons, from the same ports of departure and destination, to recover for a total loss resulting from a collision between them in the Gulf of Finland, about 4 a.m. on the 15th Sept. last. On the part of the brig the wind was represented as N.W. by N. to N.N.W. and the weather clear and fine, blowing fresh with a strong sea; for the steamer, the former was stated as N.N.W., and the wind as blowing strong, with a heavy sea and a dark night. The case for the plt. was, that the brig was steering from W. to W.½S. close-hauled on the starboard tack, exhibiting her regulation lights brightly burning, when the masthead light of the *Lena* was seen astern of her, distant three or four miles; that the *Lena* approached and brought both her side lights also into view, whereupon those on board the brig loudly hailed the steamer, notwithstanding which she ran stem on into the brig's stern with such violence as to cause her to sink in about two hours. The defence of the *Lena* set forth, that she was steering S.W. by W.½W., and was proceeding under steam about eight and a half knots, carrying her proper lights brightly burning, when the brig was descried six lengths ahead of her, no light of any kind being visible on board her to those in the steamer; that, upon the brig being seen, the helm of the steamer was put hard a-port, and her engines were stopped and reversed, but nevertheless the steamer's port bow came in contact with the brig's starboard quarter; that after the collision the brig's crew boarded the steamer, and the brig sunk after daylight. There were three questions raised here: first, whether the collision was the result of inevitable accident; secondly, whether the steamer was solely to blame; and, thirdly, whether the brig herself was to blame, either for omitting to show a light, or, after the collision, in consequence of neglecting to do that which was incumbent upon her to do for the preservation of the property. It is agreed that the steamer was following very nearly, though not precisely, in the wake of the brig; and the Admiralty regulation states that "Every brig overtaking any other vessel shall keep out of the way of the said last-mentioned vessel." It is also provided that the vessel which precedes shall keep her course. It is manifest, the collision having actually taken place, this regulation was not strictly complied with; and on behalf of the steamer it is said that she could not comply with it in consequence of the state of the weather and the neglect of those on board the brig. The duty of proving that defence is clearly and entirely upon the steamer. She must make out affirmatively that it was impracticable for her, in consequence of such state of the weather, to have seen the brig in time to have avoided her; and, moreover, she must show that she was pursuing her course at that reasonable rate of speed, considering the state of the weather, that there was no impropriety of conduct in that respect which could avail against her. Regarding the conflict of evidence as to the darkness of the night, undoubtedly it was very great. The time of collision may be fairly taken at a few minutes, five or ten minutes, before four, and it is admitted the day was breaking at that time. There is one matter that ought to be taken into consideration, viz., that on board the steamer it was said the brig was seen seven to eight ship's lengths off. Taking it at seven, that is 1400 feet, which is more than 400 yards. As to whether it was the duty or not of those on board the brig to have hoisted a light, as a general proposition it must be admitted that it is the duty of those who see any chance of

C. P.] FRY v. THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA. [C. P.]

an approaching collision to take all reasonable means in their power to avoid it; but this must depend on the circumstances of the case. The third point is, whether or not after the collision occurred there was a dereliction from duty on the part of the master of the brig, in not adopting those measures which it is said could have been adopted to save the vessel. A case was cited where there was a collision with Her Majesty's ship *Flying Fish*, and the ship that came in contact with her was run ashore in the Bay of Rye some hours after the collision. The question arose then whether or not great damage had not accrued from the improper conduct of the master in not accepting the services offered to him by being towed off in that bay. I refused to hear that question discussed in the principal collision case; and I think when I come to look at the result I acted wisely, for when the matter came on as to the propriety of running her on shore, and the propriety of getting her off, fourteen or fifteen witnesses were examined, whose evidence was all contradictory and conflicting, when the question I should have put to the Trinity Masters would have been, whether the running her on shore was right or wrong. But whenever I meet with such a case again I will make a separate case of it. This is totally different, because all the witnesses here can speak to the facts, and no other witnesses could be produced. It has been said that the master of the brig was to blame for not having taken measures to prevent the ship sinking, that those measures could have been adopted, and with safety to the parties on board, and that the loss would have been avoided. In the first place, when the collision actually occurred, the master was left on board the vessel with, as he says, himself, a boy, and two seamen only. We must recollect, after a vessel of 876 tons, a steamer, has come immediately into collision with a brig of 259 tons, you cannot immediately expect that all on board the vessel run into are in entire possession of their wits so as to take all measures for their safety. Rational measures they must take. But at the same time they must not be expected to be very acute in their judgment, and it does not appear to me that after the collision anything could be done in the first instance. We will suppose that the rest of the crew were brought back from the steamer, and that the master had the power of getting all of his hands on board the brig; and that he had all his original crew. It has been said that the vessel remained afloat for the period of an hour and fifty minutes: the strong probability therefore is, under the circumstances, that she might have been saved. That that is a circumstance well deserving consideration I do not doubt, but it appears to me the main point in the case is the extent of damage which was actually done, because it must depend upon that whether there was danger of immediate sinking, or a probability that the danger could be temporarily repaired so as to bring the vessel into a state of safety. There is very little evidence from the steamer as to the extent of damage, and none that is satisfactory to my mind. The master of the brig described the hole as about as big as one of the windows of the court, and so large that the sea undoubtedly did from time to time get in. It was for the Trinity Masters, who assisted the court to say whether, under the circumstances, it was proved satisfactorily on the part of the steamer that the master of the brig neglected his duty; and by not doing that which might have been done with facility and safety, occasioned the ultimate sinking of his vessel, and the loss that has accrued. After carefully weighing the evidence on both sides, and upon the facts adduced, the court, under the advice and with the concurrence of the gentlemen who assisted it, is of

opinion that the steamer was solely to blame for the collision.

The Court was assisted by Capt. Pigott and Capt. Weller, of the Trinity-house.

COURT OF COMMON PLEAS.

Reported by W. MAYD and W. GRAHAM, Esqrs.
Barristers-at-Law.

Thursday, June 21, 1866.

FRY v. THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA.

Ship—Bill of lading—Freight payable as per charter-party—Lien.

The vessel of the plts. was chartered at S. to ship cotton to L. under a charter-party containing the stipulation, "the ship to have a lien on cargo for freight, 3l. 10s. per ton, payable on right delivery at the port of discharge." The goods shipped fell short of a full cargo. The bill of lading of these goods stated "freight to be payable as per charter-party." Three of the cargo was shipped at a lower freight. The debts were indorsees for value of the bill of lading:

Held, that the plts. had no lien on the goods for the whole amount of freight, and that the provision as to freight being payable as per charter-party only incorporated the charter-party as far as the rate of freight was concerned.

SPECIAL CASE.

Messrs. Sanderson, Frys, Rigge, and Co., the plts in this action, carry on business as shipowners and merchants in St. Helen's-place, in the city of London, and are the owners of the ship *Her Majesty*.

The debts are a chartered banking company, carrying on business in London, and also at Shanghai in China, where they have a branch bank.

In the autumn of 1864 the said ship *Her Majesty* was at Shanghai, and was by a charter-party, dated 14th Sept. 1864, chartered by Messrs. Dadabhoys and Co., of that place, to take a full and complete cargo of cotton and [or] other merchandise, which they bound themselves to ship in the usual way for London or Liverpool as ordered.

Amongst other clauses the charter-party contained the following one, which is chiefly material in the present case:

And, being so loaded, shall therewith proceed to London or Liverpool, as ordered at Shanghai, and deliver the said cargo on being paid freight as follows:—The ship to have a lien on cargo for freight. Three pounds ten shillings (3l. 10s.) sterling per ton of fifty (50) cubic feet measured in Shanghai to be paid to captain or his agents on right and true delivery at port of discharge (the act of God, the Queen's enemies, &c., &c. always excepted). The freight to be paid on unloading and right delivery of the cargo.

A fac-simile of the charter-party, which is partly in print and partly in writing, is annexed to and forms part of this special case.

After some difficulty and delay, the charterers, Dadabhoys and Co., succeeded in procuring for the said ship a full and complete cargo which, for the purposes of this case, is treated as divisible into three portions.

The first portion, consisting of 185 packages of tea and 42 bales of cotton, was shipped by the charterers themselves, and on their own account, under the bill of lading hereinafter set forth, the freight for the same being payable at the same rate as that agreed upon in the charter-party, and amounting at 3l. 10s. per ton, to the sum of 101l. 8s. 10d.

The second portion (with respect to which similar questions arise between the plts. and other parties, viz., the Commercial Bank Corporation of India and the East) was also shipped by the charterers

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under a similar bill of lading, and at the charter rate of freight.

The third portion, being by far the largest portion of the cargo, was shipped by other merchants at various rates of freight all below the charter rate.

The difference between the total amount of the bill of lading freight payable upon the cargo as above mentioned, and the freight payable under the charter-party, was very considerable and amounted to the sum of 1710*l.* 8*s.* 10*d.* The portion of the cargo which had been shipped by merchants other than the charterers as above mentioned was duly delivered as hereinafter mentioned upon payment of the freight due upon the bills of lading of the same, and no question arises with respect to this portion of the cargo.

The large deficiency above mentioned between the amount of the bill of lading and that payable under the charter-party, gave rise to a question between the *plts.* and the holders of the bills of lading of the first and second portions of the cargo above referred to respecting the right of the *plts.*, upon the true construction of the bills of lading and charter-party, to a lien upon those portions of the cargo, under the circumstances hereinafter mentioned, for the whole balance of freight payable under the charter-party.

The following is a copy of the bill of lading under which the first portion of goods were shipped:

[B.R.] 185. Shipped in good order and well conditioned to Dadabhoj and Co., in and upon the good ship or vessel called the *Her Majesty*, whereof is master for this present voyage, Seymour, and now lying at anchor in the port of Shanghai, and bound for Liverpool, one hundred and eighty-five packages of tea, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Liverpool, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, excepted, unto or order, for to their assigns. Freight for the said payable in Liverpool as per charter-party, with *primage* and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date, one of which bills being accomplished the others to stand void.

GEORGE F. SEYMOUR.

Dated in Shanghai, 21st Feb. 1865.

The said Dadabhoj and Co., after the shipment of the above goods by them, applied to the defts.' branch bank at Shanghai to make them an advance upon the security of the same, and it was thereupon agreed that on receiving the bill of lading for the same, and also the letter of hypothecation hereinafter set out, the defts. should negotiate the draft of the said Dadabhoj and Co. for 1250*l.* on Mr. R. E. Gibson, of Liverpool, payable to the drawers' order, and by them indorsed to the bank.

The above arrangement was carried out, and in pursuance of it the defts. negotiated the said Dadabhoj and Co.'s draft upon the said R. E. Gibson for 1250*l.*, receiving from them at the same time the above-mentioned bill of lading, which was duly indorsed by them, and also the following letter of hypothecation:

The Chartered Mercantile Bank of India,
London, and China

Shanghai, 7th March 1865.

We having this day negotiated with you our bills of exchange drawn on R. E. Gibson, Esq., of Liverpool, the particulars of which are noted at foot, and having at the same time handed to you as collateral security for the due payment of the said bills, the bills of lading and shipping documents belonging to us of the several goods also stated at foot, our agreement is understood to be as follows:

We hereby authorise the said Chartered Mercantile Bank of India, London, and China, and the holders of the above bills for the time being, to take conditional acceptances to all or any of such bills, to the effect that on payment thereof at maturity the above-mentioned bills of lading and shipping documents shall be delivered to the drawers or acceptors thereof, and such authorisation on our parts shall be taken to extend to cases of acceptance for honour.

We further authorise the said bank, or any manager or agent thereof, on default being made in acceptance on presentment, or in payment at maturity of any of the above bills, or on the drawers' suspension of payment during the currency of

the bills, to sell the said goods, and to apply the net proceeds (after deducting usual commission and charges) in payment of such bills with re-exchange and charges, the balance, if any, to be applied in liquidation of any other debt or liability of ours to the said bank, any ultimate balance to be at our disposal. And in case the net proceeds of such goods shall be insufficient to pay the amount of any such dishonoured bills with re-exchange and charges, we authorise the Chartered Mercantile Bank of India, London, and China, or the holders thereof for the time being, to draw on us for the deficiency, and we engage to honour such drafts on presentment, or to pay the said bank in London.

We further authorise the said bank, or the holders of the said bills for the time being, in case the aforesaid power of sale shall not have arisen at any time before their maturity, to accept payment from the drawers or acceptors thereof, and on payment to deliver the said bills of lading and shipping documents to such drawers or acceptors, and in that event the said bank, or the holders of said bills, are to allow a discount thereon for the time they have to run, at the Bank of England minimum rate of the day, if taken up in London, or if in India, Ceylon, or China, at the current rate of discount of the day on Government acceptances in India, Ceylon, or China, as the case may be.

We also authorise the Chartered Mercantile Bank of India, London, and China, or any manager or agent thereof (but not so as to make it imperative), to insure the above goods from risk, including loss by capture and also from loss by fire on shore, and to add the premiums and expenses of such insurances to the amounts chargeable to us in respect of the said bills, and to take their recourse against the said goods or against us for their reimbursements, and also to sell any portion of the said goods which may be necessary for payment of freight, and the said bank are to take such measures generally, to make such charges for commission, and to be accountable in such manner, but not further or otherwise, as in ordinary cases between a merchant and his correspondent, it being hereby declared that the bank is not to be liable for the default of any broker or auctioneer employed in the sale of the goods.

Lastly, it is mutually agreed that the delivery of said collateral securities to your bank shall not prejudice your rights on said bills in case of dishonour, nor shall any recourse taken thereon affect the title of the bank to said securities to the extent of our liability to your bank as above.—We are your obedient servants,

DADABHOJ and Co.

BILLS AND DOCUMENTS ABOVE REFERRED TO.

Date.	Particulars of Bills.		Particulars of Goods.	
	Amount.	Drawee.	Bills of Lading.	Name of Ship.
March 7.	1250 <i>l.</i>	R. E. Gibson, Esq.	[B.B.] 185 P Tea. [D.] 42 B Cotton.	<i>Her Majesty.</i>

No copy of the charter-party was handed to the bank at Shanghai, and the officials of the bank there were not acquainted with its contents. They were given to understand that the freights were 70*s.* per ton.

The said ship having received orders to that effect at Shanghai, proceeded on her voyage to Liverpool; and shortly after she set sail the said Dadabhoj and Co. stopped payment, and their estate is now being wound-up in China by trustees, under a deed of assignment.

The news of the failure of Dadabhoj and Co. reached England before the arrival of the ship, as hereinafter mentioned. The draft above mentioned was accepted by the said R. E. Gibson, who failed before its maturity, and is still unpaid.

The said ship afterwards arrived in due course at Liverpool, and all the goods shipped by merchants other than the charterers were delivered to the consignees thereof upon payment of the freight according to the bills of lading for the same, and this (calculating the freight for the residue of the cargo, consisting of the first and second portions above mentioned at the charter rate) left a deficiency below the total amount of freight payable upon the cargo according to the charter-party of 1710*l.* 8*s.* 10*d.* as before mentioned.

Under these circumstances the defts., as the holders of the bill of lading and other documents above mentioned relating to the 185 packages of tea and 42 bales of cotton, shipped by Dadabhoj and

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Co., claimed to be entitled to delivery thereof upon payment of the freight for the same at the charter rate, viz., 3*l*. 10*s*. per ton, amounting to 101*l*. 8*s*. 10*d*. The plts., however, claimed to be entitled to a lien thereon for the whole balance of the freight due and unpaid under the charter-party, as above mentioned.

The plts. and defts. entered into the following memorandum of agreement:

Memorandum. Whereas the Chartered Mercantile Bank of India, London, and China claim to be *bona fide* holders for value of a bill of lading, dated at Shanghai, 21st Feb. 1865, for 185 packages of tea, and a bill of lading, dated 8th Feb. 1865, for 42 bales of cotton, which said tea and cotton are now in the custody of the agents of the shipowners at Liverpool. And whereas Messrs. Sanderson, Fry, Rigge, and Co., the owners of the said ship, claim payment of a balance of 1930*l*. 4*s*. 5*d*. as due to them for freight as per charter-party entered into by Messrs. Dadabhoj and Co. at Shanghai, and they have accordingly asserted a lien on the before-mentioned tea and cotton for the full amount so due to them. And whereas the said bank, as holders of the said bills of lading, deny the right of the shipowners as against them to their alleged lien for charter freight, and claim delivery of the said 185 packages of tea and 42 bales of cotton on payment of freight at the rate of 70*s*. per ton, and which freight amounts to 101*l*. 8*s*. 10*d*. And whereas Messrs. Sanderson, Fry, Rigge, and Co. have, for the purpose of enabling the holders of the said bills of lading, to deal with the said bank, held the said 185 packages of tea and 42 bales of cotton, without prejudice, and on the understanding hereinafter mentioned, on receiving payment of the last-mentioned sum of 101*l*. 8*s*. 10*d*. It is therefore mutually agreed by and between the said parties, that on payment of the said sum of 101*l*. 8*s*. 10*d*. as and for freight on the said tea and cotton at the rate of 70*s*. per ton, the said Messrs. Sanderson, Fry, Rigge, and Co. will deliver the said bank an order on their agents at Liverpool for delivery thereof, it being nevertheless understood and agreed that for the purposes of any future proceedings it shall be considered that Messrs. Sanderson, Fry, Rigge, and Co. have asserted a lien on the said tea and cotton for the whole of their said claim of 1930*l*. 4*s*. 5*d*, and that the said tea and cotton are to be delivered without prejudice to their right to recover against any party any sum beyond the said sum of 101*l*. 8*s*. 10*d*, the sum to be determined as if the said tea and cotton still remained in the docks subject to their lien (if any). Dated 25th Sept. 1864.

The above goods were thereupon delivered to the defts. and sold, and the net proceeds thereof, amounting to 1514*l*. 17*s*. 11*d*., having been received by the bank, they have in hand (after retaining their claim on the goods) a balance of 224*l*. 12*s*. 7*d*. (subject to the deduction thereout of some law charges in reference to the matter), payment of which has been required of them by the trustees of Messrs. Dadabhoj and Co's deed of assignment.

For the purposes of the present case it is to be taken that this claim is good and valid in law or in equity as against Messrs. Dadabhoj and Co.

The questions for the opinion of the courts are:— 1. Whether the plts. had a lien as against the present defts. upon the said tea and cotton for the unpaid balance of freight due under the charter-party or any part thereof. 2. Whether the plts. have a lien or claim to the said surplus of 224*l*. 12*s*. 7*d*. less law charges over and above the defts.' claim, and whether the defts. ought to hand the same over to the plts.?

If the court should answer the first question in the affirmative, the judgment is to be entered for the plts. for 1514*l*. 17*s*. 11*d*., being the net proceeds of the shipments or such part as the court may determine, and costs of suit.

If in the negative, then if the court should answer the second in the affirmative, judgment is to be entered for the plts. for 224*l*. 12*s*. 7*d*. less the before-mentioned legal charges, but without costs of suit.

If the court should answer both questions in the negative, then judgment is to be entered for the defts. with costs of suit.

CHARTER-PARTY.

14th Sept. 1864.

It is this day mutually agreed between George F. Seymour, master of the good ship *Her Majesty* (for and on behalf of himself and owners of the said vessel), burthen per register

1112 tons, now lying in port of Shanghai, and Messrs. Dadabhoj and Co.

That the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed take on board in Shanghai a full and complete cargo of cotton and [or] other merchandise, cotton to be taken by measurement in Shanghai, the same to be placed alongside the ship within reach of her tackle, and not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, water, and furniture, and exclusive of the poop and cabins, which shall remain for the use and benefit of the captain and owners; the said George F. Seymour to provide all necessary dunnage and ballast, and, being so loaded, shall therewith proceed to London or Liverpool, as ordered by charterers before final sailing of the vessel from Shanghai, or as near thereto as she may safely get, and deliver the said cargo on being paid freight as follows: the ship to have a lien on cargo for freight three pounds ten shillings (3*l*. 10*s*) sterling per ton of fifty (50) cubic feet, measured in Shanghai, to be paid to captain or his agents on right and true delivery at port of discharge.

The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, always excepted.

The freight to be paid on unloading and right delivery of the cargo. The ship at port of discharge to be consigned to the owners or their agents; lay days to commence twenty-four hours after written notice being given the charterers that the vessel is ready to receive cargo; seventy working days to be allowed the charterers for loading the ship. All cargo to be loaded and discharged by people employed and paid by the ship. All port charges and pilotage at Shanghai, as also at London or Liverpool, are to be borne by the ship; demurrage beyond that time to be paid by the charterers at the rate of eighty (80) Mex. dollars per day, paid in advance. Commission as customary, to be paid to the brokers by ship as gross amount, earned under this charter. Penalty for non-performance of this agreement the estimated amount of freight.

Witness,

F. PORTER,
R. BEAUM.

GEORGE F. SEYMOUR,
DADABHOJ and Co.

Watkin Williams, for the plts., cited

Faith v. The East India Company, 4 B. & Ald. 630;

Chappell v. Comfort, 10 L. R., N. S., 802;

Weyener v. Smith, 15 C. B. 285;

Kern v. Dealandes, 10 C. B., N. S., 205; 5 L. T. Rep. N. S. 349;

Saunders v. Vanseller, 4 Q. B., 260, 290;

Smith v. Siercking, 4 E. & B. 945.

Quain (Field, Q. C. with him) for the defts.:

Russell v. Nieman, 17 C. B., N. S., 163; 10 L. T. Rep. N. S. 786.

Williams in reply.

ERLE, C. J.—I think our judgment should be for the defts. The case turns on the construction of the words in the bill of lading, "freight payable as per charter-party." The freight as per charter-party is 3*l*. 10*s*. per ton of fifty cubic feet, measured, &c., on right and true delivery at the port of discharge. The true construction of the words refers us to the charter-party for the rate of freight, and that is 3*l*. 10*s*. per ton. The charter-party contains a stipulation that the shipowner is to have a lien on cargo for freight, and it is contended that the shipowner has a right to demand the whole of the freight for every portion of the cargo from the holder of this bill of lading for these 500 bales. I think he has no right of lien for the whole cargo. The bill of lading incorporates the charter-party as to the amount of freight, but not the other terms of the charter-party. Is the stipulation that the shipowner is to have a lien for freight intended to enable him to hold these goods till the whole 760*l*. is paid? I think it is not. The judgment of Willes, J., in *Chappell v. Comfort* is applicable to this case, and I agree with the opinion there expressed; but if you wish to import anything more than the rate of freight, the words should appear in the bill of lading, so as to give notice to the innocent holder. It is effectual as to the amount of freight only.

M. SMITH, J.—I am of the same opinion. The question in this case is, what is the meaning of the contract under the bill of lading. I think it should

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SUTHERLAND v. ALLHUSEN AND ANOTHER.

[Ex.]

be interpreted according to the plain and ordinary construction of the words. The plt. undertakes to deliver 185 packages, freight payable in Liverpool as per charter-party, that is, that the amount of freight payable for those goods shall be that fixed by the charter-party. You may refer to it for the amount of profit, but it incorporates no other term. It is admitted that no action would lie on this bill of lading for the whole freight, and it would require very plain words which should make the particular goods liable for the whole freight. This case differs from cases where the freight is payable as a lump sum, in which the lien might be preserved. But that is not the case here. The case of *Kern v. Deslandes* was the one cited most in Mr. Williams' favour, but I think it is distinguishable from the present case. The court there thought the holders of the bill of lading stood in the same position as the charterers. Whether that assumption was right or not is unnecessary for us to discuss now, and our judgment must be for the debts to the extent before indicated.

Judgment for debts on the first point; for the plts. as to the surplus.

ERLE, C. J.—I desire to add that my brother Byles (who had gone to chambers) concurred in the opinion we have expressed, so far as he heard the argument.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Thursday, May 31, 1866.

SUTHERLAND v. ALLHUSEN AND ANOTHER.

Heading—Assumpsit—Contract for sale of goods—"Free on board"—Naming the ship—Condition precedent to delivery.

Assumpsit on a contract for the sale of fifty tons of bicarbonate of soda at "11l. per ton in 1 cwt. kegs; or, if taken in 10 cwt. casks, the price to be 10s. less per ton; free on board, to be delivered in equal monthly quantities during April, May, and June 1865." Averment, that debts duly delivered divers portions of the goods according to agreement, and that plt. was not required by debts to accept delivery of the residue. Breach, non-delivery of the residue. Plea, that debts were ready and willing to deliver the said residue according to the agreement, whereof plt. had notice, and that plt. was not ready and willing to accept, and would not accept, and did not require delivery of the same:

Held (on the authority of Armitage v. Insole, 14 Q. B. 728; 19 L. J., N. S., 202, Q. B.), that before the debts were bound to deliver the goods, the plt. was bound to name the ship or the place where he desired the goods to be delivered, and that a tender of the goods by the debts was not a condition precedent to their delivery, or to the ship or place being named by the plt.

This was an action for the non-delivery of fifteen tons, the balance or residue of fifty tons, of bicarbonate of soda in pursuance of a contract. The declaration stated that it was agreed that plt. should buy of debts fifty tons of bicarbonate of soda of debts' own manufacture, and that debts should sell the same to plt. at certain prices therein named, and should deliver the same to plt. in such quantities as plt. should require, not exceeding one-third of the whole of the said goods in each of the respective months of April, May, and June next ensuing the date of the said agreement, and that plt. should, if required by debts, accept the said goods in the respective quantities within the respective times in that behalf aforesaid.

Averment, that debts duly delivered divers quan-

ties of the said goods under and according to the said agreement, and that plt. was never required by debts to accept the residue or any part of the said residue of the said goods in the respective quantities &c., and that all conditions were performed, &c. to entitle plt. to have the said residue delivered and to maintain his action in respect of the breaches therein as alleged; yet debts did not, nor would deliver to plt. the said residue, &c., and allegation of damage therefrom.

Pleas:—1. *Non assumpsit*. 2. Debts were ready and willing to deliver the residue according to the agreement, whereof plt. had notice, and that plt. was not ready and willing to accept, and would not accept, and did not require a delivery of the same according to the agreement. 3. Exoneration and discharge of debts from performance before breach.

At the trial before Mellor, J., at the last Spring Assizes at Newcastle-upon-Tyne, it appeared that plt., a commission agent at Newcastle, had contracted to buy from debts, who were alkali manufacturers, fifty tons of bicarbonate of soda. The bought note, as proved at the trial, was in the following terms:

Newcastle-on-Tyne, 24th Nov. 1864.

I have to-day bought from you fifty tons bicarbonate of soda of your own manufacture; price 11l. per ton, in 1 cwt. kegs; or, if taken in 10 cwt. casks, the price to be 10s. less—say 10l. 10s. per ton. Free on board. Terms cash, in fourteen days after each delivery, less 5 per cent. discount. Delivery in equal monthly quantities during April, May, and June 1865.

(Signed)

B. J. SUTHERLAND.

The sold note signed by debts, which was also in evidence, was, *mutatis mutandis*, in the same terms, except that it did not contain the words "free on board." It was proved also that portions of the fifty tons were from time to time delivered during the months of May and June 1865, each delivery being preceded by an order from the plt. indicating a particular wharf or ship where he wished to have the goods delivered. At the end of June a balance of fifteen tons remained undelivered. In August following plt. sent an order for the balance. At that time debts' stock was exhausted, and they refused compliance, in consequence of which the action was brought. The market price of bicarbonate of soda had risen between June and August from ten guineas to 13l. 10s. per ton. In the declaration as originally framed there was an allegation that the parties had agreed by parol for an extension of time for delivery. After the decision of *Noble v. Ward* in the Ex., 13 L. T. Rep. N. S. 639; 4 H. & C. 149; 35 L. J. 81, Ex.; 1 L. R. 117, the declaration was amended, after issue joined, by striking out this allegation.

The contract being proved, evidence was given of the facts on which plt. relied as extending the time for performance of it. These facts were denied by the debts, but the learned judge, being of opinion that the case turned wholly on the construction of the contract, no evidence was given by debts, and a verdict was taken for the plt. with agreed damages (if any) at 40l., leave being reserved to debts to move. Accordingly a rule was obtained in Easter Term to set aside the plt.'s verdict, and to enter it for debts, pursuant to leave reserved, on the ground that upon the evidence the debts were entitled to the verdict, and against that rule.

Tenple, Q. C. and T. Jones, for plt., now showed cause, and contended that the onus was on debts to offer to deliver. It was contended on the part of debts, on the motion for the rule, that, plt. having an option as to the manner in which he would take the goods, it was a condition precedent to debts tendering them that plt. should exercise his option, and point out the place of delivery, and indicate in what sized casks he would take the goods. But that was not so. And, even assuming plt. to have failed to do his part, yet, before debts could take

[Ex.]

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[Ex.]

advantage of such failure, they should have insisted on plt.'s taking the goods: (*Carpenter v. Blandford*, 8 B. & C. 575.) Was the option in the vendors or the vendee? If in the former, they should have tendered; if in the latter, yet, nevertheless, debts were bound to deliver, according to the contract, in the smaller casks, unless before the time of delivery plt. notified his election to take the goods in the larger casks. The only duty on the face of the contract on plt.'s part was to be ready to pay on delivery, and debts' entire duty was to deliver goods on board. [*Manisty, Q. C.*, contra, for debts., refers to *Armitage v. Insule*, 14 Q. B. 728; 19 L. J., N. S., 202, Q. B., and the judgment of Coleridge, J. there. MARTIN, B. refers to *Startup v. Macdonald*, 12 L. J., N. S., 477, Ex.; 7 N. R. 269; 6 M. & G. 593.] The present case was not like, or affected by, *Armitage v. Insule*. There it was a contract to deliver on board a ship lying at Cardiff. But debts. ought, at any rate, to be ready and willing to deliver on board that ship. After part performance the objection was not good. All that debts. were entitled to do on plt.'s omission to name a ship was to rescind altogether, but that could not be done where part had been performed. Having had the benefit of the contract in May and June, they could not now rescind. Their remedy was an action for breach by plt. of a condition precedent to the performance, not of the whole contract but, of the remaining part of it. They cited also

Behn v. Burgess, in the Ex. (Ch., 8 L. T. Rep. N. S. 207; 32 L. J. 204, Q. B.; 3 B. & S. 751.

Manisty, Q. C. and *Hugh Shield*, for debts., in support of their rule, were stopped.

POLLOCK, C. B.—I believe that we are all of opinion that it is not necessary to hear counsel in support of the rule. I am disposed to agree with my brother Martin that it would have been more agreeable to the court to have discharged this rule; but, on the authorities that have been cited and the facts before us, I own I concur with the rest of the court in thinking that it must be made absolute. The action is upon a contract, and the expression "free on board" does not necessarily import that the goods should be put on board ship; it would be competent to the parties to prove that the goods were to be delivered somewhere else. The buyer may have them on board a ship or may have them at a railway-station, or may have them at any other place pointed out by him. The only question here is, was it incumbent upon the debts. to tender the goods, or was it incumbent on the plt. to tender the ship or point out the place where they were to be delivered, and, if on board ship, to specify the ship by description and name? It has been decided, in a case where the expression "free on board" was used, that it is the duty of the person who seeks to have the goods to point out the ship, or specify the place where they are to be delivered, before he can complain that the goods are not on board the ship. I think the spirit of that decision clearly applies in *omnibus* to the present case, and that the plt. was bound, if he meant these goods to be delivered on ship board, to name the ship, and, if elsewhere, he was bound to name the place where he desired them to be delivered, and that it was not necessary for the debts. to tender the goods, as a sort of condition precedent to their delivery or to the ship being named, or the place being designated by the plt. That being so, it appears to me, looking at all the facts and the point reserved, that the rule obtained to set aside the verdict, or to enter it for the debts. must be made absolute.

MARTIN, B.—I regret also that I am constrained

to give this judgment. The case has nothing to do with the construction of a contract, but with the performance of a condition precedent, with regard to which the case which has been referred to is directly in point. This contract was for the sale of fifty tons of bicarbonate of soda, and the deliveries were to be in the stipulated quantities during the months of April, May, and June 1865, and those deliveries were to be "free on board" in the Tyne, and the price was to cover that. Therefore, what the vendee, that is the plt., contracted for was, that there was to be delivered to him fifty tons of bicarbonate of soda in the months of April, May, and June, in equal quantities "free on board in the Tyne," at a certain price. One's common sense therefore, would point out that before the party can complain of the non-delivery of those goods the vendor ought to be told where on the Tyne, or on what ship on the Tyne side they were to be put. The case cited seems to me directly in point. At one time it could not be done, but now it is necessary that there should be a performance of all conditions precedent which are essential to be set out in the declaration. On a contract for a certain quantity of coal to be ready on board, with an averment of performance, and a breach of the condition that the goods had not been delivered according to contract, *Patteson, Coleridge, and Wightman JJ.* were all of opinion that, for the purpose of enforcing the contract, it was necessary for the vendee to name the ship to the vendor: (*Armitage v. Insule*.) I cannot distinguish between that case and the present; and the circumstance that now parties are bound to aver performance of conditions precedent cannot alter the law as to the effect and the nature of the contract when once we know what the contract is. I therefore think the debts. are entitled to succeed, though I regret it.

BRAMWELL, B.—I am of opinion that this rule should be made absolute. The contract being to do a certain thing, the debts. were not bound to deliver till the plt. told them where they were to deliver. The plt. did not tell them where they were to deliver before the day of delivery arrived, and consequently the debts. never were bound. That seems the plain and fair meaning of it upon the authorities.

CHANNELL, B.—I am of the same opinion. This does not arise on a question as to a right to rescind the contract. I am of opinion, notwithstanding what has been urged upon us by counsel, that there might have been, as against the vendee, as to part of the goods, an acceptance and performance of the contract. The contract here is for the sale of goods, and the plt. insists on shipment on board a certain ship in the Tyne, and in order to make out the case he is bound to indicate the ship before he can bring an action for the non-acceptance and non-performance of the contract, which raises the question whether the debts. were ready and willing to deliver and the plt. ready and willing to accept.

Rule absolute.

Attorneys for plt., *Hill and Hoyle*, 73, Cannon-street east.

Attorneys for debts., *Shum and Crossman*, 3, King's-road, Bedford-row.

[Ex.]

EUROPEAN AND AUSTRALIAN ROYAL MAIL CO. v. PENINSULAR, & C. NAVIGATION CO.

[Ex.]

Monday, June 4, 1866.

THE EUROPEAN AND AUSTRALIAN ROYAL MAIL COMPANY (LIMITED) v. THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

'Ship' within the meaning of the Merchant Shipping Act (17 & 18 Vict. c. 104), ss. 58, 56—Ship converted into coal-hulk—Transfer of without bill of sale.

ship registered under the Merchant Shipping Act may be so treated and dealt with as, at any rate between the parties to a transfer thereof, to be no longer a ship or the purposes of the 53rd section of that Act, and so be transferable without a bill of sale like any other vessel, even, it would seem, although not becoming the object of any of the contingencies specified in the 53rd clause of the Act.

essel which had been registered was by the owners for the space of four years as a mere coaling-hulk or workshop, moored at one of their coaling-stations; it was then transferred by them under an agreement to a company to which the owners transferred their business. She was described in the agreement, and also in an invoice delivered, as a coal-hulk:

old, as a matter of fact, that under the circumstances of the case she was not a ship, at any rate as between the parties, so as to be by the 53rd section of the Merchant Shipping Act transferable only by bill of sale, and therefore that the property in her passed to the company.

This was an action of trover brought by the plts. against the defts. under the circumstances set forth below. By consent of the parties and in pursuance of the order of Bramwell, B. a special case was stated without pleadings.

The following facts appeared from the case:—

The defts. were engaged in the year 1853 in carrying mails, passengers, and goods by steam-vessels between England and ports in the Indian Ocean on the one hand, and Australia on the other. For the purposes of this line of vessels they had established a coaling station at King George's Sound, in Western Australia. The coal was sent out in sailing colliers, and, until the defts. in the year 1853 made use of the *Larkins*, as after mentioned, was discharged direct from the colliers into the defts.' steam-vessels or warehouses on shore. In the year 1853 the defts. purchased in England and sent out a vessel called the *Larkins*, to be used for coaling their vessels. This vessel was an old three-masted wooden vessel, which had been up to the time of its being so purchased always used as a sailing vessel, and was then duly registered and capable of being used as such. The defts. at that time caused her to be newly registered. They then loaded her with a cargo of coals and stores for the use of their vessels, and sent her direct to King George's Sound. Upon her arrival there all her masts, spars, and rigging, except the lower masts and standing rigging, were taken down and sent on shore, and she was moored fore and aft with two anchors. The officers and crew were then all discharged with the exception of two persons. The masts and rigging sent on shore were warehoused and taken care of there. From that time forward the *Larkins* remained at King George's Sound, and was used for the purpose of receiving on board the coal from the sailing colliers, storing it until wanted, and then delivering it out to the defts.' steam-vessels in the same manner as an ordinary coaling hulk, and she was also used as a workshop, and was never used for any other purposes. The plts. were incorporated in the year 1856 as a joint-stock company for the purposes of steam navigation, and in the latter part of that year they undertook the service of carrying mails, passengers,

and goods between England and ports in the Indian Ocean on the one hand, and Australia on the other, in the place of the defts., who retired from such service. A written agreement was entered into at this time between the plts. and the defts. with respect to various matters, and among other things it was provided by article 2 of such agreement as follows:

The European and Australian Company agree to purchase, and the Peninsular and Oriental Company to sell, the coal-hulk *Larkins*, belonging to the latter company, now lying at King George's Sound, together with their stock of coals in Australia. The price of hulk, to be delivered in fair and sound condition, with all her appurtenances, is agreed at £6000., to be paid on receipt of notice of delivery, and of the coals 35s. per ton in store, to be paid for upon production of certificates of quantity supplied to each steamer.

In pursuance of this agreement, the *Larkins* was handed over by the defts. to the plts., one of the persons left on board as aforesaid delivering her over, on the 9th Feb. 1857, to their agent appointed for the purpose. On the 7th May an invoice was delivered to plts., in which she was termed the hulk *Larkins*.

In the month of Oct. 1857 the plts. accepted a bill of exchange drawn by the defts. for a sum including the price of the *Larkins*. In consequence of the pecuniary difficulties of the plts., the bill was not met at maturity and never was paid.

No bill of sale of the *Larkins* was ever executed by the defts. to the plts. From the 9th Feb. 1857 till the 18th May 1859 the plts. in the first instance, and afterwards the Royal Mail Company under an agreement with the plts., carried on the service with the vessels of the plts. as the defts. had previously carried it on, and employed the *Larkins* solely as a coaling hulk. In the early part of 1859 the plts. became greatly embarrassed, and were compelled to discontinue the service, and the bill before mentioned still continuing unpaid, the defts. thereupon applied to the said Royal Mail Company, who were then in possession of the *Larkins* under the agreement lastly before mentioned, to deliver her up to them, which the Royal Mail Company, without instructions from the plts., accordingly did on the 18th May 1859. Since then the defts. have resumed the service and employed the *Larkins* as before described. The plts. company is now in the course of being wound-up. It was to be taken as admitted for the purposes of the case that there had been a demand by the plts. and a refusal by the defts. to deliver up the *Larkins* before action brought, and the court was to be at liberty to draw inferences of fact.

The plts. contended that the property in the *Larkins* had passed to them, and that defts. were not entitled to resume possession, and the defts. contended the contrary. The question for the court was whether under the circumstances the plts. were entitled to recover. The Merchant Shipping Act (17 & 18 Vict. c. 104), s. 55, enacts that a registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale.

Horace Lloyd (with him *Maude*) for the plts.—The vessel in question is not a ship within the Act; it is a mere floating coal magazine, a chattel. The parties have treated it as such in their dealings with it. It cannot be contended that a ship may not lose its character as such and become a mere chattel. One often sees at seaports instances of old ships used as mere storerooms. The definition of a ship given in the Act is, every description of vessel used in navigation not propelled by oars. This vessel does not come within that definition.

Mellish Q. C. (with him *Borill, Q. C.* and *Watkin Williams*) for the defts.—I apprehend the true test is

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[Ex. Ch.]

this: had this vessel lost its right to sail about upon the seas as a British ship? This place where she was moored is a mere coaling station; there is no trade there; there would be no means, if the use of her as a coal-hulk ceased, of getting her away or utilising her in any way except by putting up again her rigging and spars which were preserved on shore, and sailing away. It is the commonest thing on the coast of Africa, in the palm-oil trade, for a ship to be used as a storehouse for some time and then to come home with a cargo herself. Would she, if she had done so, have been entitled to the privileges of a British ship? She never ceased to be upon the register. There are certain clauses that specify the events in which a ship ceases to be a British registered ship. The 53rd section enacts that where a registered ship is either actually or constructively lost, taken by the enemy, burnt or broken up, or if by reason of a transfer to any persons not qualified to be owners of British ships, or of any other matter or thing, any such ship as aforesaid ceases to be a British ship, the certificate of registry shall be given up under a penalty. The intention of the Act is, that the register shall be a complete list of all ships entitled to the privileges of British ships. So long as a ship is *de facto* a British ship on the register she cannot be transferred except by a bill of sale. [MARTIN, B.—The form of declaration mentioned in sect. 56 seems to be against your contention, for that must show how the vessel is propelled. POLLOCK, C. B.—Suppose the owner of a ship, after some calamity had occurred with reference to her, from some superstitious notion had made up his mind that she should not sail the seas again and sold her to be broken up?] She must be actually broken up, I contend, to pass otherwise than by bill of sale. Intention is not sufficient. The 53rd section is intended to provide for all cases in which what was once a British registered ship ceases to be so. If this is not so, there is a case where no provision is made for delivering up the certificate although the vessel ceases to be a British ship. There is nothing to prevent the transferees here using her as a British ship. [CHANNELL, B. referred to sects. 84 and 87, which provide, in cases where a ship is altered, for re-registration or forfeiture of the privileges of a British ship.]

Horace Lloyd in reply.—I submit that this is not really a question of law, but of fact. The question is, whether the *Larkins* was appropriated permanently to the purposes of a coal-hulk. [MARTIN, B.—They profess to sell her as a coal-hulk.] The argument of my friend proves too much. According to that it would have been impossible to convert her into a coal-hulk so as to pass as a chattel. This vessel, no doubt, continued to have a hull and a keel and other attributes of a ship, but all intention of using her as such had been abandoned.

POLLOCK, C. B.—I am of opinion that our judgment should be for the *plts.* I agree with Mr. Lloyd that this is substantially a question of fact, and I think that under the circumstances the vessel in question had ceased to be a ship.

MARTIN, B.—I think that this vessel had really become a mere chattel, a coal-hulk as she was described, and that, therefore, she was not a ship within the meaning of the Act. For four years before she was purchased she had been used as a coal-hulk, and occasionally as a workshop; after that the *defts.* sold her by the description of the "coal-hulk *Larkins*." In pursuance of the agreement of sale she was delivered to the *plts.*, and an invoice was given in which she is mentioned by a similar description. I think, as against the *defts.*, she must

be taken to be what they describe her themselves. She had been for a long time used as a coal-hulk, and it was never contended that it was really intended that she should ever be used again as a ship. Therefore I think she is not within the Act requiring the transfer to be by bill of sale. The 55th section enacts that a registered ship shall be transferred by bill of sale, and by the 56th section no individual shall be entitled to be registered as transferee of a ship until he has made a declaration in the form marked F. in the schedule. That form and the form of the bill of sale are to state various particulars, the name of the ship, and how she is propelled. I am clearly of opinion that what the Legislature were there dealing with was a ship to be propelled by steam or otherwise, not a thing which had been a ship four years before, but was then used as a warehouse. I should say, too, that however that may be, as against the *defts.* who had themselves sold her as a hulk, she must be taken to be such. After that sale I think she must clearly be taken as intended to be used only for coals and other stores.

CHANNELL, B.—If we are bound to consider this a ship, I think Mr. Mellish's argument is unanswerable. But the question is whether we are not at liberty to deal with this as a question of fact, and think under the circumstances we are entitled so to do. I think that this was not a ship, and the 53rd section is therefore not decisive. The forms given in the schedule seem to me to go far to support the construction we have put on this case in dealing with the question as a matter of fact.

Judgment for plts.

Attorneys, *Upton, Johnson, and Upton; McClintock, Stenning, and Watney.*

EXCHEQUER CHAMBER.

Reported by W. MAYN, Esq., Barrister-at-Law.

ERROR FROM THE COMMON PLEAS.

Friday, June 15, 1866.

(Before POLLOCK, C. B., BRAMWELL, CHANNELL, and PIGOTT, BB., MELLOR and SHEE, JJ.)

NIELL v. WHITWORTH.

The defts. contracted to sell to the plts. cotton to arrive at £. per ship from C. to be of a certain quality, with this stipulation: "the cotton to be taken from the quay." The defts. on its arrival warehoused the cotton, and sent the plts. a delivery order. They refused to accept.

Held, that this was a stipulation introduced in favour of the seller, and not a condition precedent, upon the performance of which the vendee could insist; and that the contract amounted to a contract to deliver at a reasonable time and circumstances, the article to be at the buyer's charge from the time of its landing on the quay.

This was an action for an alleged breach of a contract for the delivery of certain cotton (reported from the court below, 11 L. T. Rep. N. S. 677).

The declaration stated:

That the *defts.* bargained and sold to the *plts.*, and the *plts.* bought of the *defts.* certain cotton, that is to say, 500 bales of cotton guaranteed to be October shipment, at 15d per lb. to arrive from Calcutta in Liverpool per ship or ships, and to be fair Bengal cotton, the said cotton to be taken from the quay; customary allowances of tare and draft, and the invoice to be dated from the date of the delivery of the last bale. The said cotton to be in merchantable condition, the damaged, if any, to be rejected, provided it could not be made merchantable. Should the said cotton be transhipped into other vessels arriving, the contract to hold good; but if any of the vessels

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lost, the contract to be void so far as regarded such . Payment for the said cotton to be made in cash 1 days, made equal to ten days and three months, on account to be paid before delivery if required, that all conditions were fulfilled and all things and all times elapsed necessary to entitle the plts. to ry of the said cotton as agreed.

h:

s defts. made default in delivering the said cotton l, whereby the plts. had lost and been deprived fts which would have accrued to them from the f the said cotton, and were prevented from fulfilling entered into by them for the resale of the said d thereby lost great gains and profits, &c., and by the premises the plts. incurred expenses in and endeavouring to procure the delivery of the said cotton fts. as agreed.

lefts. pleaded, first, that the defts. did not and sell to the plts. and the plts. did not n the defts. the cotton in the declaration ed upon the terms therein alleged; secondly, defts. did not make default in delivering the in the declaration mentioned as therein thirdly, that the plts. were not ready to he cotton. thereon.

ause was tried before Pigott, B., at the last Assizes at Liverpool, when the following re taken by consent on the learned judge's The plts. were merchants in London, the vere merchants at Manchester, and both gely in cotton. On the 2nd Oct. 1863, the hrough their brokers Truman and Rouse, the plts. 500 bales of cotton at 15^d. per The bought note was as follows:

for account of Messrs. Neill Brothers, of B. Whit- l Brothers, Manchester, 500 bales of cotton at 15^d. l, guaranteed October shipment, to arrive in Liverpool r ships from Calcutta. The cotton guaranteed fair ny slight variation in mark not to vitiate this con- case of dispute arising out of this contract, the be referred to two respectable brokers, who shall to quality, and the allowance, if any to be made. on to be taken from the quay; customary allowance nd draft, and the invoice to be dated from date o f last bale.

a merchantable condition; the damaged, if any, to be provided it cannot be made merchantable. Should i be transhipped into other vessels, the contract to l; but if any of the vessels be lost the contract to be r as regards such ships only. at, cash within ten days, made equal to ten days and ths. Cash on account before delivery if required. TRUMAN and ROUSE.

ie 28th Oct. 1863 the plts. re-sold the cotton Clarke, through the same brokers, at 15^d. On the 8th Jan. 1864 the defts. declared the 1 and the *Fort George* as the ships by which on was to arrive, 250 bales by each. The 1 arrived at Liverpool on the 3rd Feb. with a cotton, which was landed on the quay there sequently warehoused. Application was n the part of the plts. for delivery orders, e were given or tendered until after the ad been carried to the warehouse. By the gulations at Liverpool the authorities have o warehouse all goods after they had been four hours on the quay.

Fort George was stranded in Carnarvon-bay, cargo was landed there and forwarded by to Liverpool. Arrived there it was put into reck transit-sheds" on the quay, which is rel as part of the quay. The 250 bales *George* were afterwards removed from the ransit-sheds to the warehouse.

subsequent occasion the vendors (the defts.) to deliver the whole 500 bales from the ware- out at quay weights, and without any charge ousing, or to cart them back to the quay iver them there. The plts. however refused them, insisting that the defts. had broken ntract by allowing the cotton to be ware- instead of delivering it on arrival from the

A verdict was taken for the plts. with 2109l. 7s. 6d. damages, leave being reserved to the defts. to move to enter a verdict for them, or to reduce the damages, the court to be at liberty to draw such inferences of fact as a jury might have drawn, and to make all such amendments as the judge at Nisi Prius might have done.

Brett, Q. C., in Michaelmas Term last, obtained a rule nisi to enter the verdict for the defts., or to reduce the damages, on the grounds that the stipulation in the contract, that *the cotton should be taken from the quay*, was in favour of the vendors, or, if not, that it was a stipulation only, and not a condition in the contract; and secondly, that the damages should be either nominal, or at most the difference between the contract price and the market price on the day of the breach. That rule was made absolute on the 26th Jan. last.

The plts. now appealed.

Mellish, Q. C. for the apps.—The stipulation in the contract, that the cotton was to be delivered to the plts. from the quay, was not a stipulation introduced in favour of the sellers merely, but was introduced for the purpose of appointing a time and place of delivery; and by it the sellers were bound to deliver, and the buyers to take, the cotton from the quay. The term "delivery" includes acceptance by the buyers. As to the other question of damages, there is a direct decision against me in the *Q. B.*

Holker (Cohen with him), for the resps., was not called upon.

POLLOCK, C. B.—We are all of opinion that the judgment of the court below should be affirmed, for the reasons assigned in the court below.

Judgment affirmed.

HOUSE OF LORDS.

Reported by JAMES PATERSON, Esq., Barrister-at-Law.

Tuesday, June 5, 1866.

MERSEY BOARD v. GIBBS.

MERSEY BOARD v. PENHALLOW.

Negligence—Public statutory trustees—Liability for servants—Review of authorities.

G., the owner of a cargo which was damaged by reason of the ship's stranding on a mud-bank negligently left at the entrance of a harbour vested in the Mersey Board by statute, sued the board for damage. The defence was that the board acted under a statute; that they derived no personal benefit from the management of the docks; that they took no part personally in the management, but merely appointed servants and officers in discharge of their public duty, and that the negligence was not theirs, but was solely that of one of their servants:

Held (affirming the judgment of the Ex. Ch.), that the case of public statutory trustees, if not servants of the Crown, did not differ from that of absolute owners levying tolls for their own benefit, and that the board were liable in damages to G.

Dictum of Lord Cottenham, L. C., in *Duncan v. Findlater*, 6 Cl. & F. 894, overruled.

This was a proceeding in error from a judgment of the Court of Ex. Ch. sitting in error from the Court of Ex., reversing the judgment given in that court in favour of the defts. below, who are the plts. in error, upon a demurrer to the declaration.

The action was commenced on the 15th Oct. 1855. It was originally brought against the trustees of the

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Liverpool Docks, but upon the passing of the Mersey Docks and Harbour Act 1857, by which the Liverpool Docks were vested in the Mersey Docks and Harbour Board, a suggestion was, pursuant to the said Act, entered upon the record, and the action was continued against the said board, the plts. in error.

The declaration contained two counts. The first count alleged that the plts. below were the owners of a cargo of guano on board the ship called the *Sierra Nevada*, and that the said ship in endeavouring to enter a certain dock of the defts. below, called the Wellington Half-tide dock, struck against a bank of mud remaining by the negligence of the defts. in the entrance of the dock. The second count alleged that the defts. below, knowing that the said dock was by reason of an accumulation of mud therein in an unfit state to be navigated, did not take reasonable care to put the same into a fit state for that purpose, whereupon the *Sierra Nevada* in endeavouring to enter into the dock struck against the mud, and the cargo thereby became damaged.

The defts. below pleaded four pleas. The first plea was not guilty, and the last a demurrer to the whole declaration. The plts. took issue on the first three pleas and joined in demurrer.

The demurrer was argued before the Court of Ex. in Easter and Michaelmas Terms 1856, and that court gave judgment in favour of the defts. below, on the ground that the case was governed by the decision in *Metcalf v. Hetherington*, 11 Ex. Rep. 257: (see 1 Hurlstone & Norman's Reps. p. 439; 2 L. T. Rep. N. S. 806.)

The plts. below brought error upon that judgment, and the Court of Ex. Ch. reversed it, and gave judgment in favour of the plts. below: (see 3 Hurlstone & Norman's Reps. p. 164; 31 L. T. Rep. 22.)

The issues in fact came on for trial before Martin, B. and a special jury, at the assizes held at Liverpool in the autumn of 1858, when a verdict was found and given for the plts. below.

In Michaelmas Term 1858 the Court of Ex. was moved on behalf of the defts. below for a rule to show cause why a rule for a new trial should not be had, on the ground, among others, that the learned judge did not leave the question whether the defts. below had any knowledge of the existence of the mud-bank to the jury. The rule was refused as to this ground. A rule was granted on the ground of surprise, which was subsequently discharged.

The owners of the ship also brought an action against the plts. in error, in respect of the damage sustained by the vessel on the same occasion. That action (*Penhallow and others v. The Mersey Docks and Harbour Board*) came on for trial before the Lord Chief Baron and a special jury at the Middlesex sittings after Michaelmas Term, in the year 1859, when the learned Lord Chief Baron directed the jury, that if, in their opinion, the cause of the misfortune was a bank of mud in the dock, and the defts. by their servants had the means of knowing the state of the dock and were negligently ignorant of it, then in the opinion of him the Lord Chief Baron, the defts. below were liable. A bill of exceptions was tendered to this ruling, and the jury thereupon found a verdict for the plts. below, and judgment was signed thereon in the Court of Ex.

The defts. below in that action brought error, and the Court of Ex. Ch. overruled the bill of exceptions, and confirmed the judgment given by the Court of Ex.: (see 5 L. T. Rep. N. S. 42.)

The Acts of Parliament relating to the Liverpool Docks contain the following among other enactments: By sect. 81 of the 51 Geo. 3, c. cxliii., the harbour master and dock masters were empowered to direct the removal of vessels from one part of a dock to another. By sect. 82, the harbour master and dock masters were empowered to direct the

time and manner of every ship coming into docks. By sect. 86 a penalty is imposed on master bringing a vessel into the docks contrary to the directions of the harbour master or dock master. And by the 6 Geo. 4, c. clxxxvii. s. 134, the trustees were empowered to pay as they should see fit for damage caused by the insufficiency of works or the negligence of their servants.

The point of law to be determined in the present case was, whether a public board, the members of which receive no emolument whatever direct or indirect, appointed under the provisions of an Act of Parliament to carry out certain duties imposed upon them by the Legislature for the general benefit of the community, are liable for damage sustained by reason of the default of one of their officers where no improper conduct on the part of the board was the cause of the injury.

In the judgment given by the Court of Ex. in favour of the plts. below on the demurrer, reversing the judgment of the Court of Ex. Ch., were some expressions which at the time led to the belief that that judgment was to some extent upon the allegation of knowledge in the first count. This belief induced the defts. below to bring error on that judgment until the issues were ascertained. On the trial of the issues no evidence was given or suggestion made of actual knowledge on the part either of the defts. or of their servants of the existence of the supposed mud-bank, and the learned Baron who gave the judgment refused to leave the question of knowledge to the jury.

This ruling was upheld by the Court of Ex. Ch. on motion for a new trial, and the Court of Ex. Ch. in the judgment in the action of *Penhallow and others* against the plts. in error, explained that judgment of that court in the present case as depending upon the allegation of knowledge that the declaration was to be considered as alleging error was struck out, and the case was referred to the simple point of law already mentioned.

The defts. brought error to the H. of L. in these cases.

The following learned Judges attended the argument, viz., Channell, B., Black, Keating, and Shee, JJ., and Pigott, B.

Sir F. Kelly, Q. C., Mellish, Q. C., and Quain, the plts. in error, contended that the judgment ought to be reversed, because the declaration contained no averment that the trustees of the Liverpool Docks exceeded their statutory powers, they acted maliciously or oppressively, or in bad faith, contrary to their own judgment. A cause of action is by law sustainable against trustees acting without remuneration in discharge of public duties imposed upon them by the Legislature for damage occasioned solely by the negligence of officers, the appointment of whom was a branch of the duty of such trustees.

The *Solicitor-General* (Collier), Sir H. Cairns, *Cleasby*, Q. C., *Honyman*, and *V. Lushington* defended the defts. in error.

The cases referred to in the arguments have been fully reviewed and discussed in the judgment, and are therefore here omitted.

At the conclusion of the arguments the learned Judges put the following questions to the learned judges:—*Mersey Board v. Gibbs*—Does the declaration in this case state a good cause of action?

Mersey Board v. Penhallow—Is the judgment of the Court of Ex. Ch. right?

The learned Judges took time to consider the questions, and afterwards returned their unanimous opinion as follows by

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BLACKBURN, J.—My Lords, I have the honour, in answer to your Lordships' questions in these cases, to deliver the joint opinion of all the judges who heard the argument. The two actions before your Lordships, though arising out of the same transaction, do not come before your Lordships' House in precisely the same manner. In *Gibbs v. The Mersey Board* (the action by the owner of the cargo) the question is raised by a demurrer to the declaration, on which all the material averments must be considered as admitted to be true. The damages are assessed on the second count, and it is to the averments on that count that your Lordships' attention should be directed. On this record it is admitted by the demurrer that the defts. (the dock corporation, at that time called by the style of the Trustees of the Liverpool Docks), knowing that the dock and its entrance was, by reason of accumulations of mud, unfit to be used by ships, did not take due and reasonable or any care to put it in a fit state, but negligently suffered the dock to remain in such unfit state, whilst, as they well knew, it was used by vessels, and that the damage arose in consequence. In the action of *Penhallow v. The Mersey Board* (the action by the shipowner), the averments in the second count are similar to those in the first action; at they are not admitted by a demurrer. The action was raised at Nisi Prius on the plea of not guilty, which the jury have found for the plts.; but the charge of the Lord Chief Baron is brought before your Lordships by a bill of exceptions, by which it appears that he told the jury that if in their opinion the cause of the misfortune was a bank of mud "and the defts. by their servants had the means of knowing the state of the dock, and were negligently ignorant of it, then, in his opinion, the defts. were liable;" obviously meaning, that if the jury so thought they ought to find the issue for the plts. The exception taken to this summing-up was, that even if the jury thought the cause of the misfortune was a bank of mud, the defts. were not liable unless they knew that the dock and entrance were, by reason of the said mud-bank or otherwise, unfit for navigation. That is the only exception. Mr. Mellish, in the course of his very able reply at your Lordships' bar, contended that the statement in the bill of exceptions disclosed no evidence to go to the jury of negligence on the part of the defts. or their servants. But that is not the exception on the record; and we need hardly remind your Lordships that the party tendering a bill of exceptions is confined to the exceptions he makes at the trial. This is not a merely technical answer; had the exception been that there was no evidence of negligent ignorance fit to be left to the jury, the whole of the evidence bearing on that point would have been set out on the record, and then the Court of Error could have formed a judgment whether it was sufficient or not; as it is, the record contains no more of the evidence than is necessary to explain the exception really made at the trial, viz., that the Chief Baron told the jury, in effect, that it was not necessary to prove knowledge on the part of the defts. or their servants of the unfit state of the docks, and that proof that the defts., by their servants, had the means of knowledge and were negligently ignorant of it, would entitle the plts. to the verdict. The Court of Ex. Ch., in each of the cases, based their judgment on that of the Court of Ex. Ch. in the *Lancaster Canal Company v. Parnaby*, 1 Ad. & El. 230. In that case the defts. were a company incorporated by Act of Parliament for the purpose of making and maintaining a canal, which was to be open for the use of the public on the payment of rates, which the canal company were empowered to receive for their own proper use and behoof (i.e. to be divided among the shareholders). And the Court of Ex. Ch. in that case state the law thus (11 Ad.

& El. 242): "The facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon payment of tolls to the company; and the common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property." In the present case the dock board do not receive the dock rates for their own use and behoof, i.e., to be divided amongst themselves or their shareholders; but they are bound by the statutes, under which they are incorporated, to apply them to the purposes of the Acts, which may in substance be stated to be to maintain the docks and pay the very large debt contracted in making them. The Court of Ex. Ch. in both cases decided that this difference did not affect the question; that so long as the dock was kept open for the public, the duty to take reasonable care that the dock and its entrance were in such a state that those who navigate it may do so without danger was equally cast on the proprietors having the receipt of the tolls and the possession and management of the dock, whether the tolls are received for a beneficial or a fiduciary purpose. If this proposition is correct, the direction of the Lord Chief Baron excepted to was right, for a body corporate never can either take care or neglect to take care, except through their servants; and, assuming that it was the duty of the corporation to take reasonable care that the dock was in a fit state, it seems clear that if the corporation, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty, and did not take reasonable care that it was fit. And after hearing the very able arguments at your Lordships' bar, we are of opinion that the judgment of the Court of Ex. Ch. was correct. It is pointed out by Lord Campbell in *Southampton and Itchen Bridge v. Southampton Local Board*, 8 El. & Bl., that in every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created. It is desirable, therefore, in the first place to state what was the effect of the legislation, so far as it applied to these docks, at the time of the accident on the 12th April 1865. The docks in Liverpool have been made at different times under a great many different Acts of Parliament, the earliest being the 8 Anne, c. 12. At the time when the accident happened which gave rise to these actions, the latest of the Acts was the 14 & 15 Vict. c. 64. All these numerous statutes are public Acts, of which the courts must take judicial notice; and as many of the statutes were at that time still in force, though their provisions had been in many respects varied by those subsequently passed, it is extremely difficult to ascertain with precision what was, at the time of the accident, the exact state of the legislation peculiar to those docks. But having had the assistance afforded by the able and industrious counsel who argued at your Lordships' bar, we think we may venture to say that the effect of the material parts of the statutes is the following: The members of the Town Council of Liverpool and their successors were formed into a corporation by the style of the "Trustees of the Liverpool Docks." By statutes 51 Geo. 3, c. 143, s. 2, 6 Geo. 4, c. 87, s. 3, and 14 & 15 Vict. c. 64, ss. 2, 3, and 4, the powers of this corporation were to be exercised by committee. On this Mr. Mellish founded an argument which we shall notice afterwards. Subject to these provisions we may say that the effect of the legislation was, that the dock corporation were empowered to make and maintain docks and ware-

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houses, which were to be open to the use of the public, paying dock rates for the use of the docks and warehouse rates for the use of the warehouses. The same accommodation and the same services were to be supplied to those using the docks and the warehouses respectively that would have been supplied by any ordinary dock and warehouse company to their customers. Powers are given to the trustees of the Liverpool Docks from time to time to close the docks for the purpose of cleansing and repair. General powers are given to them to appoint officers and servants; but the duties of those officers and servants are not in any place defined in the statutes, except by statute 51 Geo. 3, c. 143, ss. 80, 81, 82, 84, 85, and 86. By those sections the water bailiff or harbour-master, or any of the dock-masters, have power to remove wrecks and obstructions, and to regulate the time and manner in which vessels shall enter and leave the docks; and penalties are imposed on those who disobey the orders of those officers. On these latter sections, and on the decision of the Court of Ex. in *Metcalfe v. Hethrington*, 11 Ex. 257, an argument was raised for the defendants, which we will notice afterwards. At present we will only observe that such powers are almost essential for the due use of any dock; and that accordingly it has been for many years the practice to insert similar clauses in all harbour and dock Acts, whether for private companies or public bodies. And in the Harbour Docks and Pier Clauses Act 1847 (10 Vict. c. 27), the clauses commonly in use are collected under the head "and with respect to the appointment of harbour-masters and pier-masters and their duties." It will be found on examining them that sect. 56 in the general Act is equivalent to sect. 80 in the 51 Geo. 3, c. 143; and that the other powers given to the officers of the Liverpool Dock Corporation are also given to the officers of all dock companies, whether for public or for private purposes, incorporated by any statute which incorporated the Harbours, Docks, and Piers Clauses Act 1847. By a general appropriation clause, 51 Geo. 3, c. 146, s. 29, all the revenues of the trustees of the Liverpool Docks are to be applied in the first instance to making and maintaining the docks, paying the interest on the large debt secured on the dock rates, and to paying "all the charges and expenses already incurred, or hereafter to be incurred, in the carrying into execution or under or in consequence of any of the former Acts or this present Act; and the residue in paying off the principal moneys of the debt." And when it is all paid off, the trustees are required to lower and reduce the rates, "as far as can be done, leaving sufficient for defraying all charges of management and other concerns of the docks, &c., and improving, repairing, and maintaining the same, and for the carrying into execution the provisions of this Act and the former Acts." By subsequent enactments the trustees of the Liverpool Docks are enabled to raise much more money on bonds, and to make much more extensive works; but in substance this clause still, at the time of the accident, remained the clause governing the appropriation of all moneys received by the trustees of the Liverpool Docks, including the moneys paid for the use of the docks and warehouses. There are some peculiar enactments in one of the statutes (6 Geo. 4, c. 187, ss. 130 to 136) which were relied upon as showing the intention of the Legislature, on which we shall remark afterwards; but with this exception, there is nothing in the statutes either extending or limiting the liability of the dock trustees to those paying for the use of the docks, so as to make it different from that which the general law would cast upon them under such circumstances. And, consequently, in our opinion the great question in both these actions is,

what is the duty which the general law does cast upon a corporation, being the proprietors of docks maintained under such enactments? Now, it is obvious that a shipowner who pays dock rates for the use of the dock, or the owner of goods who pays warehouse rates for the use of a warehouse and the services of the warehousemen, in, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid. It is well observed by Mellor, J., in *Coe v. Wise*, 33 L. J. 281, Q. B., of corporations, like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works. If, indeed, the Legislature has by express enactment or necessary intendment enacted that they should not be subject to such a liability, there is an end of the question; and if the Legislature had in the Acts now under consideration, enacted that none of the revenue of the trustees of the Liverpool Docks should be applied to the purpose of discharging liabilities incurred in consequence of the trustees acting as proprietors of docks and warehouses, it would go far to show that the Legislature intended that they should not be so liable. But the appropriating clause in the Acts, now under consideration, has no such effect. It was, indeed, supposed by the Court of K. B., in *Re v. Liverpool*, 7 B. & C. 61, that in effect was to prohibit the payment of poor-rates; but your Lordships' House has decided in the recent case of *Jones v. Mersey Board*, 35 L. J. 1, M. C., that this was a mistake, and that the trustees of the Liverpool Docks were out of that fund to defray all expenses incident by law to the maintenance of the docks, and, as such, poor-rates. We think on the same principle they are at liberty to apply the fund to the discharge of the liabilities which in execution of the Act, by keeping open the docks and warehouses, they must from time to time incur to their customers. It was pointed out in the course of Mr. Mellish's argument, that the effect of applying the revenue of the trustees of the Liverpool Docks to the payment of such a liability as the present, would be to postpone the time at which the rates would be reduced, and that consequently the ultimate loss would fall on those who were the payers of the rates at the time when the rates, but for this liability, would have been reduced; and so that, in the possible, but not very probable, event of the plaintiffs being then persons using the docks, the loss would partly fall upon the plaintiffs themselves. But we are unable to see how that affects the question whether the action would lie or not. A shareholder in an incorporated company, such as a railway company or an ordinary dock company, who has a cause of action against the corporation, does in effect, by obtaining redress, diminish the future dividends of the shareholders, including his own. In this respect his position is analogous to that of the ratepayer, yet it never can be contended that a shareholder in an incorporated dock company could not maintain an action for an injury to his ship from the neglect of the company. It was pointed out by Sir Hugh Cairns, in the course of his argument at your Lord-

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ships' bar, that the Legislature, in the 6 Geo. 4, 187, ss. 130 to 136, showed a clear intention that the funds of the dock trust might, in some cases at least, be applied by the committee to indemnifying parties who had suffered by the negligence of the servants of the trustees of the Liverpool Docks; and also that damages recovered against the trustees of the Liverpool Docks might be levied out of the rates, by the circuitous and somewhat clumsy process of distraining on the goods of the treasurer, who was to recoup himself out of the rates. And these enactments, so far as they go, seem to us to show that the Legislature at least did not intend to take away any liability of the trustees, which would otherwise have been cast on them by the general law, though we should not willingly infer from them that it was intended to impose any liability beyond that which would be imposed by the general law. Mr. Mellish also founded an argument on the wording of these sections, taken in conjunction with the enactments in the second clause of 51 Geo. 3, c. 143, and the second, third, and fourth clauses of the 14 & 15 Vict. c. 64, which it is proper we should now notice. The trustees of the Liverpool Docks were required by the second section of 51 Geo. 3, c. 143, to appoint a committee of their body, and all their powers were to be exercised by that committee, except in so far as the trustees of the docks might reserve any question for their own determination. By the subsequent enactments, this committee was to consist partly of the members of the trustees of the Liverpool Docks, and partly of members elected by the persons who had paid dock rates, and the whole of the powers of the trustees of the Liverpool Docks were to be exercised exclusively by this committee so constituted. When the sumner in the case of *Gibbs v. The Trustees of the Liverpool Docks* was argued in the Court of Ex., that court gave judgment upon the ground that the action, if it lay at all, lay against the committee, and not against the trustees of the Liverpool Docks: (1 Hurl. & Nor. 439.) But in the Court of Error, the debts, by their counsel, very handsomely agreed that the plt. should not be put to the expense and trouble of issuing another writ against the committee; but that, if the action would lie against either body, judgment might be given against the debts on the record. Subsequent legislation has done away with the committee, and the question whether the writ ought in such a case to have been directed against the one body or the other can never in future arise. Your Lordships will probably agree with the Court of Ex. Ch. that this arrangement was one which ought not to be disturbed by the court, and there has been no attempt on the part of the counsel for the Mersey board (who now represent both the original debts and the committee) to depart from the agreement. But Mr. Mellish argued that the whole scheme of the Legislature showed that the intention of the Legislature was to give to the committee an uncontrolled discretionary power to compensate such persons as in their opinion ought to be compensated, and no others. He did not say that they were to exercise this power capriciously, but *quasi* judicially, though without appeal; and he argued that the change of the constitution of the committee, by which one-half were to be elected by the ratepayers though only introduced by the later Acts) rendered it less unlikely. But we do not think that such is a fair construction to be put on the enactments. It is contrary to the general rule of law, not only in this country but in every other, to make a person liable in his own cause; and, though the Legislature can, and no doubt in a proper case would, depart from that general rule, an intention to do so is not to be inferred except from much clearer enactments than any to be found in these statutes.

We have gone through these enactments, and we think your Lordships will hardly be inclined to dispose of this important case on any of the special provisions peculiar to these Acts. As we have already intimated, in our opinion, the proper rule of construction of such statutes is that, in the absence of something to show a contrary intention, the Legislature intend that the body, the creature of the statute, shall have the same duties, and render its funds subject to the same liabilities as the general law would impose on a private person doing the same things. This rule of construction was not admitted by the debts. They did not rest their case exclusively, or even mainly, on any special provisions peculiar to their own private legislation, but upon broader grounds, which, if we do not mistake them, were in effect two. They said that by the general law of this country, bodies, such as the present, are trustees for public purposes, and that being such, they are not in their corporate capacity liable to make compensation for damages sustained by individuals from the neglect of their servants and agents to perform the duties imposed on the corporation, or, at all events, that the duty of such a corporation was limited to that of exercising due care in the choice of their officers, and that if they had properly selected their officers, any evil which ensued must be the fault of the officer, and that redress for it must be sought against him alone. A great many cases were cited at your Lordships' bar as supporting this position, many of which are really not applicable to such a case as the present. *Lane v. Cotton*, 2 Ld. Raym. 646; *Whitfield v. Le Despencer*, Cow. 754 (the case of the Postmaster-General); and *Nicholson v. Mounsey*, 15 East, 384 (the case of the captain of the man-of-war), are authorities that where a person is a public officer in the sense that he is a servant of the Government, and as such has the management of some branch of the Government business, he is not responsible for any negligence or default of those in the same employment as himself. But these cases were decided upon the ground that the Government was the principal, and the debt, merely the servant. If an action were brought against the manager of the goods traffic of a railway company for some injury sustained by the owner of goods on their line, it would fail unless it could be shown that the particular acts which occasioned the damage were done by his orders or directions; for the action must be brought either against the principal or against the immediate actors in the wrong: (see *Story on Agency*, s. 313.) And all that is decided by this class of cases is that the liability of a servant of the public is no greater than that of the servant of any other principal, though the recourse against the principal, the public, cannot be by an action. The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury from the parish ways being out of repair, though no action can be brought against his principals the inhabitants of the parish. But the debts, in the present action are not servants of the public in that sense. For this we need do no more than refer to the recent decision of your Lordships' House in *Jones v. Mersey Board*, where they were held to be rateable as occupiers of the docks on the very ground that they did not occupy as servants of the public or Government. Another class of cases also cited depends upon the following principle. If the Legislature direct or authorise the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorising the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation

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under the provision of the statutes legalising what would otherwise be a wrong. This, however, is the case, whether the thing is authorised for a public purpose or for private profit. No action will lie against a railway company for erecting a line of railway authorised by their Acts, so long as they pursue the authority given them, any more than it would lie against the trustees of a turnpike-road for making their road under their Acts; though the one road is made for the profit of the shareholders in the company and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorised by the Legislature: (see *Rea v. Pearce*, 4 B. & A. 36.) This, we think, is the point decided in *The Governors of the British Plate Cast Plant Manufacturers v. Meredith*, 4 T. R. 794; *Sutton v. Clarke*, 6 Taunt. 29, and several other cases, as is well explained by Williams, J. in *Whitehouse v. Fellows*, 10 C. B., N. S., 779; 4 L. T. Rep. N. S. 177. But though the Legislature have authorised the execution of the works, they do not thereby exempt those authorised to make them from the obligation to use reasonable care that in making them no unnecessary damage be done. In *Brine v. The Great Western Railway Company*, 31 L. J. 34, Q. B.; 2 B. & S. 402; 6 L. T. Rep. N. S. 50, Crompton, J. says: "The distinction is now clearly established between damage from works authorised by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works having been negligently done, as to which the owner's remedy by way of action remains." This distinction is as applicable to works executed for one purpose as for another. This principle seems to have been acted upon in *Leader v. Moxon*, 2 H. Bl. 924, and it is to some extent recognised in *Sutton v. Clark*, 6 Taunt. 29, by Gibbs, C. J., who puts the judgment on the ground that the defts., in the execution of a duty imposed on him by the Legislature, had exercised his best skill, diligence, and caution in the execution of it. "We are of opinion," says Gibbs, C. J., "that he is not liable for an injury which he did not only not foresee, but could not foresee. He has done all that is incumbent on him, having used his best skill and diligence." This certainly implies, that in the opinion of those who concurred in that judgment the defts. would have been liable if he had neglected to use his best skill and diligence. In the subsequent case of *Jones v. Bird*, 4 B. & A. 837, Bayley, J. laid down a stricter rule. He said that the defts., who in that case were the persons actually executing a sewer, authorised by statute, were not protected merely because acting *bona fide* and to the best of their skill and judgment. "That," says he, "is not enough, they are bound to conduct themselves in a skillful manner, and the question was most properly left to the jury to say whether the defts. had done all that any skillful person could reasonably be required to do in such a case." And there is a considerable number of cases to which we shall afterwards refer, in which, on this principle, actions have been held to lie against bodies executing works under the authority of statutes for the improper mode in which their powers have been executed, though the defts. did not derive any profit from the execution of the works. There are, however, authorities that bear the other way upon this part of the case; and it is necessary to examine these authorities in order to contrast them with the others. It will be for your Lordships then to decide on which side the preponderance of authority lies. Those in favour of the defts. are *Hall v. Smith*, 2 Bing. 156; *Duncan v. Findlater*, 6 Cl. & Fin. 894; *Halliday v. St. Leonard's, Shoreditch*, 11 C. B., N. S., 192; and *Metcalfe v. Hethrington*, 11 Ex. 257. It is necessary, in considering these authorities, to bear

in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work. This distinction is well stated in *Pickard v. Smith*, 10 C. B., N. S., 480; 4 L. T. Rep. N. S. 470; by Williams, J., who says: "Unquestionably no one can be made liable for any act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment; consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; not, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." "If the performance of the duty be omitted, the fact of his having entrusted it to a person who also neglected it furnishes no excuse either in good sense or law." Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant, between the employer and the person actually in default, according to the well-known exposition of the law in *Quarman v. Bennett*, 6 M. & W. 509, where Parke, B. says: "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrong-doer, he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly or immediately through the intervention of an agent authorised by him to appoint servants for him, or make no difference. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist." In such a case as the present, the liability does not depend on that relation. Liability for doing an improper act depends upon the order given to do that thing; and the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done; and in the last two cases it is quite immaterial whether the actual actors are servants or not. Now, in *Hall v. Smith*, 2 Bing. 156, the action was brought against the commissioners for paving Birmingham (sued by their clerk), Norton, a surveyor, and Kimberley, a contractor, employed by them to make a sewer, for leaving a quantity of rubbish unguarded and unlighted, whereby the plt. was thrown down and injured. The commissioners were authorised by an Act of Parliament to order the making of the sewer. "No negligence," says Best, C. J., "was imputed to the commissioners themselves: they had ordered the tunnel to be made, and left the making of it to the defts. Norton and Kimberley, the former of whom was the surveyor and the latter the undertaker of the work. The accident happened to the plt. from these persons not putting up rails, and not having lights during the night." The close of his judgment is that "no action can be maintained against a man acting gratuitously for the public for the consequence of any act which he is authorised to do, and which, so far as he is concerned, is done with due care and attention; and that such a person is not answerable for the negligent execution of an order properly given." This, no doubt, is true; but it would be equally true if the defts., instead of

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being a body acting gratuitously for the public, had been a body like a railway company authorised to make the tunnel for their own profit. No action could have lain against them unless they stood in the relation of master to the parties actually guilty of negligence. This was not noticed by Best, C.J., as is pointed out in *Scott v. Mayor of Manchester*, 1 H. & N. There, Alderson, B. says, "*Hall v. Smith* goes too far—the person who selects the workmen is the party liable. Commissioners may get rid of liability by making contracts, but if they employ their own servants to do the work, they will be liable for the acts of such servants." But, he adds, "*Hall v. Smith* was bestly decided upon the facts." But though what Best, C.J. said in *Hall v. Smith* was irrelevant, and therefore of less weight, still, his opinion is an authority in favour of the defendants. It is, however, based upon a ground quite inapplicable to the present, or indeed to any modern case. He points out clearly and forcibly that it is harsh and impolitic to cast on individuals, gratuitously, a public duty, and make them responsible out of their private means for the non-fulfilment of it. But for many years it has been the practice of the Legislature to exempt the private means of commissioners from liability, either, as in the present series of Acts, by incorporating them, or by enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners. The basis of Best, C.J.'s reasoning fails, and *debile fundamentum fallit opus*. *Duncan v. Findlater*, 6 Cl. & Fin. 894, was a Scotch appeal brought before the House of Lords on a bill of exceptions. The action was against the trustees of a turnpike-road, to recover damages for an injury sustained by the plt. from falling over a heap of stones negligently left on the road. It was stated on the bill of exceptions that the trustees had given directions, through their surveyor, that a drain should be filled up, and that the workmen engaged in filling up the drain left negligently the stones in the road. Assuming that the law of Scotland and of England are the same, it is clear that no one could be answerable for this sort of negligence unless he stood to those who actually were guilty of the negligence in the relation of master and servant. The Judge who presided at the trial took a different view of the law of Scotland, and directed the jury "that road trustees on a public road are liable for any injury which may happen to passengers, in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees." And to this direction there was an exception. If the body authorising the operation had been a railway company or a private individual, instead of being trustees of a turnpike-road, this direction would, according to English law, have been wrong; and this is pointed out by Lord Brougham, who says: "The rule of liability and its reason I take to be this—I am liable for what is done by me and under my orders by the man I employ, for I may turn him off from that employ when I please. And the reason I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it." Language which is very similar to that already cited from *Quarman v. Barnett*. But though all that really was decided in that case was that the trustees were not liable for the negligence of persons in their employment who were not shown to be their servants, it is not to be disputed that Lord Cottenham's language goes a great deal further, and shows that, in his opinion, persons incorporated

for the purpose of executing works could never in their official or corporate capacity be liable to damages at all, the remedy for any wrong or neglect being only against the individual corporators for their individual wrong or neglect. His reasoning on this point is: "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it. And this is clear on the legal presumption that the act creating the damage, being within the statute, must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct." Lord Cottenham is there speaking of a body of trustees acting under the Scotch Turnpike Act, but his reasoning is general. And the dilemma, if a good one, is applicable to all cases. This is, no doubt, a very high authority, being said by the L. C. in the H. of L., though in a Scotch case, but not being the point decided by the House, it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down, both on principle and on the preponderance of authority. It is pointed out by Lord Campbell, in *Southampton and Itchin Bridge Company v. Southampton Local Board of Health*, 8 Ell. & Bl., that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created. And if the true interpretation of the statutes is, that a duty is cast upon the incorporated body, not only to make the works authorised, but also to take proper care, and use reasonable skill, that the works are such as the statute authorises, or, as in the present case, to take reasonable care that they are in a fit state for the use of the public who use them, there is, with great deference to Lord Cottenham, nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfil the duty thus cast by the statute upon it, may maintain an action against that body, and be indemnified out of the funds vested in it by the statute. Accordingly the Court of Q. B., in *Ward v. Lee*, 7 Ell. & Bl. 426, and the Court of C. P. in *Clothier v. Webster*, 12 C. B., N. S. 798; 6 L. T. Rep. N. S. 461, have expressed an opinion that an action lay against a local board of health in its corporate capacity, for an injury sustained from making improper works. And in *The Southampton and Itchin Bridge Company v. Southampton Local Board*, the point was expressly decided. And this decision was followed and approved of by the Court of Ex., in *Ruck v. Williams*, 3 Hurl. & Nor. 308, where it was held that an action would lie against the improvement commissioners of Cheltenham (sued by their clerk) for the improper mode in which they caused a sewer to be made. And Bramwell, B. forcibly observed: "I can well understand if a person undertakes the office or duty of a commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that if one of several commissioners does something not within the scope of his authority, the commissioners as a body are not liable; but where commissioners, who are a quasi corporate body, are not affected (*i. e.* personally) by the result of an action, inasmuch as they are authorised by Act of Parliament to raise a fund for payment of the damages, on what principle is it that if an individual member of the public suffers from an act bona fide but erroneously done, he is not to be compensated? It seems to me incon-

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sistent with actual justice, and not warranted by any principle of law." In *Whitehouse v. Fellows*, 10 C. B., N. S., 765, the Court of C. P. decided that an action lay against the trustees of a turnpike-road sued in their *quasi* corporate capacity by their clerk, for negligence in the manner in which they had caused drains to be made. This decision it is hardly necessary to point out, though quite consistent with all that was decided by the H. of L. in *Duncan v. Findlater*, is directly opposed to the opinion of Lord Cottenham. And lastly, in *Brownlow v. Metropolitan Board*, 13 C. B., N. S., 768; 6 L. T. Rep. N. S. 187, it was decided that an action lay against the Metropolitan Board for the injury sustained by a shipowner for the improper construction of a sewer in the bed of the Thames. And this decision was affirmed by the Court of Ex. Ch. (16 C. B., N. S., 546). It must rest with your Lordships to say whether those decisions to which we have referred are to be overruled. We think they are not consistent with Lord Cottenham's opinion. Before leaving this part of the subject we ought to call your Lordships' attention more particularly to the case of *Holliday v. St. Leonard's, Shoreditch*, 11 C. B., N. S., 192; 4 L. T. Rep. N. S. 406. The point actually decided there was, that there is an exception from the general law making a master liable for the negligence of his servant, where the servant is employed by a public body. The Court of C. P. did not intend to decide anything inconsistent with the decisions of the Court of Ex. Ch. now at your Lordships' bar, or with their own decision in *Whitehouse v. Fellows*, 10 C. B., N. S., 765. And the point which they did decide does not arise in the present case, so that it is unnecessary directly to decide anything upon it. But we think that we ought to call your Lordships' attention to the case, as much of what was said in the course of the judgment by Erle, L. C. J. is based upon the opinion of Lord Cottenham in *Duncan v. Findlater*, and is therefore an authority making against the view we have submitted to your Lordships. There remains only one further point to consider. The Acts under which the Liverpool Docks have been made contain, as has been already mentioned, clauses enabling the trustees of the docks to appoint water-bailiffs and harbour-masters, and confers on those officers powers of regulating the manner in which vessels shall enter the docks, &c. It was argued that the effect of these clauses was to confine the duty of the trustees to that of selecting proper officers, and they could not be responsible further. The case of *Metcalf v. Hethrington*, 11 Ex. Rep. 257, was cited as an authority for this position, and we think it is a decision much in point. The Court of Ex. there, in construing the Maryport Harbour Act, attributed this effect to enactments not very dissimilar to those now in question, and we agree, if this was so, the consequence would follow that the *plts.*' remedy would be, not against those who appointed the officer, but only against the officer himself. But we cannot agree in so construing the present Acts. As has been already pointed out, clauses almost identical with those now in question are inserted in every Harbour and Dock Act, whether the docks be, as in the present case, the property of public commissioners or of a trading company. And we cannot think that it was the intention of the Legislature to deprive a shipowner who pays dues to a wealthy trading company, such as the St. Catherine's Dock Company, for instance, of all recourse against them, and to substitute the personal liability of a harbour-master, no doubt a respectable person in his way, but whose whole means, generally speaking, would not be equal to more than a very small percentage of the damages, when there are any. If these enactments are in the present case so construed as to relieve the Mersey Board, from liability, the cor-

responding enactments in the Harbours, Piers, and Docks Clauses Act 1847, must also be so construed as to relieve all trading dock companies from liability, and that we think a *reductio ad absurdum*. This was not brought to the notice of the Court of Ex. when deciding *Metcalf v. Hethrington*. With greatest respect for those who joined in that decision, we think it was erroneous. For these reasons, we answer both your Lordships' questions in each of these cases in the affirmative, that is, in favour of the *plts.* below, the *resps.* in error.

(*Cur. adr. ult.*)

The LORD CHANCELLOR.—My Lords, these are two appeals depending very much on the same principles as those which led to the decision of your Lordships' House last year in the case of *the Mary Docks and Harbour Board v. Cameron*. The question there was whether the trustees of the docks and harbour, who are a body having no beneficial interest in the tolls and other produce of the docks were rateable to the relief of the poor. The argument was that, as a public body not receiving tolls for their own benefit, they were not liable; but your Lordships, after a long argument, decided that they were. The question in the present two cases is different. Both cases arise out of the one transaction. A ship called the *Sierra Nevada*, in entering, or endeavouring to enter, one of the docks, sustained an injury by reason of a bank of mud left negligently at its entrance. The ship and the cargo were damaged. Two actions were brought against the *apps.*, one by Gibbs, as owner of the cargo, the other by Penhallow, as owner of the ship. I do not think it necessary to go through the pleadings. In both cases the Ex. Ch. held that the *apps.* were liable. In both cases they have appealed, and the ground of appeal is that they are not a public company, deriving benefit, like a railway, from the traffic, but a public body of trustees constituted by the Legislature for the purpose of maintaining the docks, and for that purpose having authority to collect tolls to be applied in the maintenance and repair of the docks, then in paying off a large debt, and ultimately in reducing the tolls for the benefit of the public. In the case of Gibbs it must be taken as admitted by the *apps.* that, knowing that the dock was, by reason of an accumulation of mud therein, in an unfit state to be navigated, they did not take reasonable care to put the same into a fit state for that purpose, whereupon the *Sierra Nevada*, in endeavouring to enter into the dock, struck against the mud, and the cargo thereby became damaged. In the other case, which did not arise upon a demurrer, it must be taken as an established fact that the *apps.* had, by their servants, the means of knowing the dangerous state of the dock, but were negligently ignorant of it. It is plain that if the *apps.* are liable in the former case, they must be liable also in the latter. If the knowledge of the existence of the mud-bank made them responsible for the consequences of not causing it to be removed, they must equally be responsible if it was only through their culpable negligence that its existence was not known to them. The principles, therefore, which are to regulate the judgment of the House in the one case, must also decide it in the other. And the question therefore, is, what are the principles which regulate the liabilities of such a body as that of the Mersey Docks and Harbour Board? Where such a body is constituted by statute having the right to levy tolls for their own profit in consideration of their making and maintaining a dock or a canal, there is no doubt of their liability to make good to the persons using it any damage occasioned by their neglect in not keeping the works in proper repair. This was decided by the Court of Q. B., and their decision was affirmed in the Court of

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ror, in the case of *Parnaby v. The Lancaster Canal Company*, 11 Ad. & El. 228. The ground on which a Court of Error rested their decision in that case stated by Tindal, C. J. to have been that the company made the canal for their profit and opened to the public upon the payment of tolls. And the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property. The only difference between that case and those now standing for decision by your Lordships is, that here the apps., whom the docks are vested, do not collect tolls for their own profit, but merely as trustees for the benefit of the public. I do not, however, think that this makes any difference in principle in respect to their liability. It would be a strange distinction to persons coming with their ships to different parts of this country that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not, such a distinction arising not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed. It is impossible to argue, after the decision of this House in the case of the *Mersey Docks and Harbour Board v. Cameron*, that the apps. are not in the occupation of the docks. They are as much the occupiers of them as if they received the tolls and dues for their own use and benefit. The principle of that decision, coupled with that of *Parnaby v. The Lancaster Canal Company*, must govern this case. The apps. are the occupiers of the docks, entitled to levy tolls from those who use them and are liable to the same responsibilities as would attach on them if they were the absolute owners, occupying and using them for their own profit. It cannot be denied that there have been dicta, and perhaps decisions, not capable of being reconciled with the result at which I have arrived. But the whole series of authorities have been so fully brought under review in the very able and elaborate opinion of the learned judges delivered by Blackburn, J. in answer to the questions put to them by your Lordships, that I do not feel myself called on to do more than to express my concurrence in that opinion. I content myself, therefore, with moving your Lordships to give judgment in both cases for the debts, in or.

Lord WENSLEYDALE.—My Lords, the Court of Ex. Ch. in both these cases founded their judgment on that of the Ex. Ch. in the case of *Lancaster Canal Company v. Parnaby*, 11 Ad. & El. 330, in which case there was a company incorporated by Act of Parliament for the purpose of maintaining a canal to be open for the use of the public on payment of rates which the canal company might receive for their own benefit (that is, the profit to be divided amongst the shareholders), and the court held that the common law imposes a duty on the proprietors not perhaps to repair the canal or absolutely to free it from obstructions; but to take reasonable care, so long as they kept it open for the use of all that might navigate it, that they might navigate it without damage to their lives or property. Of the propriety of this decision there could be no doubt where the profits were received for the benefit of the company. In the present case the dock board do not receive the rates for their own use, but to be applied to great public purposes for the benefit of all the subjects of the realm, that is, to maintain the docks for the use of any who choose to frequent and pay the debt incurred in their construction; and the court decided that there was no dif-

ference between that case and the present. If this question were *res integra* not settled by the authority of decisions, I am strongly inclined to think that this decision of the courts could not be supported. It would appear to me that this case falls within the principle of those cases which have decided that when a person is acting as a public officer on behalf of Government, and has the management of some branch of the Government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself in the same business. This was the principle of decision in *Lane v. Cotton*, 2 Ld. Raym. 646, and *Whitfield v. Le Despencer*, Cow. 754, and other cases. The subordinates are the servants of the public, not of the person or persons who have the superintendence of that department even if appointed by them. Thus the Postmaster-General, who has the management of one department of the public service, the duty receiving, and conveying and delivering of letters from and to different places, which is eminently beneficial to the whole community and causes profit to the Government, is not responsible for any of the servants of the Post-office department, though he might appoint or dismiss them, and whether the Postmaster-General be an individual, as he is now, or two, as in the case of *Whitfield v. Lord Le Despencer*, or if more, however numerous, or the Crown were to make a corporate body for the regulation and government of the Post-office, neither individuals nor a corporate body would be responsible for the neglect of their servants. In this case, if there had been a postmaster-general for all the ports of England to take care that the receipt and discharge of goods, and the repairs of ships should be easy and convenient, and the receipt of Custom duties convenient, or suppose his duties to be limited to a certain number of ports; or suppose a corporation were appointed instead of an individual, would it cause that corporation to be responsible for the defects of its officers by whom alone they act in the management of the docks, and in the due discharge of its duties towards the public, on whose behalf it was acting? If we had now only to review a great number of cases connected with this subject decided in different courts, many contradictory and many very unsatisfactory, I should be disposed to abide by the decision of the case of *Metcalfe v. Hethrington*, 11 Ex. Rep. 257, where the trustees and managers of the harbour were held not to be responsible for the defaults of the persons actually employed in conducting the business of the harbour. If this case depended only on the decision of the courts below I should feel great difficulty indeed in supporting the decision of the Court of Ex. Ch. But I cannot help thinking that the decisions of your Lordships' House, which are no doubt binding upon your Lordships and all inferior tribunals, have gone so far that they have concluded the question, and ought to be considered as deciding that the apps. are responsible. In the case of the *Mersey Docks and Harbour Board Trustees v. Cameron*, and *Jones v. Mersey Docks and Harbour Board Trustees* in July 1864 (11 H. of L. Cas. 444), your Lordships, upon a full review and consideration, after a difference of opinion between the consulted judges, decided that the apps., the Mersey Dock and Harbour Board, were liable to be rated as occupiers though they occupied those docks for the purposes of those who frequented the port and derived no benefit from the occupation, and that they did not occupy for public purposes in such a sense as to exempt them from liability to poor-rates. It seems to follow, therefore, that they were not considered as being on the same footing as occupiers of public buildings for the Post-office or other Government

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purposes, but were liable as mere private individuals, and if so, it is difficult to say that they were acting on behalf of the public benefit, and therefore were irresponsible for the neglect and defaults of their servants, by whom alone they could act. Whether they were acting for the benefit of the public or not seems to be decided by that case. As we are bound by your Lordships' decision, the opinion of the learned judges delivered by Blackburn, J. must be considered as correct, and therefore ought to be affirmed.

Lord WESTBURY.—My Lords, I entirely concur in the conclusion derived from the authorities, and from the principles of law laid down in the very able opinion delivered to your Lordships by Blackburn, J. I concur also in the observation of my noble and learned friend on the woolpack, and that judgment ought to be given for the debt in error. But I think it desirable to say a few words with reference to the difficulty felt by the learned judges in consequence of certain observations that fell from Cottenham, L. C., and which are reported in the case of *Duncan v. Findlater*, 6 Cl. & Fin. I can well divine what was at that time passing in the mind of my Lord Cottenham. My Lord Cottenham seems to have thought that if a corporation be trustees of property for the direct benefit of certain individuals and there is no other corporate property; and if in their capacity as trustees an act is done by order of the corporation which amounts to a tort or trespass and gives a right of action and a right to damages to any private individual, a court of equity would not permit an execution to issue on any judgment that might be recovered against the property of the corporation, seeing that it is property held upon trust for certain beneficiaries, and that the corporation as trustees have no interest therein. But, my Lords, I apprehend that was a misapprehension on the part of the noble and learned lord, and that it would lead to very mischievous consequences. It is by no means true that a court of equity is able to protect the property of beneficiaries against the act of trustees. If trustees alienate property for valuable consideration to a person who pays that consideration without notice of the trust, the interest of the beneficiaries suffers from that act, and it would be a very unreasonable and a very mischievous thing if, in the case of a corporation dealing with the public or with individuals, such corporation should, by any act of theirs in respect of property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting for a remedy against the body doing or authorising those acts, and should be driven to seek a remedy against the individual corporators whose decision or order in the name of the corporation may have led to the mischief complained of. It is much more reasonable in such a case that the trust or corporate property should be amenable to the individuals injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint and his title to relief against the individual corporators who have wrongfully used the name of the corporation. My Lords, the learned judges observed—and with very great correctness—that it is not everything that falls from a noble and learned lord in advising the House, which is to be considered as the opinion of the House. Those observations of Lord Cottenham, which directly tend to this conclusion, that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done, would, if they were

recognised as the law, undoubtedly lead to great evil and injury. My Lords, I could observations to the case of a remedy sought wrongful act, because you are very well aware the rule has been well established that if, in the case of a contract entered into with a corporation, by Act of Parliament, the contract is made corporation *ultra vires* of the corporation, the corporation may not be entitled to recover under that contract. That may be a very convenient rule, and it is not all affected by the considerations we are now dealing with. But with regard to the observations attributed to the noble and learned Lord Chancellor (Lord Campbell), I conceive that they ought not to be regarded as establishing any rule that at all interferes with the decision at which your Lordships have arrived in the case now before you. With regard to what has been suggested by my noble and learned friend (Lord Wenleydale), that it would be a more correct principle to hold public debtors not to be answerable for inferior servants, that would be quite correct where an officer, fulfilling a duty, is directly appointed by the Crown, acting as the servant of the Crown; but it is not applicable to the case of trustees incorporated for the purpose of public works, and standing in relation to the public in the way these trustees stand in the present case. I concur, therefore, in the opinion of my noble and learned friend.

Judgment affirmed with costs in both appeals.

Plt. in error's attorneys, Norris and Allen.

Deft. in error's attorneys, Gregory, Rowcliffe, Rowcliffe; Upton, Johnston, and Upton.

COURT OF COMMON PLEAS.

Reported by W. MAYD and W. GRAHAM, Esqrs.
Barristers-at-Law.

May 31, June 2 and 4, 1866.

GRILL v. THE GENERAL IRON SCREW COLLIERY COMPANY (LIMITED).

Carriers by water—Bill of lading—Excepted perils—Barratry—17 & 18 Vict. c. 104, s. 299—Negligence of ship's crew—"Gross" negligence—Contributory negligence—Perils of the sea—Depositions taken under a commission—Irregularity.

In an action on a bill of lading by the shipper against the shipowner it appeared that the cargo which the defendants' ship was totally lost, was on board the persons in charge of the ship negligent in boarding their helm when they ought, according to the rules laid down in sect. 296 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), to have put a person on board the ship at the time of the storm which was called, but by sect. 299 of that Act it is that, in case damage to property arises from the negligence of any ship or of any of the said persons, damage shall be deemed to have been occasioned by the wilful default of the person in charge of the ship. The bill of lading excepted, among other things, perils, barratry of the master and mariners, and perils or damage of the sea, of whatever kindsoever.

Held, first, that to constitute barratry there must be an unlawful act wilfully done, and that the word "wilful default" in the statute did not make the same applicable for all purposes, but was only used for the purpose of expressing that the ship was in fault, and that the person in charge of the deck must explain his conduct.

Secondly, that the loss having been brought about by the negligence of the defendants, it was not within the excepted perils of the sea in the bill of lading.

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that there is no difference between "gross" and negligence, and that "gross" is only used as epithet, and not as a definition:

that it was only necessary for the plt. to show that it was caused by the negligence of the defts., and there was no want of ordinary care on the part of the ship, and that he was not obliged to go and negative the fact that if the other ship did something which she was not bound to do, it was not wrong in not doing, the loss would not be cured.

it was made to examine witnesses on behalf of the cross-interrogatories which were sent out, and the defendant cross-interrogatories, but the gentlemen who attended the plt. and defts. examined the witnesses:

it is if this was an irregularity an application be made to quash the depositions, and that it is too late to object to them at the trial.

that there was no irregularity.

was an action on a bill of lading by the plt., against, at Messina, Sicily, against the owners of the steamship *Black Prince*, to recover the value of goods lost in that vessel in consequence of collision between her and the steamship *Arazes* of St. Vincent.

The declaration was on the bill of lading, and set out excepted perils, which were, "the act of Queen's enemies, pirates, robbers, thieves, of master or mariners, restraint of princes, fire, accident or damage from machinery, steam, or from other goods by contact, leakage, or otherwise, and accidents or of the seas, rivers, and steam navigation, of whatever nature or kind soever." The declaration averred that the defts. did not safely or properly carry and deliver the goods, but took such improper care of their steam-vessel, and did and directed and managed the same in a negligent, and improper manner, that through the gross carelessness, &c. of the plt. and their servants and mariners in that and not otherwise, the said steam-vessel was put to force and violence ran foul of and struck a certain other steam-vessel, to wit the *Arazes*, whereby the plt.'s goods were sunk and wholly lost to the plt.

—1. A traverse of the bailment. 2. Not guilty. 3. That the defts. were prevented from carrying and delivering the goods agreeably to the bill of lading which they received the same by the perils.

The plaintiffs, taking issue, and to the third plea, supposed excepted perils in the plea mentioned wholly of the collision in the collision mentioned, and that the collision arose wholly caused, and the said supposed perils caused by and through the gross carelessness, the defts. by their servants and mariners in that and not otherwise, and that the defts. did prevent from carrying the goods by the perils, or any of them, further or otherwise the replication mentioned.

Their pleadings are not material to the question raised on this rule.

The trial before Erie, C. J., at the sittings after Term in London, it appeared that the goods were shipped by the plt. at Messina on the defts.' vessel the *Black Prince*, in Oct. and the vessel proceeded on her voyage. Witnesses were called who were on board the *Arazes* at the time of the collision, and stated that on the 8th Nov. a light, which turned out to be the *Black Prince*, was seen right ahead, or off a point on the starboard bow, and about

four or five miles off; that the helm of the *Arazes* was ported and the light brought about three points on the port bow. Shortly afterwards the light was seen close on the *Arazes*, and orders were given to port the helm and stop the engines of that ship, which were done, and almost immediately afterwards the collision took place, the port bow of the *Arazes* striking the starboard beam of the *Black Prince*, and the *Black Prince* went down. No witnesses were called who were on board the *Black Prince*, but it was clear from the evidence that she must have starboarded her helm when she ought to have ported. Both the *Arazes* and the *Black Prince* were English ships, and the latter was owned by the defts.

Erie, C. J. told the jury that if they were of opinion that the *Black Prince* was sunk by reason of negligence on the part of the crew bringing about a collision with the *Arazes*, and that the *Arazes* could not by reasonable care have avoided that collision they would find for the plt., and that the plt. was bound to prove that there was no want of ordinary care in the management of the *Arazes*, by the exercise of which the collision would have been avoided. The jury found a verdict for the plt. for 1220*l*.

In the course of the trial it was proposed to put in evidence, and his Lordship admitted, certain depositions taken at Messina by virtue of a commission. The judge's order was an order to examine on interrogatories, and the commissioner was commanded to examine on interrogatories and *vidé voce* witnesses for the plt., the plt. to be at liberty to examine on interrogatories, and to put additional questions *vidé voce*, with liberty to the deft. to cross-examine upon cross-interrogatories and additional *vidé voce* questions. Interrogatories were sent out, and the defts. did not join in the commission, but sent out cross-interrogatories. At the examination both the plt. and defts. were represented, and the gentleman who appeared for the plt. put questions to the witnesses, but did not use the interrogatories, and the gentleman who appeared for the defts. and was not a lawyer cross-examined, and one of the witnesses named was not called.

E. James, Q. C. in Easter Term obtained a rule calling on the plt. to show cause why the verdict should not be set aside and a verdict entered for the defts. pursuant to leave reserved, on the ground that the conduct of persons in charge of the defts.' ship brought the case within the exception of barratry in the bill of lading, or why there should not be a new trial on the ground that the judge ought to have told the jury that the loss was caused by peril of the seas within the bill of lading, and also that he ought to have left to the jury whether the loss was caused by gross negligence; also, whether the loss might not have been avoided by care on the part of those on board the *Arazes*, and on the ground of the misreception of the depositions taken at Messina, or why judgment should not be stayed on the ground that matters set forth in the replication to the third plea do not take the case out of the protection given to the defts. by the bill of lading. Against this rule

The Solicitor-General (Collier), Hannen, and Cohen now showed cause.—The first ground is that the acts of negligence proved amounted to barratry, and my friend relies on sects. 296, 297, 298, and 299 of the 17 & 18 Vict. c. 104. This case has already been considered in *The General Iron Screw Collier Company v. Moss*, 15 Moo. P. C. C. 122; 4 L. T. Rep. N. S. 138. The contention on the other side is, that the words "wilful default" in sect. 299 make this barratry. If it was with the intention to defraud the owners it would be; but the essence of all crimes

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is the intention. This point was taken in the Admiralty Court and overruled:

The Seine, Swab. Adm. Rep. 411;

The Druid, 1 W. Rob. Adm. Rep. 891.

In 2 Arnould on Marine Insurance, 3rd ed. 712, it is said that "barratry, in the English law, may be said to comprehend not only every species of fraud and knavery covinously committed by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence, by whatever motive induced, whereby the owners or charterers of the ship (in cases where the latter are considered owners *pro tempore*) are in fact damnified." *Phyn v. The Royal Exchange Insurance Company*, 7 T. R. 505; *Earle v. Rowcroft*, 8 East, 126, may be relied on by the other side, and the effect of the decision there is, that there may be barratry without an express intention to injure the owners; but there the captain did an illegal act, and did it against his better judgment and in breach of implied orders from the owners, though for their benefit. In *Tuff v. Warman*, 2 C. B., N. S., 740, though the precise point was not raised, there is a construction of the statute excluding the contention of the other side:

Morrison v. The General Steam Navigation Company, 8 Ex. 783;

Sadler v. Dixon, 8 M. & W. 895.

A wilful default must be shown on the part of a person who knows it to be wrong; it must, in fact, be shown to be a crime, or it is not barratry:

2 Parsons on Maritime Law, 239;

Todd v. Richie, 1 Stark. 240.

There must be a wrongful intention on the part of the master; a deviation is not barratry, because it is not done with a wrongful intention:

Phyn v. The Royal Exchange Insurance Company, 1 Pritch. Adm. Dig. 147;

Wyld v. Pickford, 8 M. & W. 443.

It does not follow that, because an act is by statute made wilful for a particular purpose, it is so for every purpose. It is reasonable that when a statutory provision is broken the owner should be liable, and the words "wilful default" are put in for that purpose, but not for any other, and all the cases show that there cannot be barratry if the owner would be liable, but there must be such a breach of trust that the owners would not be liable: (*The Ida*, 1 Lush. 6.) The second point, that the loss was caused by peril of the sea, has been already decided in *Lloyd v. The General Iron Screw Collier Company*, 3 H. & C. 284; 10 L. T. Rep. N. S. 586, which was a case arising out of this very collision, and the pleadings are identical. [WILLES, J.—The Court of Ex. does not seem to have been aware that this court had decided the point above eleven years before: *Phillips v. Clark*, 2 C. B., N. S., 156.]

Jones v. Pilcher, 3 Stewart & Porter, 135 (American); *Dakin v. Ozley*, 33 L. J. 115, C. P.; 10 L. T. Rep. N. S. 268.

The next point is, that the judge ought to have asked the jury if the loss was caused by gross negligence, but it has been held in many cases that there is no difference between negligence and gross negligence: (*Wilson v. Brett*, 11 M. & W. 113, per Rolfe, B. at p. 115.) [WILLES, J.—That was considered in *Beale v. The South Devon Railway Company*, 3 H. & C. 337; 2 L. T. Rep. N. S. 665. EARLE, C. J.—I have no doubt I thought it my duty not to use a word to which I cannot attach any distinct meaning.] Then it is said that the interrogatories were not put, but the defts.' agent cross-examined the witnesses. [WILLES, J.—If no application was made to quash the depositions, they cannot object to them at the trial.] No, I submit that they cannot, and the questions were only to prove that the goods were put on board.

E. James, Q. C., Karlake, Q. C., and Sir man in support of the rule.—This is difficult to maintain an action by one shipowner against another on collision; this is an action on a contract question is what are the rights of the party that contract. Even a common carrier, in his legal position by entering into a special contract (*Carr v. The Lancashire and Yorkshire Railway*, 7 Ex. 707.) Here the contract is to carry goods, responsible, barring certain things. To say that barratry no intent to damage need be shown, that act is wilfully and deliberately done. The master had implied instructions to obey the orders of the Captain, and he has not done so, as is shown by the fact that he must have starboarded his helm. A wilful violation of the law by which the ship is in fact damnified:

Heyman v. Parish, 2 Camp. 148;

8 Kent. Com. 305.

In *Phyn v. The Royal Exchange Insurance Company*, the deviation was not a violation of the law, but is purely a question of contract, and the shipowner may limit his liability:

Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company, 10 C. B. 454;

Great Northern Railway Company v. Ma

L. J. 319, Q. B.:

Smith's Law of Master and Servant, 151;

Huzzey v. Field, 2 C. M. & R. 482.

The case of *Lloyd v. The General Iron Screw Collier Company* does not apply, as that was a demurrage question in this case is, not as to the collision, but whether, if there had been greater care on the part of the *Araxes*, it would not have so done the blow as not to have sent the *Black Prince* to the bottom. The loss is not caused by the collision alone, but by the violence of the collision the jury have found that the *Araxes* could have avoided the collision; but it is consistent with that that they could have prevented the damage to the goods. Then as to the question, in sending a commission out it is very important to know if the examination is to be by voice or by interrogatories, as, if the former, it is necessary to send some one out who knows the law of legal proceedings. In some cases the witnesses do not exactly answer a question necessary to put another, and therefore the court generally power in the commission to examine by voice. This examination was not according to the terms of the commission, as the commission did not put the cross-interrogatories. The commission did not the agent of the parties to dispense with the order by the commission. They cite

Coggs v. Bernard, 1 Sim. L. O. 171;

Hinton v. Dibbin, 2 Q. B. 646;

Beale v. South Devon Railway Company (3 H. & N. 875);

Filliter v. Phippard, 11 Q. B. 347;

Ashby v. White, 2 Sim. L. C. 216;

Smith v. Scott, 4 Taunt. 126;

Wilton v. The Atlantic Royal Steam Mail Company, 10 C. B., N. S., 458; 4 L. T. 706;

Wilson v. Rankin, 1 Law Rep. 162, in error Rep. N. S. 564.

WILLES, J.—I am of opinion that this rule should be discharged. With respect to the admission of the depositions, I should regret if it turned out that any objection going merely to the irregularity of the proceedings, and not to the merits, was taken; but in this case I am not satisfied that irregularity has taken place. The commission consists in this, that whereas the commission was obtained by the plaintiff for an examination of the witnesses on his behalf at the trial, and whereas the defts., though not joined in the commission, furnished cross-interrogatories

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o those witnesses, one of those witnesses, whose once it is stated would have been important, was called, whereby the cross-interrogatories were put to him; and that in respect of others of the cases who were called the written interrogatories were asked and furnished by the defts. were not asked; and that the examination of some of the cases consisted only of a series of questions put Mr. Talavera, who was instructed to attend the examination on the part of the defts., and who got answers to the cross-interrogatories. The court asked in vain to have pointed out any matters to the benefit of the defts. that were not put forward by the gentleman who represented them, and the fact that they cannot be pointed out shows that, all practical purposes, the cross-interrogatories, the substance of them, were administered, though in a written form, to the witnesses called, and the defts. have really suffered no detriment whatever. This objection, therefore, has no solid foundation, and only amounts to this, that the questions were put by word of mouth instead of being read from written paper, and that being so, I think my Lord is right in allowing the depositions to be received in evidence. If it be any satisfaction to the defts., I would desire to say that, having read the examination by this gentleman, I cannot agree that he required any want of either mercantile or legal assistance. Now we have to discuss the really important questions in the case. The first of them that was reserved is, whether the loss which took place under the circumstances of this case was a loss in respect of which the defts., as shipowners, are liable, but for the exemption in the bill of lading which has been answerable to the plt. as a shipper, yet it falls within the exceptions in the bill of lading, as being a loss caused by a barratry, or by some act of the sea. And first with reference to whether it was a loss by barratry. For the purpose of deciding that question, of course it is necessary for the court to be satisfied whether a barratrous act appeared on the evidence, and that reasonable conclusion from the evidence was that the act by which the loss took place was some-thing barratrous on the part of those on board the *Black Prince*. The *Arauxes* appears to have been in error in her right course; there is no proof of negligence whatever on her part. She appears to be all to have seen the *Black Prince* some five miles off on her starboard bow. Her helm was altered so as to bring the *Black Prince* on her port side, and in that position they remain till shortly after the collision; the collision being that the *Arauxes* ran into the *Black Prince* on her starboard about midships, whereupon the *Black Prince* sank, the goods on board of her belonging to the plt. entirely lost. It must be admitted that the proper conduct of the parties was, that while the *Arauxes* was right in porting her helm, the *Black Prince* must at some period have starboarded her helm. There being no circumstances shown to justify a departure from the rule which requires vessels to port their helms, necessarily, the *Black Prince*, or those on board of her, were in fault. It did not follow what was the extent of that fault. The amount of negligence might be set down such as would make the owners liable, at any rate, for the amount of negligence up to an act of misfeasance, even an act of malfeasance, so as in the latter to surpass negligence altogether. The evidence appears to have come from the people on board the *Arauxes*, and no evidence was given by people on board the *Black Prince*. There was no evidence in any way of whether what was done was done wilfully or only by default. Under these circumstances, apart from the statute, it would hardly be concluded, I suppose, on the part of the defts. that it was a proof of barratry, barratry consisting of

something done in fraud of the owners. It is not like the case referred to in the argument, in which it has been held that the master, by using the vessel in smuggling, or for some other unlawful purpose, without leave of the owner, although he intended that the owner should have the benefit of the adventure, was guilty of barratry. Those cases do not at all prove the propriety of the definition contended for, for this simple reason, because nobody has a right to risk the property of another in wilfully doing an unlawful act without his leave, whether his intention be to benefit him or not. It is that sort of intention one sometimes hears of in a case of forgery. A person puts another's name to a bill, and on the part of the prisoner it is urged that he had large expectations of money from some one, and was sure to have the money in his pocket so as to take up the bill, and intended to do so. The answer to which is, that he had no right to incur the risk of his being in funds, and had no right to put his good intentions against the peril to which he exposed the person who took the forged instrument, or the annoyance to which he put the person whose name he thought proper to use. His good intentions are utterly immaterial. That, I take it, is the explanation of why the master, in doing an act which is obviously unlawful, though he chooses to take the risk of being punished and intends the owner to get the benefit of it, if he has not his leave to incur the risk, does a barratrous act. It must be an unlawful act wilfully done which occasions the injury. Here there is no evidence that the act done was of such a character that it was barratrous. But it is said that the effect of the statute is to make it by a fiction of law a barratrous act; because the statute says that if damage shall accrue from the non-observance of any of the regulations set down, it is to be deemed to have been occasioned by the wilful default of the person in charge of the ship; and it is said that by reason of that provision it must be taken for all purposes, among others for the purpose of this case, that the helm was wilfully starboarded by the persons on board the *Black Prince*, and that the collision was therefore caused by an act that was barratrous because an act contrary to law and an act which redounded to the disadvantage of the owners. Upon consideration I am unable to arrive at that conclusion. The statute in question was certainly not passed with a view to determine cases of the description of that now before us; questions arising upon a contract between the shipper and the shipowner. That statute was passed with a different intention, namely, for the regulation of ships and for determining the rights of shipowners *inter se*. It appears from the case cited from Swabey's Reports, that it was thought by Dr. Adams, that the expression "wilful default" might be construed to mean malfeasance; but it was held in that case by the learned judge of the Admiralty Court, that the statute had no such intention as that, and that the words "wilful default," which I think it must be admitted are rather unhappily chosen, were chosen for the purpose of expressing that the ship on board of which the blunder has been made of not porting the helm, under the circumstances in which the rule applies, was to be considered the ship which was in fault; and that, unless the person on board could explain why he did not port the helm, he must be answerable for the like consequence, as if he had wilfully abstained from doing so. That appears to me to be strongly confirmed by the subsequent Act. For the purposes of this case we are dealing with the 17 & 18 Vict.; but the court is at liberty to see how the Legislature dealt with the subject in the subsequent Act, and, looking at the 25 & 26 Vict. c. 63, I find that wilful default is still referred to, and that in sects. 27, 28, and 29, provision is made

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with reference to what is to be the presumption the court should act on in case of collision; and by sect. 29, "If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by, or in pursuance of, this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary." Therefore, when it was seen what difficulties presented themselves in the case in *Swabey*, and the Legislature came again to deal with the subject, it excluded any doubt by showing that "wilful default" was not used in any case which would exclude the conclusion that the act was a negligent one for which the owner of the vessel was liable. I consider, therefore, that the statute was passed not for the purpose of altering the rights of parties who were contracting with one another, but, as far as the learned and very able arguments which we have heard has enabled me to judge, I think I may say that "wilful default" is not an expression of art, and for the reasons I have stated I think it is loosely used simply for the purpose of showing first, that the vessel is in fault, and secondly, that the person who is on deck is to be called on in any proceeding against him to explain his conduct in not complying with the Act, and that he is to be considered as in "wilful default," and punishable as a person who has wilfully neglected his duty, unless he can explain how it was he did not comply with the statutory regulations. That is the whole scope of the enactment, and it appears to me not to affect the question between the parties under the circumstances now brought before the court. Then comes the question, the importance of which one could not exaggerate if it was not that the shipowners have the remedy in their own hands to exclude, by more precise language, the consequences which it may be said they have entered into. That is the question whether, upon the true construction of the bill of lading in this case, the loss has happened by perils of the sea within the expression "perils of the sea" in that document. I do not propose to say much on this point, because I conceive that it has been already decided in the Court of Ex. (*Lloyd v. The General Iron Screw Collier Company*) in a similar action to the present brought in respect of the very same collision, and arising upon the construction of the same language. But as reference has been made to the case of insurance as if it was one not sufficiently considered in that case, and not well to be distinguished from the case of an action on a bill of lading, I will say a word upon that. With respect to a policy of insurance it must be remembered that it is a positive contract to insure against the perils described, and not an exception from liability, and therefore it is only necessary to see whether the perils, in respect of which the assured seeks to recover, come within the description in the insurance in point of fact. Moreover, I should observe that the general words at the end of the specified perils in the policy of insurance, "all other perils that may come to the ship during the voyage," clearly show that, although the perils to which the ship has been exposed may have been brought about by circumstances not strictly coming within the description of "perils," yet, if a loss happens by the perils specified, the previous circumstances are to be rejected as immaterial. Therefore you have a question whether the loss happened by a peril of the sea plus the negligence of A. B.; perils of the sea to which the vessel might have been exposed but for the misconduct of C. D. or what not. With respect to the action on a bill of lading, that stands, as it appears to me, on a very different footing. The contract is a contract to carry with

reasonable care and safety unless prevented by certain excepted perils; and therefore, when you show that the damage is caused by one of the excepted perils, but also prove that there has not been carrying with reasonable care, by reason of which the goods were exposed to the peril, you have conflicting portions of the contract which you must choose between. On the one hand the owner of the vessel promises reasonable care, skill, and diligence to his master and mariners; on the other hand he says, "I am not to be answerable if the accident happens by perils of the sea." How are you to reconcile those? It has been said they may be reconciled by saying that if the accident happens by perils of the sea, but is brought about by want of due care and skill on the part of the master and mariners, you have a breach of the contract before you come to the exception. Whether that is an answer or not is unnecessary to consider now; we are bound by the case of *Lloyd v. The General Iron Screw Collier Company*, which, so far as I have been able to turn the matter over in my mind, is supported by the case of *Phillips v. Clark* in this court. It will not require very much diligence to find, on the authorities referred to, and on what has been called the general mercantile law, abundance to show that this is a new doctrine, and I would make no further remark on this part of the case beyond saying that the main question arose at the trial of the issue as to what was the replication on which the Court of Ex. pronounced judgment, with one exception, and that depends on the use of the word "gross" in the replication, whereas the learned judge at the trial laid down that with reference to the circumstances of this case gross and ordinary negligence would effect the same, and although in a portion of the summing up the word "gross" was used, yet it was accompanied by a statement, in which I entirely concur, that there was no distinction at all for the purposes of this case between gross and ordinary negligence. Here we may endeavour to obtain information upon the meaning of the word "gross," which it was said was improperly rejected or made away with in the summing up. So far as the argument has gone, I have been unable to ascertain what the injury that is complained of by the defendants in using the word "gross." What does it mean? No one appears to be able to give an answer. I apprehend the answer has been given long ago in former cases, and I own I entirely agree with the dictum of Lord Cranworth that "gross negligence" is ordinary negligence with a vituperative epithet. That was the law laid down in *Wyld v. Field*, and upheld and recognised in the Ex. Ch. in the judgment of Crompton, J. in *Beale v. The Great Devon Railway Company*. The confusion seems to have arisen in using the word "negligence" as if it was an affirmative word, whereas, in truth, it is a negative word; it is the absence of such care, skill, and diligence as it was the duty of the defendant to the performance of the work which he is said to have performed. Then if you begin with what is the amount of care, skill, and diligence which a man ought to bring? In the case of gratuitous bailment it is said, if you employ a man of no skill to ride your horse, he is bound to such skill as he possesses, and that you can require no more, and that he is liable for gross negligence in that sense. But, if you employ a man to ride your horse who professes to be a groom, he will be answerable unless he had competent skill in horse-riding. Therefore the word "gross" is a word which, as pointed out by Sir Patrick Colquhoun in his summary of the Roman civil law, is used as a description, not as a definition. If we have to separate law from fact, and to leave the question of fact to the jury, we could not get nearer to a precise definition of "gross negligence" than what has been

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tionable; the want of such care, skill, and diligence it was reasonable to expect under the circumstances. When you are dealing with a bailee for hire, any act of omission of his in the course of his employment, the want of due care, skill, and diligence if there be any, is therefore necessarily gross negligence. It is only introducing confusion and to mislead the jury, in my opinion, to use the "gross" instead of using, as my Lord appears to have done over and over again on this occasion, want of due care and skill in navigating a vessel. I apprehend that was clearly a correct thing to say, and that the introduction of the word "gross" might even have led to complaint on the part of the plaintiffs, that the jury might have been misled by the use of an epithet to which they might have attributed more weight than it really deserved. There is only one point remaining, and I think I now understand what is intended to be represented to the court, which is this, that this not being a collision between the *Araxes* against the *Black Prince*, but the owner of goods on board the *Black Prince*, undertakes to show that the damage happened to the goods not by perils of the sea, but by the negligence of the crew; he does not sustain that which rests upon him, by showing merely that a collision between the two vessels happened by the negligence of the crew on board the *Black Prince*. He must go further and show that the collision under the circumstances up to the point of the collision, by which the goods were lost, were caused by the negligence of the people on board the *Black Prince*, and not with any contributory negligence on the part of the *Araxes*. And the argument went on; it was said that if the *Araxes* could have done so as not to impinge with such violence upon the *Black Prince*, though she was not bound to do so, yet, if she had done so, peradventure the collision would not have been accompanied by a loss of goods. I have taken great pains to understand this point, because of one's difficulty in apprehending it, but I think it comes to this; given that there was negligence on the part of the people on board the *Araxes*, vessel, and that if there had not been the negligence of the goods of the plaintiff would not have been lost, still the defendant seeks to divide the blame of collision, and so qualify his own wrong, and to say that though what took place did not have taken place if there had not been negligence, yet there were other circumstances which might have intervened and did not, and that if they had, would have prevented the loss. That either means that the *Araxes* was negligent, or it does not. If it means that the *Araxes* was negligent, I should like to have pointed out here she was negligent. The fact is, there is evidence of wrong on the part of the *Araxes*. If she backed, and slowed, and fumbled about the *Black Prince*, she might have done more damage. If she did not wrong for the *Araxes* not to back, the defendant is not having done something which she is wrong in not doing, and which it was not her duty to do cannot qualify the damage which the defendants are to pay for their wrongful act. This brings me to the point which is perfectly clear, which is scarcely matter of authority, but for there is an authority in *Davis v. Garratt*, 6 that if a man does a wrongful act, and a consequence follows as the ordinary consequence of that act, he cannot get rid of that consequence by showing that it must have happened if he had done the wrong. All the points in this case appear to me, as I have already stated, to be of great importance; the court is exceedingly anxious to counsel for the assistance which they rendered it in the course of the argument, and the whole it appears to me that on none of the points ought the rule to be made absolute.

M. SMITH, J.—I also think that the rule should be discharged. [His Lordship stated the facts.] It is contended that starboarding the helm was in contravention of the positive rule of the Merchant Shipping Act, and, being so in contravention of law, that it was barratry on the part of the master. Section 209 of the Act and the evidence fail to establish any such case. It was perfectly consistent with the facts proved that those on board the *Black Prince* were asleep, or that those who ought to have been on deck were asleep below; and it would be strange to say that, though the act of going to sleep may be wilful, yet, if the master or men in charge of the deck are asleep, and an accident is occasioned thereby, that would be barratry within any definition which has hitherto been given. Take the case of the master getting drunk, which is a more wilful act. If an accident was caused by his want of care, it is hardly to be contended that there was barratry so as to bring the case within the exception in the bill of lading. I entirely agree with Willies, J., that the words in the statute have not that effect. It is clear to my mind that it was not the object of the Legislature to alter the effect of contracts made between the shipowner and merchant; and, looking at the whole scope of the Act, it certainly does not seem to have been the intention to release the owner of the offending ship from the consequences of such an act. The next part of the rule relates to the motion for a new trial; and the first ground is, that the judge ought to have told the jury that the loss was caused by a peril of the sea within the exception of the bill of lading. That raises very much the same question as arises on the replication; but it is said that my Lord ought to have told the jury that the foundering of the ship was immediately caused by the perils of the sea and that the negligence of the crew, being the *causa causans* of that effect, had no effect on the perils. It seems to me that that would have been directly in opposition to the judgment of the Court of Ex., and it is sufficient to say that I think my Lord was bound by that decision at Nisi Prius, and that we are bound by it here. The next ground is, that my Lord ought to have left to the jury the question whether there was gross negligence. I conceive my Lord put the case with perfect propriety in the direction that he gave to the jury, and it has not been suggested at the bar in what way he could have put it differently, unless he had used the word "gross" which is found in the replication. I think it is a word which is indefinite in itself, and which, without explaining what he meant, would not have tended to enlighten their minds as to the question they had to determine. There is no doubt that the expression "gross negligence" is to be found in some of the decisions, but it is only one mode of expressing, perhaps, that in a particular case there is a less degree of care required than there might be in other cases; and when you have to define between "negligence" and "gross negligence" it certainly seems to be more scientific and more intelligible to define what are the degrees of care than to attempt to say what are the degrees of negligence. As I read the replication, it would have stood equally well without the word "gross;" the question is, whether there was a want of that due care, skill, and diligence which a captain and crew ought to bring to the service of the ship. The other point of misdirection is, that my Lord ought to have asked the jury whether, although the collision was caused by the negligence of the *Black Prince*, the foundering of the ship and the loss of the cargo was not caused by the negligence of those in charge of the *Araxes*. It seems to me that the argument on that point might prevail if there were facts to justify it; but I think there is an utter absence of facts which would have justified my Lord in putting such a question to the

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jury. As far as the evidence goes, there was no want of care on board the *Araxes*, and it is matter of pure speculation by the counsel for the defts. to suggest that something might have been done on board the *Araxes* which might have prevented the collision, or might have rendered it less injurious than it was. There is no other point except that which arises on the replication, which, as I have said, is very much the same question as arises on the first ground for a new trial. There is certainly one other point which in this important case one would hardly have expected, that is, that the depositions were improperly received by my Lord. Now, my Lord could not have refused to have accepted those depositions, unless they had been taken without authority, and the counsel for the defts. have scarcely contended for so wide a proposition as that. It seems to me that they were taken with authority, and that, if there had been any irregularity in the mode of taking them, the proper method of taking advantage of that would have been to apply to the court to have them suppressed, certainly not to wait until the trial and then take objection to their admissibility. Upon all these grounds, therefore, I am of opinion that the rule should be discharged.

ERLE, C. J.—I have nothing to add to the observations of my learned brothers, except that I am authorised by my brother Keating to say that he concurs in the judgment which my brothers Willes and Smith have delivered.

Rule discharged.

The word "gross" was struck out of the replication, and the defts. had leave to appeal, on the ground of barratry, and that the loss was caused by perils of the sea.

Attorneys for the plt., *Pritchard and Son.*

Attorneys for the defts., *Thomas and Hollans.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUXLEY, Esqrs., Barristers-at-Law.

Saturday, June 2, 1866.

BAINES AND OTHERS v. EWING.

Assumpsit—Marine insurance policy—Underwriters—Broker signing policy for his principal—Broker exceeding his authority—Custom at Liverpool—Principal and agent—Private instructions—Indivisibility of contract.

Def't., in writing, authorised his brokers at Liverpool to underwrite policies of marine insurance in his name and on his behalf, "not exceeding 100l. on any one vessel." The custom at Liverpool is for the broker to sign his principal's name to the policy, but it is well known there that in almost every case the broker's authority is limited to a certain sum, though the amount of such limit is only known to the broker and his principal. The brokers, without def't.'s knowledge, underwrote a policy in his name for 150l. for the pl'ts., who were ignorant of the limit imposed: and in an action by the latter thereon it was

Held, that the def't. was not liable for all or any part of the 150l., as the brokers had exceeded their authority, and the contract was one entire and indivisible contract.

This was an action brought on a policy of marine insurance to recover from def't., as an underwriter, the sum of 150l., the amount for which the pl'ts. alleged the def't. had underwritten the said policy. The declaration was in the usual form, and the def't. pleaded that he did not subscribe the said policy, and did not become an insurer as alleged, on which *plea issue* was joined. At the trial before Lush, J.

and a special jury, at the last spring assizes at Liverpool, a verdict was taken for pl'ts. by consent for 150l., with leave to def't. to move to enter a verdict for him, or to reduce the damages. No witnesses were called by either party, but the facts as stated verbally at the trial by the respective counsel, and as they appear on the shorthand writer's notes, were admitted and agreed to by both sides, and were materially as follows:—The pl'ts. are shipowners in Liverpool, trading under the firm of James Baines and Co., and def't. is a gentleman of property living in London. In July 1861 def't. authorised Messrs. North Ewing, and Co., insurance brokers, of Liverpool, to underwrite policies on marine risks, in his name, to the extent specified in the written authority, which he wrote and sent to them, and which was in the following terms:

Messrs. North, Ewing, and Company.

Gentlemen, I hereby authorise you in my name, on my behalf, to underwrite policies of insurance against marine risk, not exceeding 100l. by any one vessel, and I authorise you, &c.

(The document went on to give them authority to adjust and sign off losses, and to give the usual credit note, and to make payment and do other things usual and customary in Liverpool between underwriters and brokers.)

I remain, &c. &c.

Richmond, 26th July 1861.

WM. EWING.

It appears that the system of business pursued in Liverpool on these occasions is somewhat peculiar and different from that of London. In the former place there is an underwriters' association, and when a person instructs a broker to underwrite for him, the broker does not take the policy to the underwriter to sign, but the broker signs it for his client the underwriter. If a broker has a principal desiring to be an underwriter, the broker lays the name of his principal before the underwriters' association, and if they assent to the name, it is entered in their book, and then the broker underwrites in his name. So, in the present case, upon the def't. giving authority to North, Ewing, and Co., to underwrite for him, they from that time signed policies in his name. But it is well known in Liverpool that, in almost all cases, if not in all, a limit is put to the amount to which the broker can sign his principal's name; that is, the principal gives leave to sign for 100l., or some other fixed sum, on any number of ships, or on any terms he pleases; but, when the name is given to the association, that limit is not named, and it is, in fact, known only to the broker and his principal. It was admitted as a fact that pl'ts. did not know of the limit imposed in the present case, nor of course that it had been exceeded; neither was def't. aware until afterwards that the limit had been exceeded, nor did he subsequently ratify what his agents had done. Under the above circumstances, on the 2nd Oct. 1862, and whilst the above authority was in force, the policy in question was executed, and was underwritten by North and Co., in def't.'s name for 150l., on which the action was brought. The total loss was admitted. A rule having been obtained in Easter Term last to set aside the pl'ts.' verdict, and to enter a nonsuit or a verdict for the def't., on the ground that there was no evidence of authority given by def't. to underwrite the policy, or why the damages should not be reduced,

Brett, Q. C. and Quain, for the pl'ts., now showed cause.—Def't. allowed the brokers to hold themselves out as his agents to underwrite for him, and though they might not be general agents for many purposes, they were so for the particular purpose of signing all policies brought to them; nor could the business of an underwriter be carried on if the insured were bound to inquire on every occasion into the agent's authority. The distinction here was not between a

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general agent and an agent to do a particular thing; but it was this, that, in the case of an agent with certain powers to do certain things, those powers could not be limited by secret instructions. In such a case a man would be bound by the usual authority in the case of an agent whom he had put before the world as such: (2 Duer's Marine Insurance (American), sects. 49-50, pp. 345-6.) [MARTIN, B.—It is notorious in Liverpool that the authority of these agents is limited. BRAMWELL, B.—That must mean a limitation of the agent's *apparent* authority.] The question would be, what were the usual incidents of such an authority, and one of the natural incidents in such a case was to underwrite in different sums according to the agent's discretion. Then was it altered by the fact that it was known in Liverpool that in almost all cases there was a limit? It must be taken with the fact that the limit was never known to the public, which showed that inquiry was never made, and the right of the assured to assume that the agent was doing his duty between himself and his principal was not prejudiced. It was intended by the principal that the limit should not be made known, and plts. were entitled to say that deft. held out his agents as authorised to sign to any amount. The definition of a general agent was well stated in *Story on Agency*, sect. 126, and sect. 127, *in notis*. It was like the case of a factor, *Ib.* sect. 131. Then as to the second point, the contract was divisible, and the authority might be separated where it could be done without injury to the party to be bound. Here there was authority to the extent of 100*l.*, and to that extent, without being diminished, deft. was clearly bound. [Mellish, Q. C., *contra*.—Deft. is, or is not, entitled to a verdict on *non assumpsit*.] The distinction was well established where an agent, professing to act for his principal, pursued his authority up to a certain point, and then exceeded it, [BRAMWELL, B.—That is precisely what was not done here.] It was laid down in *Co. Litt.* 258 a, that though, where a man did less than the authority committed to him, the act was void, yet where he did what he was authorised to do, and more, it was good for that which was warranted, and void for the rest. [BRAMWELL, B.—That is to say, under an authority to enfeoff a man in one acre, an enfeoffment of him in two acres would be a good enfeoffment of the one acre. But here the contract is one and indivisible.] That depends on how such a contract was construed. By construing it as a contract to the extent of the authority below 150*l.* the difficulty would be gotten rid of, and the excess would be severable. [MARTIN, B.—You may as well say that a contract for 1*l.* is 240 separate contracts for so many pennies.] (This latter point was here given up by plt.'s counsel without further argument, upon the Court's intimating their opinion that it was not arguable.)

E. James, Q. C., Mellish, Q. C., and H. T. Holland, contra, for deft. in support of their rule, were not called on.

MARTIN, B.—With regard to the latter point, the contract is one entire and indivisible contract for 150*l.*, and in my judgment the point attempted to be made is utterly unarguable. As to the other question, it seems to me to be a very clear point indeed. Here is a contract which was made by agents on behalf of their principal, and to make the principal liable, the plts. have of course to prove the agents' authority; accordingly at the trial this document was produced and proved. Here it is [his Lordship reads deft.'s letter to North and Co. of 26th July 1861], and that document was put in to prove the contract in the declaration for 150*l.* Now, if it stood there simply, all parties are agreed that the contract which was

made was one which the agent had no authority to make. But then it is said that there is a custom in Liverpool, well known amongst commercial firms there, that as between the principal and the agent the latter is always, or so almost always as to amount to a general usage, limited to a certain amount for which he is to sign his principal's name, the precise amount of the limit being a secret between themselves, and of course unknown to third persons or to the public generally; and it is to be taken here that it is well known that there is a limit, and that when a person's name is given in the underwriters' association that limit is not made public, though it is nevertheless a matter of notoriety that such a limit exists. And it is said that the plts., when dealing with a person whose authority must have been known by them to be so limited, were bound to inquire into the extent of that authority. Avoiding all refinements and taking a common sense view of the matter, I am unable to see how the deft. by giving this authority can be said to have authorised the signing of his name to an amount beyond the extent of the limit therein expressly stated, or how it can be construed other than an authority to sign his name for 100*l.* and no more. The rule to enter a nonsuit must be made absolute.

BRAMWELL, B.—I am entirely of the same opinion. The actual authority here cannot be relied on, and therefore it was contended by Mr. Brett that the deft. had held out the brokers as his agents having an authority to make this contract, which in fact they had not. But what is the authority itself? Why it is one with a limit, confining the agents within a certain amount. If no such limitation were usual and customary amongst the Liverpool insurance brokers, it might no doubt give rise to an important question which it is not necessary to decide in the present case. The mode of doing business at Liverpool in these cases must be taken into consideration, and the utmost that can be said is that the agents were held out as having the authority which the custom at Liverpool confers upon them, and which it is plain, having regard to the mode of doing business there, and to the custom, is only a limited authority. Then Mr. Quain assimilated the case to that of an auctioneer or a factor, with a power limiting him to sell at a certain price, and he cited *Story on Agency*, s. 131, in confirmation of his argument. I should like to see the cases to which *Story, J.* refers; but certainly that of *Fenn v. Harrison*, 3 T. R. 757, which is one of them, does not, in my opinion, establish the proposition in support of which it is cited; and I doubt whether, under an authority to sell at a particular price, he would be authorised to sell at any price. Mr. Quain also asked, how is the business of an underwriter to be carried on if the view of this matter contended for by the deft. is to prevail, and it is to be held that the brokers had not the authority contended for by the plts. to bind their principal? The answer to that question is twofold: first, that the business is carried on; and secondly, that there is no difficulty in its being so. People entering into these insurance contracts trust to the honesty and veracity of the broker, and that he will not exceed his authority, and to the solvency of the party named as the principal, and generally speaking their trust is well founded and all is right.

CHANNELL, B.—I also am of opinion that, as to so much of the rule as seeks to set aside the verdict for the plts. for 150*l.*, and to enter a nonsuit or a verdict for the deft., the rule must be made absolute. As to the other portion of the rule which seeks to reduce the damages to 100*l.*, though I am clearly of opinion that we have no right to separate the amount and to enter a verdict here for 100*l.*, yet it

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is not necessary for deft. that we should decide that point; for, if we are right in our judgment upon the previous branch of the rule, that is enough. The material question is, whether or not the deft. is liable in respect of this policy, which has been signed in his name by his agents? If we are at liberty and are bound to look at the express authority which was given here, it not only does not establish, but, on the contrary, expressly negatives the authority contended for. Then it is said that we are not to look at it *simpliciter*, but in connection with the fact that the limit imposed on the brokers is a private matter between them and their principal, and that the amount or extent of their authority is not disclosed to the public, and that they as general agents have authority in this particular instance to bind third persons contracting with him. Now, I agree with the law as it is laid down relative to private instructions; nor do I mean to intimate a doubt as to the rule with regard to general and particular agents, or to say that, in order to have this authority, they need be general agents for every purpose: a man may be a special general agent, and the authority may be general as to the particular business to which it applies. But, looking at the facts of this case, and the admission on both sides that it is understood that such a limit is usually, if not always, imposed on the broker's authority, although the precise amount of that limit is unknown to third parties—which, in my opinion, is not material to the decision of the case—I am of opinion that the deft. is not liable. Upon these grounds I agree with the rest of the court in thinking that the rule to enter a nonsuit must be made absolute.

POLLOCK, C. B. was absent.

MARTIN, B.—I wish to say that it is clear from the notes that my brother Lush took the same view of this case at the trial that we have.

Rule absolute to enter a nonsuit.

Attorneys for plts., Marshall, Westall, and Roberts, 8 Gray's-inn-square, and 7, Leadenhall-street, agents for H. Forshaw, Goodman, and Hawkins, Liverpool.

Attorneys for deft., Upton, Johnson, and Upton, 20, Austin-friars, E.C.

EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

ERROR FROM THE QUEEN'S BENCH.

Thursday, May 10, 1866.

(Before ERLE, C. J., POLLOCK, C. B., MARTIN, B., WILLES, J., CHANNELL, B., KEATING, J., PIGOTT, B., and SMITH, J.)

KEMP v. HALLIDAY.

Marine insurance—Constructive total loss—Raising sunken ship and cargo.

A ship sailed with a general cargo, and on the voyage sustained sea damage, the admitted subject of general average. She put into port with her cargo on board for repairs; and a part of the cargo was taken out and the repairs proceeded with. While the repairs were going on, the ship with the cargo left in her sank in deep water in consequence of a hurricane. The owner of the ship abandoned her, but the agents of the insurers subsequently raised her and the cargo:

Held, that, in considering whether this was a constructive total loss, the liability on the part of the cargo or freight to contribute in a general average towards the expenses of raising the ship should be taken into account.

Per Martin B. and Willes J.—The case is not sufficiently stated to enable the Court to pronounce judgment

Error from the Court of Queen's Bench, brought by the plt. upon the judgment for the deft. upon a special case.

Action upon a policy of insurance on the ship *Chebucto*, as for a total loss of the ship on a voyage from Liverpool to Rio Janeiro. The policy was dated Oct. 6, 1863, and underwritten by the deft. for 25*l*.

Plea, payment into court of 18*l*. 15*s*. as for a partial loss only.

At the trial before Mellor, J., in London, the verdict passed for the plt., subject to the opinion of the Court on the following special case:—

1. The *Chebucto*, the vessel insured, belonging to the plt., sailed on the 21st Oct. 1863, from Liverpool to Rio Janeiro, on the voyage insured, laden with a general cargo.

2. In the due prosecution of her voyage the ship met with heavy gales, and worked, strained, and leaked very much, so that it became necessary by reason of the perils of the seas, for the safety and preservation of the cargo, ship, and crew, to cut away all forward, and to bear up for and to put into Falmouth harbour as a port of refuge, where the vessel with her cargo on board came to anchor on the 12th Nov. 1863.

3. By reason of the premises a certain average loss was sustained.

4. On the arrival of the ship at Falmouth, the master of the ship applied to Messrs. Broad and Sons, ship agents, at Falmouth, requesting them to act as agents for the ship, and Messrs. Broad and Sons agreed to do so.

5. On the recommendation of surveyors employed by the master the ship was passed inside the break-water, and was moored to the pier for the purpose of being repaired, and a portion of her cargo was discharged, the heavier portion of her cargo, however, being left in the ship. The repairs were then proceeded with, but were not completed by the 2nd Dec. 1863.

6. On the 2nd Dec., while the ship was lying moored to the pier, there blew a hurricane, which caused the ship with that part of the cargo which had not been discharged to sink at her moorings at a place where at low water there was a depth of twenty-two feet, and at high water a depth of forty feet.

7. On the same day, viz., 2nd Dec. 1863, the plt. was informed by a telegram sent to him by the master of the ship that she had sunk in Falmouth harbour; and on the following day a Mr. Amos, a person experienced in surveying and repairing of ships, arrived at Falmouth with full authority from the plt. to investigate the whole matter, and to act for him in all matters concerning the ship as, according to the best of his judgment, would be best for all concerned. Mr. Amos having examined the position of the ship, and having informed himself of her prior condition, and taking into consideration the probable injuries the ship had sustained, and having formed a judgment of the cost of raising her, and of her further repairs, came to the conclusion that it would cost more to raise and repair her than she would be worth when repaired. Accordingly on the 4th Dec. he, on the part of the plt., gave notice to Broad and Sons that the plt. abandoned the ship, and would not be responsible for, and would have nothing to do with raising or repairing her.

8. On the 7th Dec. a surveyor. Mr. Thomas, by orders of Messrs. Broad and Sons (which were given on their own responsibility, and not as agents for the plt.), commenced raising the ship, and on the

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20th of that month he succeeded in raising her with all those goods on board which had not been discharged before the 2nd Dec. She was subsequently moved into dock by orders, and under the superintendence of the master, who had remained at Falmouth since the arrival of the ship in that harbour, notwithstanding that Mr. Amos, on his visit to Falmouth, had expressly ordered the captain to have nothing to do with the ship; and at the commencement of this action she was lying at Falmouth safely moored.

9. On the 4th Dec. the captain, by the instructions of Amos, signed and sent by post a notice of abandonment to Davies and Co., of Liverpool, the brokers who had effected the policy of insurance, and who then held the same; and on the 9th Dec. Davies and Co. gave due notice of abandonment to the deft. as follows:

Liverpool, 9th Dec. 1863.

Messrs. Burn and Airley.

Gentlemen,—On behalf of the owners of the *Chebucto*, we beg to give you notice that the vessel is abandoned to you in Falmouth harbour.—Yours very truly,

D. W. DAVIES and Co.

10. The value of the cargo which sank in the ship, and which was raised in her, was, when raised, 1750*l*. The value of that previously taken out was 7000*l*. The amount of the whole freight by the charter-party was 475*l*., and upon the portion of goods sunk 237*l*. 10*s*. The whole net freight was 75*l*. The questions that were left to the jury were, whether there was a constructive total loss of the vessel first at the time when Mr. Amos gave notice to Broad and Sons that the plt. abandoned her; or secondly, at the time she lay moored: both of which questions were answered in the affirmative. In putting these questions to the jury no account was taken of any liability on the part of the cargo or freight to contribute in general average towards the expenses of raising the vessel or towards the general average loss at sea, and it is to be taken as a fact that if such liability for either loss ought to have been taken into calculation, and the estimate of the cost of raising and repairing ought to have been reduced by the amount of the general average to be so constituted, then there was not a constructive total loss. The Court or Courts of Appeal were to be at liberty to draw inferences of fact in the same way as a jury would be entitled to do.

The questions for the opinion of the Court of Q. B. were, first, whether the plt. is under the above circumstances entitled to recover on the policy against the deft. as for an absolute total loss as distinguished from a constructive total loss; and if the Court should answer the above question in the negative, then, secondly, whether it was material, in determining the question of constructive total loss, to take into account the liability, if any such existed, of the cargo and freight to make a general average contribution towards the expenses of raising the ship or towards the general average loss at sea; thirdly, whether the notice of abandonment was given too late.

The case was argued before Blackburn and Shee, JJ. in Easter Term 1865. After taking time to consider the learned judges differed in opinion, and the judgment of the court was entered for the deft. in conformity with the judgment of Blackburn, J., the senior judge.

Thereupon the plt. brought error.

Watkin Williams for the plt.—The decision of the Court of Q. B. was erroneous. The first point is whether, in estimating the cost of repairs, the shipowner should give credit to the owner of the cargo for a contribution for general average as for a partial loss on the voyage to Falmouth. [*Cohen*, for the deft., said that he should not press that point.] If any general average could have been

called for, then there was no constructive total loss. [ERLE, C. J.—By the tenth paragraph of the case it appears that, “in putting the case to the jury no account was taken of any liability on the part of the cargo or freight to contribute in a general average towards the expenses of raising the vessel, or towards the general average loss at sea; and it is to be taken as a fact that, if such liability for either loss ought to have been taken into calculation, and the estimate of the cost of raising and repairing ought to have been reduced by the amount of the general average to be so contributed, then that there was not a constructive total loss.”] In this case no claim for general average arose at all, which only arises when expenses are voluntarily incurred for the purpose of avoiding a danger to the whole of the ship and cargo: (*Bencke's Marine Insurance*, cap. 5, edit. 1824.) Here the ship was raised, with the cargo on board, without the authority of the owners. In *Job v. Langton*, 6 E. & B. 779, the ship was stranded, and after the cargo was taken out of her, she was got off, and it was held that the expenses of getting her off were not the subject of general average, as they were not incurred for the joint benefit of ship and cargo. In *Moran v. Jones*, 7 E. & B. 523, where the ship was stranded, the cargo taken out and warehoused, and then the ship was got off and repaired, and afterwards the cargo was reshipped and conveyed to its destination, it was held that the expenses were the subject of general average. The distinction between the two cases was held to be that the warehoused goods remained in the custody of the master of the ship, and were reloaded and carried forward without any interference on the part of the owner of them. The present case ought to be regarded solely with respect to the thing itself, and not to collateral considerations; and the question is, whether under all the circumstances it was prudent to repair the ship? If the cargo had been bullion, could the shipowner have been bound to encounter the risk so as to entitle himself to contribution from the bullion? This vessel when sunk was a wreck, and by the 17 & 18 Vict. c. 104, s. 450, notice not having been given to the receiver of the district all claim to salvage was forfeited. The master had no right to impose a charge on the cargo without the consent of the owners of it. The rule that where the ship is restored to the assured there is no total loss applies to cases of capture and recapture only; but the better opinion is that recapture does not reduce it to a partial loss, except in cases where the ship is restored in a slightly damaged state only:

Phillips on Insurance, s. 1545;

Bainbridge v. Nelson, 10 East, 329;

McIvor v. Henderson, 4 M. & S. 576.

Cohen for the deft.—There was no constructive total loss in this case. The jury have found that the expense of repairing the ship was less than her value when repaired. The cost of raising the vessel ought not to have been taken into consideration without also taking into consideration the sum that was to be earned by her being raised. The ship and cargo were at the bottom of the sea, and if the master had raised them the expenses would clearly have been the subject of general average. It is conceded in the case (par. 7) that there was not an actual total loss. It cannot be said that there was ever an effective privation of the *spes recuperandi*:

Arnould, 1021, 2nd edit.;

Phillips on Insurance, 1527;

2 *Parson's Maritime Law*, 403.

Submersion does not *per se* authorise the abandonment of the ship; the question being whether the expense of raising and repairing the vessel is reasonably justifiable. This is a case for general average within the rule in *Moran v. Jones*, where

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[ADM.]

the cargo was taken out, warehoused, and repaired. The Court of Admiralty always apportioned the salvage equally where ship and cargo are simultaneously saved:

King v. Walker, 2 H. & C. 384;

Knight v. Faith, 15 Q. B. 649;

Hunt v. Royal Exchange Assurance Company, 5 M. & S. 47;

Farnworth v. Hyde, 18 C. B., N. S., 835; 2 L. T. Rep. N. S. 231;

Castellain v. Thompson, 18 C. B., N. S., 105; 7 L. T. Rep. N. S. 424;

Atkinson v. Woodall, 31 L. J. 174, M. C.; 6 L. T. Rep. N. S. 361;

Lozano v. Janson, 2 E. & B. 160;

Bailey on Average, 138-150.

Watkin Williams in reply.—The case of *Hamilton v. Mendes*, 2 Burr. 1198, which decided that where the ship is restored to the owner it is not a case of total loss, was one of capture and recapture, where the assured resumed possession of the vessel. But here the owner declined to have anything to do with the vessel when raised by the agent of the insurers; and the jury have found that there was a constructive total loss.

Cur. adv. vult.

ERLE, C. J.—In this case we affirm the judgment for the deft., and give the same answer to the two questions in the special case as was given by the court below, being of opinion, first, that there was no absolute total loss; and secondly, that it was material, in determining the question of constructive total loss, to take into account the liability, if any such existed, of the cargo and freight to make general average contribution towards the expenses of the ship. The real dispute was confined to the second question, and although the case has been argued with remarkable learning both here and in the court below, yet our decision turns upon inference of fact from the statement in the special case more than upon any point of law. We do not lay down a rule that all claims for contributions to the ship from any other interest ought to be taken into account in determining whether the ship was worth raising. But we hold that the plt., in considering whether the submersion of his ship containing cargo as stated in the case was a constructive total loss, was bound to take into his estimate the fact that cargo would be saved by the operation which raised the ship, and would contribute to the expense thereof, and that the circumstances which would go to increase or diminish the outlay required for raising and repairing the ship, and the circumstances which would go to increase or diminish the benefit to be derived from that outlay, are elements in calculating whether the cost of raising would exceed the value when saved. We infer from the statements in the case that there was a common peril of destruction imminent over ship and cargo as they lay submerged; that the most convenient mode of saving either ship or cargo, or both, was by raising the ship, together with the cargo; that the expense required for such raising would be an extraordinary expense for the common benefit of both; that the cargo would be liable to a general average contribution towards that expense; and that the shipowner would have a lien on the cargo to secure the payment of that general average. If those facts are properly inferred from the statements of the special case, it follows that the plt., in calculating the cost of raising, was bound to take into his estimate the contribution which would become due to him from the cargo, secured to him by a lien thereon, and, if so, the special case provides that the deft. should succeed. If the case had not been so stated, and we had to apply the common rule, we should consider that a prudent owner uninsured would calculate on the

amount of the general average contribution inseparably connected with the raising of the ship, and safely secured, with as much reliance as if he could calculate on the value of the ship itself when repaired, it being clear that all the items both of cost and value on which the owner is to make his calculation when electing between repairing or abandoning are subject to contingency, and are matter of conjecture only. In this decision we have adopted the principle upon which *Blackburn, J.* relied below, and we refer to his judgment for a more ample statement of that principle in the application of it to this case. My brothers *Martin* and *Willes* desire me to say that in their opinion the judgment ought to be for a new trial, on the ground that the facts are not sufficiently stated to enable the court to pronounce judgment.

Judgment affirmed.

COURT OF ADMIRALTY.

Monday, Feb. 26, 1866.

(Before the Right Hon. Dr. LUSHINGTON.)

THE ALEXANDRA.

Stowage of cargo and damage to goods—The Baltic trade—General cargoes—Heat and fermentation.

On an allegation that damage to cargo originated from defective stowage, and heat and fermentation arising from the cargo being stowed in too close conjunction with other cargo:

Held, that the plts. must establish affirmatively that the cargo on its arrival at its port of destination was in a damaged condition; and that the onus then falls on the ship to prove that the original stowage was good, and that the perils of the sea, subsequently occurring, created the damage.

Dr. LUSHINGTON.—This cause is instituted under the 6th section of the Admiralty Court Act of 1861, against the Prussian steamer *Alexandra*, by Messrs. Borch and Jepson, the consignees and alleged owners of two parcels of butter, imported in the *Alexandra* from Copenhagen to Hull, and the ground of complaint is that damage was done to the butter in breach of the contract evidenced by the bill of lading. That the butter arrived in a damaged condition is not denied, and nothing turns upon the terms of the bills of lading, which were of the usual tenor that the goods were to be delivered in the same condition as shipped, perils of the sea excepted. The only question in reality is, whether the damage was occasioned by perils of the sea or by improper stowage? The facts, as far as I am able to state them accurately, are as follow:—The *Alexandra* sailed from Stettin to Hull, stopping at Copenhagen as a port of call. The cargo in her main fore hold consisted of spelter for Hull, and general cargo for Copenhagen. Altogether there were about 100 tons of spelter in plates of about one and a half feet long, one inch thick, each weighing from seven to fifteen pounds. The master, who had been ten years a master, acted on the occasion as stevedore. This was in accordance with his usual habit and the general custom of trade for ships in that part of the world. What seems to have been done was, in the first place, to put dunnage at the bottom of the main fore hold, above that to stow the spelter to the extent of ninety-five tons, and over that again the general cargo for Copenhagen, the other five tons of spelter being secured on deck. In the after main hold there were casks of zinc at the bottom, and above that a grain cargo. The vessel had a good voyage to Copenhagen. On her arrival there the master delivered his general cargo, which

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was above the spelter, and in its room took in a cargo for Hull, consisting of wool, bran, and butter. These he stowed himself, with the following precautions: leaving the spelter where it was, at the bottom of the fore hold, he began by placing above the spelter, at the fore end, fifteen or sixteen bags of wool; the rest of the surface of the spelter he covered with bags of bran weighing about one hundredweight each. Then came three or four tiers of bran bags over the whole surface. When he had done this he took out some bags of bran from two places in the fore part of the hold. Each of these places he first lined with loose planks, then filled with the five tons of spelter which he brought down from the deck; so that the spelter, guarded by the planks, lay, as it were, embedded in the bags of bran, the surface of the whole being level from bulkhead to bulkhead. Then over the spelter he put planks, and over the planks he stowed another tier of bags of bran. The consequence was that the fore part of the fore hold, where the spelter was, was higher by one tier of bags than the rest of the hold—and it was this space of the rest of the hold, terminated at one end by the after bulkhead of the hold and at the other by the extra tier of bran bags protected by a bit of boarding, that the master chose for the stowage of the butter. He first threw gutta-percha covers right across the bran bags and firmly lashed them; over the covers he laid planks of deal, and on the planks he placed the butter casks on their sides; with their ends fore and aft. The casks he secured from moving by chocking them under the bilge with firewood, and also placing firewood in the same manner above them, and then fastening ropes over them to planks screwed into the ship's sides; these ropes and the bags of bran, the master deposes, were quite sufficient to keep the five tons of spelter in their place. After the cargo was loaded there was still left a space three or four feet high between the butter and the decks. The hatchways were secured with double tarpaulins. The master swears that the agent of the shipper was present, saw the butter stowed, and made no complaint. This is the statement of the master, and the facts so deposed to are not contradicted by any direct evidence, though it is difficult to see how any such evidence could be produced by the plt., the consignee of the cargo. On the 4th Sept. 1863 the ship left Copenhagen, and experienced very violent gales for four days. On the 8th the master finding that the cargo had shifted to the starboard side, and had given the vessel a considerable list, and hearing also the cargo knocking about, put about and ran to Norway. On the 9th he anchored in Christiansand. A protest was immediately made, and has been since extended here, after, however, part of the cargo had been returned; still, to the truth of this protest, the master, mate, and one of his seamen have sworn in this court. No time was lost in making survey of the vessel and cargo at Christiansand. The first survey was dated 10th Sept., and was held by the town serjeant with his customary assessors, a ship's carpenter, and a captain of the navy, in the presence of Lloyd's agent, and persons representing the Hamburg Insurance Company. It contains the following passage: "It was found that the vessel had a list of two feet on the starboard side. On sounding the pumps we found 14in. of water, and 6in. in the engine-room, although during the voyage no leakage had been discovered. On the ship we could discover no other damage than that the deck seams over the engine-room had opened and the oakum had come out; also, that on the saloon hatchways the forepart of the hatch-ram was damaged or split. The hatchways, which were properly provided with double tarpaulins, and tight all over, were opened in the presence of a Royal Custom-house officer. Through the mid-

hatchways no water was forthcoming; but still we found in the main fore hold that the cargo, which consisted of bran bags, butter, and spelter plates, had been displaced so much that the different articles were mixed together, and a great part of the butter and bran had come out of their packages, so that it had been mixed together to a paste. In consequence, a great part of the remainder of the cargo was smeared and wet. Through the hatchways aft we noticed several bags which were rotten, so that we presume the water had gone through the hatch-rams. At the hatchways aft the saloon we noticed that a small quantity of water had entered into the cargo through the breaking loose of the hatch-rams; also that some water had entered by the port side without doing any considerable damage to the cargo, which consisted of barley. On account of the above mentioned, we consider it necessary for preserving the cargo that the two middle holds should be discharged." What was really effected on this survey will best appear from the terms of the second survey, which took place on the 15th Sept. (as the first survey was on the 10th), and was conducted by the same persons:—"With regard to the cargo in the middle of the ship—that is, the fore hold—which consisted of bran, butter, and zinc, the damaged part was discharged, and properly stored in the warehouse, so that the remaining part of the bran bags which was left in the hold was only partly smeared with the butter, in consequence of which no particular damage is to be feared, and it was therefore decided not to discharge any more. The fore hold was then properly cleared, and put in order to take the cargo on board. Amongst the bran which had been discharged out of the hatchways aft and gone into the warehouse, we found 46 bags in a small degree damaged by sea water. Amongst the cargo which had been loaded in the middle of the hold was 33 kegs of butter, wholly and partly without damage. Besides, we found 34 bags of bran which were smeared with butter, and out of that in the hold, consisting of butter and bran mixed together, 68 firkins were taken up. And we advised the commander of the steamer to take the bags of bran and firkins of butter to England, as the same, as far as we could judge, would not be worth much if put up to public auction. Besides, we advised that if the damaged cargo were taken on board again, it must not come into contact with the remainder of the cargo." As there is no ground for distrusting the terms or accuracy of these surveys, it is clear that a great part of the damage had occurred before the ship reached Christiansand, and in reloading the ship at Christiansand the master acted under the orders and superintendence of the surveyor. The spelter and about 500 bags of bran had not been moved from the hold. Over these the master now placed gutta-percha covers, then boards, bought at Christiansand, and on the boards he placed side by side, not above one another, the following items: first, the damaged bran, which, though removed from the ship, had never been taken out of the bags it was in the fore part of the hold; secondly, the mixture of bran and butter in new casks with no top to them; and, thirdly, the thirty-three casks of undamaged butter. So loaded, the ship sailed from Christiansand on the 16th Sept., and on the same day she met with such rough weather that she put back to Mandal. On the 18th she sailed again, and after experiencing a heavy gale arrived at Hull on the 21st Sept. On the arrival of the ship at Hull, the plt., as consignee of part of the cargo, went on board, and could identify by the marks only thirty-three out of his ninety-two casks of butter. On the same day also, the plt. received a letter from the agents of the ship, asking the plt., as one entitled to receive a portion of the damaged cargo, to attend

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the delivery thereof and to render assistance in separating the damaged goods. At the same time an average agreement was presented to the plts. for signature, containing some statement of the circumstances of the voyage. The other consignees of the cargo consented to sign the average agreement, but the plts. refused to do so, and the cargo appears to have been at once discharged. The bran was taken to the quay and then to the storehouse of Messrs. Smith, Lee, and Co., the good butter and the mixture being discharged into a shed on the quay. As to the mixture, the plts. received notice that it would be sold by auction on Oct. 2. At the sale a Mr. Thompson and a Mr. Fothergill bought the whole (except half a dozen barrels), melting the butter out of the mixture, and selling it for butter grease at a clear profit of 60%. The plt. bought the other barrels at the rate of about 4s. per hundredweight, instead of 11s. which would have been the market price of undamaged butter, and a specimen of the mixture which they thus bought was exhibited at the hearing. With regard to the good butter, the defts.' solicitor wrote to the plts.' solicitor on the 14th Oct. as follows: "The good butter is now in the warehouse and will soon spoil. Will your clients Messrs. Borch and Jepson have it, or say what is to be done with it. We will forego our lien for, but not our right to, freight; rather than useless damage should be incurred." This offer the plts. refused, thinking that by that time even the good butter might have become bad; in short, they refused to accept the cargo or to pay freight, and instituted this suit. The plts.' case is: that the butter was melted through bad stowage, and hence the damage to them. In support of their case they produced witnesses to prove that heat existed in the hold and in the bran on the arrival of the ship at Hull, and their witnesses account for this heat, either by the heat of the engine-room, or by the fermentation of the bran. The first question is, was the butter ever melted? No one, certainly, ever saw the butter in a liquid state, and the evidence therefore consisted in great part of inference or opinion. The plts. and their witnesses, provision merchants at Hull, who saw at Hull the mixture of the bran and butter, and also the bran in the bags (most of them saw it on board ship, and others on shore shortly after the discharge, and others in both places), state that without liquefaction the butter could never have become so intimately mixed with the loose bran from the bags that burst, or have penetrated so far into the bran packed in the bags which remained entire. Some of the bags, Mr. Hunt says, were penetrated right through with the butter. On the other hand, Professor Way, judging from the specimen of the mixture produced in court—to which, however, as a fair average sample, several of the defts.' witnesses take exception—though he does not go the length of saying positively that the butter never had been melted, is inclined to think that the mixture was the result of purely mechanical means; at all events, he has no doubt that a purely mechanical process of shaking and rubbing together could produce such a mixture. And Mr. Thompson, who at the time was managing clerk to Messrs. Reinold, the agents of the ship, and who bought the mixture, and actually melted the butter out of it and sold it, deposes that there was a marked difference between the mixture as he bought it and the same mixture after he had exposed it to heat and allowed it to get cool, and is confident that the first mixture was not the result of liquefaction; but that during the tempestuous weather of the voyage to Christiansand the cargo was displaced and violently shaken up. The plts., however, gave evidence to prove that there was heat enough in the vessel to account for the melting of the butter. The

principal witness on this point is Mr. Wilson, foreman to Messrs. Smith, Lee, and Co. On the arrival of the ship he went on board. He deposes that he found the hold hot—hot enough to melt butter that was loose. He did not, however, see any butter melting, because the butter had been discharged before he went on board. He declared that, though he did not examine the bran carefully on board, yet the bags were hot enough to melt butter. The bags were then removed to the warehouse of Messrs. Smith, Lee, and Co. Mr. Wilson deposes that on the arrival of the bags in the warehouses they were still hot, though not so hot as they were on board the vessel; that he examined every bag, and at once separated the damaged from the sound bran. About two days after the bran had been discharged, the plt. Mr. Jepson went to inspect it with Mr. Wilson and Mr. Terry, who is a general merchant at Hull. The bran was lying in the warehouse of Messrs. Smith and Co., piled up in paper bags; but whether the separation by Mr. Wilson of the sound from the unsound had been already effected does not appear. However, Mr. Jepson and the others found that some of the bags had burst, and on cutting open some of the others found the bran much heated and saturated. The heat of the bran was so great that they could not bear their hands in it. As to the saturation, Mr. Terry says: "The butter had penetrated some of the bags from half an inch to an inch, forming a kind of crust within the bags." Mr. Jepson says: "The greasy matter had actually gone through the bags into the middle of the warehouse." Mr. Hunt, the assignee for the sale of the bran, deposed that the bran from both the holds, but especially the fore hold, was hot, that the butter had gone right through many of the bags, that the bran which was not heated was not touched by the butter, and that that which was heated was in most, but not in all cases, affected by the butter. This is the plts.' evidence, and one thing is certain, that out of 1170 bags of bran, about 282 were rejected by the purchaser as damaged. The defts., on the other hand, deny that there ever was any heat in the hold. If the butter was melted, they say that it must have been melted before the vessel reached Christiansand, that the mixture of the butter and bran was collected, and at Christiansand bags of bran were found smeared with butter. But at Christiansand the cargo was twice surveyed, and in neither of the surveys is there one word as to liquefaction of butter, or as to the presence of heat on board. Nor more is there in the evidence of Mr. Cottingham, the plts.' witness, who was at Christiansand when the *Alexandra* put in, and went on board and saw the men scraping up the mixture. On the contrary, the survey points to the derangement of the cargo as the cause of the mixture, and Mr. Cottingham speaks of bad stowage. It is almost unnecessary to refer to the facts specified by the master in disproof of any heat having been found in the hold at Christiansand, as, for instance, that the butter and bran were taken up in baskets from the hold to the warehouse, and that no butter ran out; that the butter casks which were not broken showed no signs of having been heated. The master also deposes that, at Christiansand, neither the bran which he left in the hold, nor the bran which he took out and again put on board, was hot. Then, with regard to the condition of the hold upon the arrival of the vessel at Hull, the defts. produce a number of witnesses (including Mr. Saxby, who discharged the whole of the butter from the vessel on to the quay) who depose that the hold was not hot, that the bran was not hot, that the butter was quite hard, and that there was no leaking from any of the butter casks. The evidence

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ty-three barrels, which had been sound at demand, were sound still. The plts. would for the presence of this alleged heat in one way. One explanation is, that the heat of the melted the butter. The fore hold was ely separated from the engine-room by, wooden partition one and a half inches secondly, a vacant space of four inches; an iron bulkhead quarter of an inch fourthly, a vacant space of six inches, ed by an artificial draught of air. Then he boiler; the fire itself was another foot off, and one circumstance alone proves a heat (if any) in the hold could not have om the engine, for heat from the engine- f it had penetrated into the hold, would e have most affected the butter nearest to gine; but it appeared at Christiansand, the contents of kegs in the fore part of l had been all wasted and mixed with bran, of kegs which stood next the aft bulkhead n their sides had not suffered, with one ex- that a cask had one of its ends knocked e end farthest from the engine—and even hat cask the butter had not come out; master described it, it only “looked Mr. Brett also relied upon the same a proof that the damage to the butter en from shaking, since the butter next to r-bulkheads of the hold would, as being in the part of the hold nearest to the of the vessel, be the least shaken. The planation offered of the alleged heat is the ation of the bran. The plts. produced a, provision merchants and grain importers, that bran is liable to ferment, whether dry and that it should never be stowed along iter. But Professor Way is decisive that ll not ferment unless either it be in an im- condition when shipped, or be wetted after it. Now, neither of these circumstances here. It was admitted that the bran was ran, and no water seems to have forced its to the fore hold during any part of the although some did into the aft hold. It proved to be a common practice to stow and bran together in the same hold, and one occasion butter and bran were con- safely in the very same hold of the *Alex-*. The plts., however, suggested two possible for fermentation: first, that the butter and, penetrating the bran, set up fer- on; secondly, that the heat of the engine be bran in the after end of the hold, and process expelled the natural moisture of n in the form of vapour, being unable to on account of tarpaulins, and would be ed into moisture at the colder part, that fore part of the hold, and then this mois- lling upon the undried bran there, would ite such an addition of moisture as to set entation. I mention these two theories, y to reject them. It is clear that they rest e supposition that the engine heated the hold. pposition I have already pronounced un- . The result of the evidence seems to me at the butter was never melted at all. I hat the appearance of the butter mixed with n, and of the bran bags made greasy by the misled the plts. into thinking that the had been melted. I also think that, if fer- ion ever took place in the bran, it was not until after the bran had been discharged on osibly from some of the bran bags which had sted in the after hold; for in the fore hold ver was any wet. I do not mean to say that I ecide this evidence, and especially that which e the bran at Hull in a heated state, as also

the hold—facts which would tend to show that the cause of the amalgamation was heat, and not the tempestuous weather which the ship had encountered. There is, undoubtedly, a serious conflict of evidence, and that too amongst witnesses apparently entitled to the confidence of the court. All the court can do under such circumstances is impartially to weigh that evidence, and say which under all the circumstances ought to preponderate. The plts. are bound to establish their own case affirmatively to the extent of proving that their own proportion of the cargo or goods on arrival at the port of discharge were in a damaged condition. This proved, the onus then falls on the defts. of proving that the original stowage was good, and that the perils of the seas subsequently occurring created the damage. I think that the evidence shows that the original stowage was done in the ordinary form, and with the usual precautions; that the butter became mixed with the bran, not from h at, but by the displacement and shaking up of the cargo; and that this displacement may fairly be attributed to the storm to which the ship was undoubtedly exposed on her voyage to Christian- sand; in short, that the damage arose from perils of the sea, as excepted in bills of lading. I must pronounce therefore in favour of the ship and against the claim of the plts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART
ROCHE, Esqs., Barristers-at-Law.

Jan. 26, 27, 29, 30, Feb. 20 and 21, and May 29, 1866.

(Before the LORDS JUSTICES.)

BURKE v. ROGERSON.

*Suretyship—Vessel—Cargo—Munitions of war—Belli-
gerent risk—Concealment of—Discharge of surety—
Evidence—Pleadings—Correspondence not in issue.*

The defts. R. agreed to sell two steamships to the A. D. Steam Navigation Company, of which the plts. were two of the directors, and it was agreed that the purchase-money should be paid partly in shares and partly in bills of exchange accepted by the company, and that the vessels should b mortgaged to R. to secure the remainder of the purchase-money. The plts. then agreed to indorse certain of the bills, and in consideration of that guarantee, R. agreed that they should be owners of two-thirds of the property mortgaged. The vessels were never formally transferred to the company, and no mortgage was ever executed, but soon after the agreement R., acting as agent of his own firm, and assuming to act as agent of the company, dispatched the vessels to Constantinople, and thence dispatched one of them to Trebizond, laden with munitions of war for the Circassians, who were then at war with Russia:

Held, that, as the dangerous nature of the cargo, which exposed the vessel to extraordinary risk, was concealed from the company by R., he could not have enforced the agreement against the company, and (on this ground affirming the decree of the M. R.) that the plts. were entitled to be relieved from their liability.

Correspondence between R. and the company's manager at Constantinople, which tended to show that R. had dealt with the vessels when at that port as his own absolute property, and had contemplated a sale there of one or both of them, was admitted as part of the evidence, although neither the correspondence itself nor R.'s alleged intention to sell was put in issue by the pleadings.

This was an appeal by the defts. Rogerson from a decree of the M. R., the hearing before whom is reported 13 L. T. Rep. N. S. 116.

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From that report, and the judgment below of Turner, L.J., the circumstances of the case and the nature of the contention sufficiently appear.

Southgate, Q. C. and *Lewock, Webb*, for the plts., supported the decree.

Selwyn, Q. C. and *Marten* argued the case on behalf of the app.

Fooks, jun., for the defts., the Anglo-Danubian Steam Navigation Company, and for the deft. *Couchman*, took no part in the argument.

Southgate, Q. C. replied.

Judgment was reserved until the 29th May, when

Lord Justice TURNER said:—The plts. in this suit are two of the directors of the Anglo-Danubian Company, a limited company, which was formed in the year 1862 for the purposes, amongst others, of navigating the river Danube by steamships, and of working some coal-fields at Dobra, in the neighbourhood of that river. The nominal capital of the company was 220,000*l.* divided into twenty-two thousand shares of 10*l.* each, and at the first meeting of the company it was resolved that there should be five directors and that three of the directors should constitute a quorum of the board. The company had before the 28th May 1863 two steamers, called the *Papin* and the *Bellot*, working on the Danube, and on the 28th May 1863 John Rogerson, a shipowner, carrying on business in London and Newcastle under the firm of J. Rogerson and Co., made the following tender to the company: "To the directors of the Anglo-Danubian Steam Navigation Company,—We hereby offer to supply you with the three following steamers now in full working operation on the river Tyne, viz., *Chesapeake*, 2000*l.*; *Louise Crawshaw*, 5500*l.*; *Harry Clasper*, 7500*l.*—15,000*l.* The *Chesapeake* to be allowed to take on our account a quantity of goods to a port in the Black Sea at 4*l.* per ton freight on weight.—John Rogerson and Co." At the same time and in connection with this tender John Rogerson made an offer to lend money to the company and to take shares in it. This offer was as follows: "To the directors of the Anglo-Danubian Steam Navigation Company (Limited). I am willing and hereby offer to lend your company the sum of 11,000*l.* at 5 per cent. interest upon the company's acceptances for that sum to be drawn for in such proportionate amounts in each bill as I may require; one-half the amount to be drawn and accepted for at four months' date, and the other half at six months. The company to be entitled to require renewed bills at four and six months respectively, according to the tenor of the original bills to be drawn for one-half of each bill as it arrives at maturity upon payment in cash of the other half. The amount due upon such bills to be further secured by a mortgage in the usual form on the ships *Harry Clasper*, *Louise Crawshaw*, and *Chesapeake*, and also by such deed of mortgage or charge upon all calls upon shares in the company now made, and due and owing, or to be hereafter made, such deed to be prepared by my solicitor and settled by counsel, and to contain all such clauses, agreements, and powers for my protection as counsel shall advise. A certified list of shareholders, amount paid on shares, and calls due to be forthwith furnished to my solicitor, as instructions to prepare the deed. I am willing also to take at par and pay in cash for 400 fully paid-up shares in the company, on the conditions hereinbefore contained being complied with. All legal expenses incurred by me to be repaid me by the company in any event." Upon this tender and offer being made, the directors of the company, at a meeting held on the same 28th May,

resolved to accept the tender, subject to the approval of the boats, and to accept the offer subject to certain conditions and qualifications; but no final arrangement was come to at this meeting. Subsequently, and on the 1st June 1863, Rogerson made a further tender to the company in these terms:—"To the directors of the Anglo-Danubian Steam Navigation and Colliery Company (Limited),—Gentlemen, we propose to sell you the following steamboats to be delivered in good working order in the river Tyne: the steamboat *Chesapeake* for 2000*l.*; ditto *Louise Crawshaw*, 5500*l.*; ditto *Harry Clasper*, 7500*l.*—15,000*l.* Payment in cash on delivery. The *Chesapeake* to take out for our account to a port on the Black Sea at 4*l.* per ton freight a quantity of goods. The *Chesapeake* and *Louise Crawshaw* to be paid for now. The *Harry Clasper* to be paid, 2000*l.* on account, and the balance on receipt of your order to send this boat out, which must be given within twelve months. The *Harry Clasper*, until this notice is given, to be worked by us for our sole benefit, and to be delivered over on demand in good working condition." The ships were then surveyed and reported on, and another meeting of the directors of the company was then held on the 2nd June 1863, at which the following resolutions were passed:—"The board having taken into consideration the amount in arrear for deposits and calls upon all the shares, as well those that have been forfeited as those that have not been forfeited, and having also considered the amount that yet remains to be called up upon the non-forfeited shares, are of opinion that this company will be justified in purchasing two boats and accepting a loan of 5500*l.* on the following terms, viz., to purchase (subject to inspection) the boat called the *Louise Crawshaw* for 5500*l.*, and the *Chesapeake* for 2000*l.*, making together 7500*l.*, to be paid for as follows: 2000*l.* to be paid by Mr. Rogerson on his taking 200 shares in the company, which are to be deemed as fully paid-up shares, and by the company's acceptances for 1000*l.* and 1000*l.* and 750*l.* in all 2750*l.*, payable at four months after that date, and also the company's acceptances for 1000*l.* and 1000*l.* and 334*l.* and 416*l.*, making in all 2750*l.* at six months after date; but the payment of all such acceptances to be deemed satisfied, if the board shall so desire, by half the amount of such acceptances being paid in cash when due, and the other half by acceptances of the company, payable at four and six months, as the case may be, according to the tenor of the original acceptances. The due payment of these acceptances to be collaterally secured by a mortgage of the two boats above mentioned, with power of sale not to be exercisable until after default, and after fourteen days' written notice to the company, and also to be secured by a mortgage of the calls already made and unpaid, and hereafter to be made, on the shareholders whose names are stated in a list to be furnished to Mr. Rogerson or his solicitors, with liberty, however, for the directors to apply a sum not exceeding 1500*l.* out of such arrears or calls towards the debts and liabilities of the company. Mr. Rogerson also to provide funds as and when required to the extent of 1000*l.* for the purpose of dispatching and working the two boats above mentioned, and also for working the boats called the *Papin* and the *Bellot*, and for working the coal-fields at Dobra under arrangements to be made to the mutual satisfaction of Mr. Rogerson and the directors. The directors defer the consideration of the purchase of the boat called the *Harry Clasper*. Mr. Rogerson having expressed his approval of the above, it was therefore resolved that the purchase of the two boats called the *Chesapeake* and the *Louise Crawshaw* be carried out, and the payment for the same effected in the manner and upon the terms above mentioned,

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but subject to legal approval." Then they read the letter of the gentleman who inspected the ships, who reported in favour of the vessels, and then it was further resolved, that simultaneously with the above arrangements being carried out to the satisfaction of the legal advisers of the company, and of Mr. Rogerson, the latter should be empowered, subject to the limit of expense after mentioned, to get ready and insure and dispatch to the Danube, for and on behalf of the company, the two boats called the *Louise Crawshaw* and the *Chesapeake*, and also to provide and send out by these boats proper materials for working the colliery, and that he also be empowered to send out for the company and maintain seven men for working the collieries, he also, for the company, to pay their wages. It was further resolved "that the court will reimburse Mr. Rogerson for any necessary expenses that he may incur to the satisfaction of the directors for the above purposes to the extent of 1000*l.*, Mr. Rogerson on his part undertaking to provide the necessary funds to that extent as and when required, it being understood that such reimbursements may be made, if the directors shall so desire, by acceptances of the company to be given from time to time according to the outlay actually made and approved, and to be payable respectively at four months after date." It was further resolved, "that Mr. C. Lankasky be appointed manager of the boats and collieries, and of the traffic and business of the company, at the weekly salary of 3*l.*, in addition to his reasonable and necessary travelling expenses. Mr. Lankasky to act in accordance with written instructions to be furnished to him through the secretary of the company."

In pursuance of these arrangements, 200 shares in the company were, on the 6th June 1863, allotted to John Rogerson, and he paid 2000*l.* for the shares and received it back again in part payment of the purchase-money for the ships. In further pursuance of these arrangements, seven bills of exchange drawn by John Rogerson upon the company for sums amounting in the whole to 7500*l.* were accepted by the company, three of these bills being at four months for the sums of 1000*l.*, 1000*l.*, and 750*l.*, and the other four bills being at six months for the sums of 1000*l.*, 1000*l.*, 416*l.*, and 334*l.*; and on the 11th June 1863, all these bills thus accepted were handed over to John Rogerson. On the same day the secretary of the company, at the request of John Rogerson, addressed to him a letter which was in these terms: "I am instructed by the board of directors to authorise you to dispatch the two steamers, the *Chesapeake* and the *Louise Crawshaw*, to the Danube immediately, together with such materials as you may deem requisite to work the boats and conduct the traffic of the company on the river, and the Theiss and Save. I am further directed to authorise you to send out such a number of miners, and such quantities of tools and materials, as you may deem requisite to work the mines of the company at Dobra." In the meantime an arrangement had been come to between the plts. and John Rogerson for the plts.' indorsing the bills upon terms agreed upon between them. These terms were contained in two letters of guarantee bearing date respectively the 5th June 1863, and were as follows: "Gentlemen,—In consideration of your agreeing to guarantee the payment of the acceptances of the Anglo-Danubian Steam Navigation Company drawn for the purpose of paying for the boats to the extent of two-thirds of the 5500*l.*—that is the difference between the 7500*l.* and the 2000*l.* which Rogerson paid to Kearns and received back in respect of the ships—"to the extent of two-thirds of the 5500*l.*, that is 3667*l.*, I engage that you shall not be called upon to pay under that guarantee except upon the following date, viz., twelve months

from the dates of the bills 1833*l.* 10*s.*, eighteen months from the dates of the bills 1833*l.* 10*s.*, you agreeing to indorse new bills to take up those first drawn until they will come to the dates named, that is, twelve and eighteen months respectively, at which date you become owners of two-thirds of the property mortgaged to Jno. Rogerson and Co. It is further understood that you will accept bills to raise the funds to work the boats and colliery, you being liable, in event of the company not paying, to the extent of two-thirds of the amount, which is not to exceed 1000*l.*" The other letter of guarantee of the same date was signed by Rogerson and Co., Burke and Kearns, and it is in these terms; it is addressed to Mr. Rogerson: "Sir,—We agree to the contents of your letter dated 5th June 1863; that is, we guarantee payment of the acceptances of the Anglo-Danubian Steam Navigation Company to the extent of 3667*l.*, in event of the company not paying them, in twelve months, say for 1833*l.* 10*s.*, at eighteen months for 1833*l.* 10*s.*, and we also agree to keep our indorsement on bills to keep them negotiable until they mature. We also agree to accept bills to raise the funds to work the boats and colliery, and to be liable for two-thirds in event of the company not paying the same to the extent of 1000*l.*, John Rogerson and Co. being responsible for the remaining one-third to the bank." The company also afterwards accepted two other bills drawn upon them by Rogerson for the sums of 500*l.* and 300*l.* in part of the 1000*l.* agreed to be advanced by him.

The two steamships, the *Chesapeake* and the *Louise Crawshaw*, were dispatched by John Rogerson and Co. from Newcastle and proceeded to Constantinople. They reached that place at the following times, the *Chesapeake* on the 20th Aug., and the *Louise Crawshaw* on the 23rd Sept. 1863. They were not sent on to the Danube. The *Chesapeake*, when she left this country, and indeed when she was agreed to be sold to the company, had on board a considerable quantity of munitions of war for the use of the Circassians in the war in which they were then engaged with Russia, and after her arrival at Constantinople she proceeded with this cargo to the neighbourhood of Trebizond, where she delivered the cargo, and then returned to Constantinople, arriving there on the 18th Sept. Her crew was soon afterwards discharged by Rogerson, and she was berthed at Constantinople. The crew of the *Louise Crawshaw* was also discharged soon after her arrival at Constantinople, and she was also berthed there. The three bills for 1000*l.*, 1000*l.*, and 750*l.*, which were drawn payable at four months, became due on the 8th Oct. 1863. They were not paid by the company, and on the 9th and 12th Oct. 1863 John Rogerson commenced an action at law against the plts. upon these bills. The plts. thereupon, on the 22nd Dec. 1863, filed the bill in this cause against John Rogerson, William Scott, who was his partner in the firm of J. Rogerson and Co., and John William Couchman, another of the directors of the company who had taken part in the resolutions of June 1863, and in the indorsement of the bills by the company, and also against the Anglo-Danubian Company, setting forth in detail a great variety of circumstances connected with the purchase of the ships by the company, the indorsement of the bills by the plts., the guarantee given to them by Rogerson and Co., the dispatch of the vessels from this country, their being berthed at Constantinople, and their having been, as alleged, subsequently employed by Rogerson, and therefore praying "that it might be declared that, under the circumstances, the plts. were altogether discharged from liability on the bills so indorsed as aforesaid, and that the debts John Rogerson and William Scott are severally bound and ought to indemnify

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the plts. against the actions of Messrs. Lambton and Co."—there was an action brought by Messrs. Lambton and Co. upon one of the bills which had been indorsed, and which the plts. had been compelled to pay—"or that the defts. J. Rogerson and W. Scott may be decreed specifically to perform the agreements of the 2nd and 5th June 1863, the plts. being ready and willing, and thereby offering specifically to perform such agreements on their part. That an account may be taken under the directions of the court of all moneys received by J. Rogerson and W. Scott, or either of them, or by any other person for their or his use, and of all moneys, if any, agreed to be paid to John Rogerson and William Scott, or either of them, and not yet received for or in respect of the conveyance of passengers or freight conveyed by or otherwise for or in respect of the use or employment of the steamers the *Chesapeake* and *Louise Crawshaw* respectively, since the 2nd June 1863, and of the profits realised by J. Rogerson and W. Scott, or either of them, for the adventure or speculation. That it may be declared that what upon taking such account may be found to be due from J. Rogerson and W. Scott respectively, ought to be applied, so far as may be necessary, in satisfaction of the sums due on the seven several bills of exchange;" and then the bill prays for an injunction to restrain the actions commenced on the indorsement of the bills.

The bill, which is most loosely and inaptly drawn, rests, as I understand it, on the right of the plts. to be relieved from their liability upon the bills on several grounds. First, that the agreement by the company for the purchase of the ships was made upon the faith of representations on the part of Rogerson which were not well founded, and of promises on his part which were not performed, and amongst other such representations and promises, it alleges that he promised that the ships, if the company would purchase them, should be forthwith vested in the company, and he would procure the company to be duly registered as the owners of them, and the ships should be immediately dispatched to the Danube, which the bill alleges was of great importance to the company, with a view to their securing the benefit of the autumn trade on the river in that year; but that in fact Rogerson had not at the time any title to the ships, and that the ships were never in fact sent to the Danube; secondly, that the mortgages stipulated for by the agreement of the company to be made to Rogerson, were not in fact procured by him to be made; and, thirdly, that the deft. Rogerson was not entitled under the agreement for the purchase by the company to take any freight to any port on the Black Sea, and that he took on board the *Chesapeake* the munitions of war above mentioned with full knowledge of the purpose for which they were intended, and thereby exposed that vessel to the risk of being seized and confiscated by the Russians, and that he wholly concealed from the plts. the fact of the vessel being laden with such munitions of war.

The deft. Rogerson, by his answer, insists in effect that he had a good title to the ships, and that the ships were not sent to the Danube in consequence only of the necessary funds for that purpose not having been supplied by the company or the plts., he having expended the 1000*l.* agreed to be advanced by him; that the mortgages were not taken by him only in consequence of the agreement on the part of the company to furnish the list of the calls and of the shareholders not having been fulfilled by them; and that under the agreement with the company he was entitled to carry cargo, although consisting of the above-mentioned munitions of war; and by the answer he wholly denies having made any such false or fraudulent representations as are alleged by the bill, and he alleges

that the sale of the steamships proceeded throughout upon the footing of the plts. being personally responsible for the purchase-money.

There is an enormous mass of evidence in the cause, consisting in part of letters and other documents, and in part of affidavits and depositions. Amongst the letters in evidence there is a long correspondence between the deft. Rogerson and Mr. Lankasky, the managing agent of the company at Constantinople, from which it clearly appears that, very soon after the steamships had been purchased by the company, the deft. Rogerson contemplated selling the ships when they arrived at Constantinople, and that he was continually intending to do so, and gave express directions that this intention on his part should not be made known to the Anglo-Danubian Company. The parol evidence, consisting of the affidavits and depositions, is painfully conflicting and contradictory, and if it were necessary to decide the case upon that evidence, I should find great difficulty in arriving at a conclusion upon it, although, upon the whole, I think that the evidence on the part of the plts. is more trustworthy than that on the part of the defts. In the progress of the cause the plts. paid into court to the credit of the cause the sum of 3333*l.* 13*s.* 4*d.* as the price of an interim injunction to restrain the proceedings in the actions brought against them, and at the time of the hearing of the cause there was in court the sum of 3823*l.* 14*s.* 2*d.* Bank Three per Cent. Annuities, which had arisen from the money so paid in. The steamships were also sold in the progress of the cause, and at the time of the hearing there was also in court the sum of 1706*l.* 9*s.* 5*d.* Bank Three per Cent. Annuities, which had arisen from the proceeds of the sale of the steamships. There was likewise in court at the time of the hearing of the cause the sum of 550*l.* 15*s.* Bank Three per Cent. Annuities, which stood in trust in the cause, and in another cause of the *Anglo-Danubian Steam Navigation and Colliery Company (Limited) v. Rogerson*, and had arisen from moneys paid in by the company. Upon the hearing of the cause the M. R. made the following decree:—It was declared that the plts. were not liable upon the bills of exchange indorsed by them as in the pleadings mentioned, or any of such bills; and generally an injunction was granted to restrain the defts. from suing upon those bills, and the plts. having, pursuant to the order we made and the M. R. before us, paid the sum of 3333*l.* 13*s.* 4*d.* into court, and that being invested, and there being in court in the whole this sum of 5530*l.*, it was ordered that 3823*l.* Bank Three per Cent. Annuities, part of the 5530*l.* Bank Annuities, and any interest accrued due upon them, be transferred and paid to the plts., but such transfer and payments were not to take place until after a certain time: that is, giving back to the plts. the sum which they had paid in as the price of the injunction, the court being of opinion that the injunction was proper, and the injunction was made perpetual. Then it was declared that Rogerson and Scott were bound to recoup to the plts. the sum of 1003*l.* 14*s.* paid by them on the 4th Jan. 1864 to Messrs. Lambton and Co.; that is, Burke and Kearns having been made liable upon one of the bills which they had indorsed, which had been handed over to Lambton and Co., and having been compelled to pay that amount, they were entitled to recover that amount from Rogerson and Co. Then there is a direction to tax the costs. And it was ordered that the plts. Burke and Kearns do pay to the Anglo-Danubian Steam Navigation and Colliery Company and John William Couchman, their costs and add those costs to their own, and then it was ordered that Rogerson and Scott should pay to the plts. the balance of the sum of 1003*l.* 14*s.* and interest, and of the taxed costs of the plts. in this suit,

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and Rogerson having paid into court to the credit of *Burke v. Rogerson* the sum of 1537*l.* 19*s.* 2*d.* appearing to have been the proceeds of the sale of the steamers, it was ordered that 1706*l.* 9*s.* 5*d.* Bank Three per Cent. Annuities, being the residue of the 5530*l.* 3*s.* 7*d.* like annuities which had arisen from the sale of the ships, be sold; the residue of the Bank Annuities which were in court was ordered to be sold, and it was ordered that out of the money to arise by such sale, and any interest to accrue on the sum of 1706*l.* 9*s.* 5*d.*, the 1000*l.* and interest should be paid, and out of the residue of those moneys the costs were to be paid; it provided for the payment of the costs, that is, applying the proceeds of the sale of the ships to the payment of the amount which had been paid upon the bills, and also payment of the costs, and it was ordered that the ultimate residue should be paid to the deft. John Rogerson, and there is a special direction given as to what is to be done if that money is not sufficient to pay the 1003*l.* 14*s.* and interest and the costs in full. That is the substance of the M. R.'s decree.

The appeal before us is by the deft. Rogerson from this decree. In disposing of it we must first consider upon what evidence we are to proceed. It was objected on the part of the app. that the correspondence between him and Lankasky, the manager of the company at Constantinople, with reference to the sale of the ships after they arrived at Constantinople, ought not to be received in evidence against him. Neither the correspondence itself, nor the fact of such a sale having been intended, is put in issue by the pleadings in the case, and it is wonderful that the plt. should not have put that upon the record. But this correspondence cannot, I think, be wholly disregarded. It must, as it seems to me, be receivable in evidence at least to this extent, to show that the ships were detained at Constantinople for the app.'s own purposes, and not for the reasons alleged by him, and whether it would be sufficient for that purpose I need not say. I am satisfied, however, that this correspondence is not so put in issue as that the court can properly act upon it without some further inquiry, and I proceed therefore to consider the points of the case without reference to this correspondence, and first, as to the point relied upon by the plt. that the app. had no title to the ships. I think that the plt. cannot maintain their right to the relief given by the decree upon that ground. The agreement between the company and the app. fixes no time for the completion of the purchase, and there is nothing so far as I can find upon the face of the agreement which can make the immediate completion of the purchase of the essence of the contract. What was really of importance to the company was not the transfer to them of the ships, but the dispatch of the ships to the Danube, and they were in fact dispatched upon the voyage and by the order of the company, as appears by the letter of the 11th June 1863; that letter may well be considered to have constituted Rogerson the agent of the company to dispatch the ships, and to amount in effect to the delivery of possession of the ships to the company. But whether this be so or not the company surely cannot be heard to complain that Rogerson had at this time no title to the ships when they directed him to deal with them before any title was shown; and if they could not then complain of an absence of title on his part, I see no fixed period at which they could become entitled so to complain. This part of the case does not even rest here, for as early as the 13th June both the company and the plt. knew that Rogerson was not the registered owner of the ships, and yet they continued to treat the agreement as subsisting, and took no steps to repudiate it.

Then as to the ships not having been sent to the Danube, I think the plt.' title to the relief given by this decree fails upon this point also, for Rogerson was not bound to advance beyond 1000*l.* for sending the ships to the Danube and for other purposes, and when the ships reached Constantinople he had advanced beyond that amount, and both the company and the plt., though applied to for the purpose, failed to supply the further funds which were necessary for sending forward the ships.

Again, as to Rogerson not having procured the mortgages which by the agreement were stipulated to be made to him, I do not think that there was any such default on his part in this respect as could entitle the plt. to the relief given by the decree. He was entitled, I think, to have the whole transaction completed at the same time, and was not bound to take the mortgage of the ships without the mortgage of the calls, and the company has never supplied the means of completing the mortgage of the calls, which under the agreement they were bound to do. Besides, the draft mortgage of the calls was sent to them for approval upon the 13th June, and was not returned by them until the 19th Aug. 1863, when Rogerson was on the point of leaving this country. Then, as to the representations alleged to have been made by the app. Although, as I have said, I distrust the evidence on his part more than that on the part of the plt., I am far from being satisfied with the evidence on their part as to these representations, and I should hesitate long before affirming this decree upon the faith of that evidence. If it was necessary to decide this case upon the question whether the representations alleged to have been made by the app. were in fact made by him, I am disposed to think that we could not safely come to any decision upon it without some further investigation, either by means of issues, or by examination of witnesses before us.

But I think it is not necessary to take either of these courses. I am satisfied upon the evidence that the *Chesapeake*, when dispatched from this country, was, and was known by the app. to be, laden with munitions of war for the use of the Circassians in their war with Russia, and that this fact was not communicated by the app. either to the company or to the plt., and I think that this fact alone is sufficient to entitle the plt. to be relieved from their liability upon the bills in question. It is, as I have stated, alleged by the answer of the app. that the negotiations for the purchase of the ships proceeded upon the footing that the plt. were to be responsible for the full amount of the purchase-money, but upon whatever footing the negotiation may have proceeded, I am satisfied that it was concluded upon the footing that the plt. were to be liable as sureties, and not as principals. The indorsements of the bills, and the letters of guarantee, are but parts of one and the same transaction, and must be looked at together; and by the letters of guarantee Rogerson, in consideration of the plt. agreeing to guarantee the payment of the acceptances, enters into certain engagements referred to in the letters, and the plt., on the other hand, guarantee the payment of the acceptances. It is by the indorsements only the plt. could be liable for the full amount of the bills; they would not be liable for more than two-thirds of the amount upon the guarantee itself. The plt. therefore were in the position of sureties, and I take it to be clear beyond all doubt, that in all cases of principal and surety, the surety paying the debt is entitled to the benefit of all securities which the creditor has against the principal. Upon that rule, therefore, the plt. paying these bills would be entitled to the benefit of the mortgages agreed to be given to Rogerson; but, beyond this, it is in terms

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agreed by the letters of guarantee that the plts., upon payment of two-thirds of the amount of the bills, should become owners of two-thirds of the property mortgaged to Rogerson and Co., so that in any event the plts. to the extent of two-thirds at least of what they should pay upon the bills were to have the benefit of the mortgages.

Now, what was the position of Rogerson as to these mortgages? His right to have them granted to him would be enforced only in equity; but, would a court of equity have decreed the company to grant these mortgages when it appeared that the fact of one of the ships being laden with a cargo, which, to say the least, would expose her to extraordinary risks, was known to the app., and was concealed from the company? I am of opinion that it would not. It was said for the plts., that by carrying this cargo the ship was rendered liable to seizure and confiscation. I do not enter into that point; I do not think it necessary to do so. It is, in my opinion, sufficient that she was exposed to extraordinary risks, and that this fact was concealed from the plts. The correspondence with Lankasky proves that Rogerson was well aware of the risk to which the ship was exposed by carrying this cargo. Rogerson, therefore, in my opinion, could not have compelled the company to grant these mortgages, and of course could not give the plts. the benefit of them, and in this state of circumstances I think he has been properly held to have released the plts. from their liability upon the bills. To this extent, therefore, I agree in the decree appealed from; but the decree has gone further and has fixed the payment of the 1000*l.* and of the costs upon the proceeds of the sale of the ships, and I cannot follow the decree to this extent. If the ships had not been sold, I do not see how a sale of them could have been ordered to meet these payments, and I think that the proceeds of the sale of them must stand in the same position as the ships themselves would have stood in if they had remained unsold. In my opinion, therefore, this part of the decree ought to be discharged, and these sums ordered to be paid by Rogerson and Scott. This, however, is more a matter of form than of substance, and ought not, I think, to absolve the app. from the payment of the costs of the appeal, which, in my opinion, must be ordered to be paid by him.

Lord Justice KNIGHT BRUCE said:—My conclusion is the same, and substantially on the same grounds.

Solicitor for the deft. Rogerson the app., *James Crowdy*.

Solicitor for the plts. and the other defts., *J. H. Devonshire*.

ROLLS COURT.

Reported by H. R. Young, Esq., Barrister-at-Law

Wednesday, July 25, 1866.

GLAHOLM v. BARKER.

The 17 & 18 Vict. c. 104 (the Merchant Shipping Act 1854) ss. 510, 511, and 514—Collision at sea—Loss of life—Liability of owner of malfaisant vessel—Damages, extent of.

*The Merchant Shipping Act 1854, s. 510, taken per se, limits the amount of damages recoverable against the owner of a ship causing the death of a seaman at sea, to 30*l.*; but the 511th section enables the claimant of such damages to sue the owner for more, if he thinks that amount not sufficient. The 514th section then provides that where the damages actually sustained*

exceed in the aggregate the sum for which the owner of the injuring vessel is liable, and that excess is recovered against him, the funds so recovered are to be distributed rateably among the parties entitled thereto.

See Glaholm v. Barker, 12 L. T. Rep. N. S. 317; s. c. on appeal, 13 L. T. Rep. N. S. 653.

This suit was originally instituted by the owners of a British vessel called the *Edith Murray*, to restrain certain actions at law against them. It appeared that in the month of Feb. 1864 the *Edith Murray* ran into a collier called the *Thomas Barker*. The result of that collision was that eight seamen on board the *Thomas Barker* were drowned. Their personal representatives then brought actions under Lord Campbell's Act, 9 & 10 Vict. c. 93, against the owners of the *Edith Murray*, to obtain compensation by way of damages for the deaths so caused. The plts. at law estimated the amount of their damages at the rate of 15*l.* per registered ton of the freight and vessel the *Edith Murray*. That rate the defts. at law contended was an excessive one; that in truth there was either no right of action at all, or that the liability was limited to 8*l.* per ton as aforesaid.

Under those circumstances the bill in this suit was filed praying an injunction to restrain the actions, and a direction that the proper amount of the liability might be ascertained in this court.

On the 24th April 1865, the M. R. held that the actions must be allowed to go on, and that the liability of the plts. in equity was 15*l.* per ton: (12 L. T. Rep. N. S. 317.) From that decision an appeal was carried to the Lords Justices, who confirmed the decision of the court below. Their Lordships held that the liability under Lord Campbell's Act (9 & 10 Vict. c. 93) of a shipowner for damages in respect of loss of life occasioned by a collision at sea was (although there might be no passengers aboard), by the Merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 65), modified and limited to a sum not exceeding 15*l.* for each ton of his vessel's registered tonnage: (13 L. T. Rep. N. S. 653.) The further prosecution of the suit under those decrees was carried out in chambers.

The suit now came before the court from chambers upon the question whether the damages which could be claimed by the widow and children of the seamen who had been lost were limited to 30*l.*, whatever might be the actual damage sustained by the family of the deceased. The decision of the question depended on the construction to be put upon (in particular) the following sections of the Merchant Shipping Act 1854, viz., the 510th, 511th, and 514th.

By those enactments, that is to say, by the 17 & 18 Vict. c. 104 (the Merchant Shipping Act 1854), part ix., sect. 510, it was enacted that the following rules be observed as to the damages recovered in any such inquiry as in the Act was particularly mentioned, and the application thereof, viz.: that

1. The damages payable in each case of death or injury should be assessed at 30*l.*

2. The damages found due on any such inquiry as aforesaid should be the first charge on the aggregate amount for which the owner was liable, and should be paid thereof in priority to all other claims.

3. All such damages as aforesaid should be paid to Her Majesty's Paymaster-General, and should be distributed and dealt with by him in such manner as the Board of Trade directs; and in directing such distribution the Board of Trade should have power in the first place to deduct and retain any costs incidental thereto; and in the next place, as regarded the sums paid in respect of injuries, should direct payment to each person injured of such compensation not exceeding in any case the statutory amount as the said board thought fit; and as regarded the sums paid in respect of deaths, should direct payment thereof for the benefit of the husband, wife, parent, and child of the deceased, or any of them, in such shares, upon such evidence, and in such manner as the said board should think fit.

4. The Board of Trade should refund to the owner any surplus remaining under its control after making such dis-

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as aforesaid, and the sum so refunded should form a residue thereafter mentioned.

Board of Trade should not, nor should any person or it, be liable to any action, suit, account, claim, or whatsoever, for or in respect of any act or matter omitted to be done, in the distribution of such as aforesaid.

amount paid to Her Majesty's Paymaster-General or aforesaid was insufficient to meet the demands the several claims thereon should abate proportionally.

sect. 511 that,

completion of such inquiry as aforesaid, if any used estimated the damages payable in respect of y, or if the executor or administrator of any deceased limited the damages payable in respect of his greater sum than such statutory amount, or in case monies having been made by the Board of Trade, amount accepted by such board by way of compensation such injury or death as aforesaid, the person so the same should, upon repaying or obtaining the t by the Board of Trade to the owner of the amount in to the Board of Trade in respect of such injury or at liberty to bring an action for the recovery of in the same manner as if no power of instituting an id thereinbefore been given to the Board of Trade, o the following proviso, viz., that any damages le by such person should be payable only out of the 'any) of the aggregate amount for which the owner , after deducting all sums paid to Her Majesty's r-General in manner aforesaid; and that if the recovered in such action did not exceed double the amount, such person should pay to the debt in such the costs thereof; such costs to be taxed in England id as between attorney and client, and in Scotland n agent and client.

y the 514th section,

cases where any liability had been, or was alleged n, incurred by any owner in respect of loss of life, njury, or loss of or damage to ships, boats, or goods, d claims were made or apprehended in respect of such hen, subject to the right thereinbefore given to the Trade of recovering damages in the United King- spect of loss of life or personal injury, it should be England or Ireland, for the High Court of Ch., and d for the Court of Session, and in any British pos- any competent court, to entertain proceedings at of any owner for the purpose of determining the 'such liability, subject as aforesaid; "and for the n of such amount rateably amongst the several ," with power for any such court to stop all actions pending in any other court in relation to the same after; and any proceeding entertained by such Ch. or Court of Session, or other competent court, conducted in such manner and subject to such regu- to making any persons interested parties to the as to the exclusion of any claimants who did not ithin a certain time, and as to requiring security owner, and as to payment of costs, as the court st.

appeared for the plts.

a for the defts., the representatives of the seamen.

ROMILY.—I am of opinion, in this case, it depended solely on the 510th section of chant Shipping Act 1854, the amount of ages recoverable from the ship's owner learly be limited to 30*l*. in each case of But the 511th section of that statute seems raise some doubt upon the point. I think : 511th section intended to provide this: e claimant thinks the sum of 30*l*. is not he may bring an action for the extra f damage which he claims, whether the f Trade does or does not institute any in- the matter. I think the proper construc- the 514th section is this: that when the actually sustained by the families of the seamen in the aggregate exceed the sum h the owner of the wrong-doing ship is id that excess is recovered against him, funds so recovered from the owner are to ibuted rateably amongst those entitled. mages sustained by the claimants are e ascertained in the same way as if the of the owners was unlimited. If the

damages so ascertained are together less than the amount of the owner's liability, then the sum for which the owner is liable is to be applied in payment in full of the damages so ascertained. If, on the other hand, they exceed the amount of his liability, then such sum is to be distributed rateably among the persons entitled to it.

Solicitors for the plts., *J. W. Hickin*, for *Brown and Son*, Sunderland.

Solicitors for the defts., *Maples and Teesdale*, agents for *Lietch and Kewney*, North Shields.

V. C. STUART'S COURT.

Reported by *EDWARD WINSLOW, Esq., Barrister-at-Law.*

Thursday, June 28, 1866.

BROWN v. TANNER.

Freight—Assignment—Subsequent charge—Notice—Priority.

B., a registered mortgagee of a ship, by a deed of even date referred to in the mortgage-deed, took a general assignment of the freight as an additional security; subsequently the freight of a particular voyage was assigned to C.:

Held, that C., who had given notice of his assignment to the charterers of the ship, was entitled to priority over B. who had given no such notice.

The question in this case was whether the plt., Robert James Brown, was entitled to priority as assignee of part of the freight of the ship *Pharamond* over the deft. George Tanner, who was a mortgagee of that ship, and assignee of the whole of its freight.

The facts were these:—

In 1862 the ship *Pharamond* was mortgaged by its owner, Henry John Hall, to the deft. by way of security for 2000*l*., and by a deed of even date, referred to in the mortgage-deed, the whole of the freight earned or to be earned by the vessel was also assigned to the deft. as a further security for the above sum. The mortgage was duly registered on the following day in the form required by the Merchant Shipping Act.

In Nov. 1863 the vessel was chartered from the owner by Messrs. Phillips, King, and Co., to proceed from Algoa Bay or the Mauritius to London, with such cargo, and subject to the payment of such amount of freight, and under such terms and conditions as in the charter-party were mentioned. It appeared that Hall had accepted certain bills of exchange drawn by the plt. to the amount of 1000*l*., and in order to secure their payment he, on the 20th May 1864, assigned all the freight payable under the above charter-party to the plt. On the 16th July 1864, the plt. gave a written notice of his assignment to the charterers.

The *Pharamond* arrived in London in the early part of Sept. 1864, and shortly afterwards the deft. took possession of her, but not before the cargo had been partially discharged, and on the 30th Sept. he gave notice of his claim to the charterers and all the consignees of the freight.

Subsequently, the plt. applied to the charterers to pay him the freight remaining due under the charter-party, but in consequence of the deft.'s claim they refused to do so, whereupon the plt. served a notice of stoppage for the freight upon the London and St. Katharine Dock Company.

The following correspondence between the solicitors of the parties fully sets forth their respective claims. On the 9th Nov. the plt.'s solicitors wrote to the agent of the solicitor acting for the deft. as follows:

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[V.C. S.]

The Pharamond.

Dear Sir,—There appearing to be conflicting claims to the freight per this ship, we think it desirable to communicate with you (as representing Mr. Tanner the mortgagee) on the subject. It appears that Mr. Hall, the owner of the ship, executed a statutory mortgage in favour of Mr. Tanner, on 21st Sept. 1862, which was recorded at the Custom-house on the 26th Sept. 1862. On 27th Nov. 1863 the ship was chartered by Messrs. Phillips, King, and Co., for a voyage from Algou Bay to London at a freight of so much per ton. Hall being indebted to our client, Mr. Robert James Brown, upon certain bills, and proceedings being taken against Hall in respect of such bills, he proposed to assign such freight to Mr. Brown, and accordingly, on 20th May last, Mr. Hall executed an assignment of such freight to Mr. Brown. At the time the assignment was executed Mr. Brown had no notice or knowledge of the ship being mortgaged other than is to be collected or inferred from the registration at the Custom-house. On the 16th July 1864 notice of such assignment was given to Phillips, King, and Co., the charterers. The ship arrived in London early in September. Possession of the ship was not taken by your client till after the discharge of the cargo, though he has, we understand, lodged stops for the freight. Under these circumstances, our contention is that our client, as assignee of the freight for value without notice to the charterer, is (as against Mr. Tanner, the mortgagee not having taken possession) entitled to the freight payable under the charter with Messrs. Phillips, King, and Co. Messrs. Phillips, King, and Co. happen to be clients of ours. The stops which have been lodged will only complicate matters, as Phillips, King, and Co. being thoroughly responsible parties, are at all times able to pay whatever freight is payable by them. We understand that some notices have been given on behalf of Mr. Tanner to the various consignees of cargo, claiming the freight payable by them; but we do not consider this assists Mr. Tanner, because it is, we apprehend, clear that there is no privity between the actual shippers and the shipowner, and that the bill of lading freight belongs to Phillips, King, and Co. as owners of the ship for the voyage; the master signing the bills of lading not as agent for the owner, but of the charterers, Phillips, King, and Co. We cannot but think that, upon consideration, you will arrive at the conclusion that our client Mr. Brown is entitled to the freight as against Mr. Tanner, the mere mortgagee of the ship; but if you think otherwise, we would suggest that the amount of freight payable by Phillips, King, and Co. should be deposited in some bank, and that the facts, which cannot, we think, be in dispute, be put into the shape of a case for the opinion of the court. All stops should be removed against payment of the charter freight by Phillips, King, and Co. We shall be glad to hear from you as soon as possible.

We are, dear Sir, yours very truly,

COTTERILL and SONS.

In reply to this letter Mr. Baker, the agent of the deft.'s solicitor, wrote:

Pharamond.

Dear Sirs,—In reply to yours of the 11th inst. I beg to forward you on the other side copy of the letter received by me from my client this morning, which will convey his views better than words of my own.

The copy of the letter referred to was this:

Pharamond.

Dear Sir,—I have seen Mr. Tanner on Messrs. Cotterill and Sons' letter to you of the 11th inst., respecting Mr. R. J. Brown's claim to the homeward freight of this vessel. It is clear from Messrs. Cotterill and Sons' letter that they are ignorant of the circumstance that Mr. Tanner took an assignment of all freight and earnings of this vessel by an indenture bearing even date with his registered mortgage, and which is mentioned in the latter. With this assignment Mr. Tanner considers his claim to the freight payable by Messrs. Phillips and King cannot be questioned, and even assuming that there was simply the statutory mortgage I cannot arrive at the same conclusion as Messrs. Cotterill and Sons state they have done. Mr. Tanner will release the freight upon receiving from Messrs. Phillips and King the freight payable under the charter-party.—Yours truly,

EDMUND H. CLARKE.

The plt. alleged that, when he took his assignment, he had neither notice of the deft.'s claim nor any means of obtaining information of the same, further than appeared by the register of the ship, and which register, although it recorded the deft.'s mortgage on the ship, made no reference to his alleged separate security on the freight. He therefore submitted that he was entitled by virtue of his assignment, and the notice thereof given by him to the charterers, to priority over the alleged charge on the freight claimed by the deft.

The bill, which was filed against the charterers and the owner of the vessel as well as the deft. Tanner, prayed (*inter alia*) for a declaration that the plt. was entitled to a charge on the said freight in

priority to the deft. That if the court should be of opinion that the deft.'s securities had priority over the plt.'s charge, then that the plt. might be at liberty to redeem the deft., and that he might be decreed to execute proper transfers of the premises comprised in his securities to the plt., the plt. submitting in such case to pay what should be found due and owing to the deft., or else that the premises comprised in the deft.'s securities might be realised and the proceeds duly applied under the direction of the court. That the defts. might be restrained from paying the freight payable under the charter-party or any part thereof to any other person than the plt., except under the court's direction, and from doing or continuing to do any act whereby Messrs. Phillips, King, and Co. might be prevented from paying the freight to the plt. And that a receiver might be appointed.

The deft. Tanner by his answer alleged that, on the arrival of the *Pharamond* in London from Algou Bay, he learnt for the first time that the vessel had been chartered by Messrs. Phillips, King, and Co. and he immediately placed his agent in possession of her, but not before she had broken bulk. He further alleged that he was totally ignorant of the plt.'s alleged transactions with Hall in respect of the freight, and he submitted that he had no means whatever of giving notice of his securities to parties who had no interest when such securities were taken, and of whom he knew nothing, and that if the plt. had searched the register and then applied to him for information, the fact of the assignment of all the freight and earnings of the vessel would have been communicated to him. He further submitted that it was impossible for him to have given notice of his assignment to Messrs. Phillips, King, and Co., as he was not aware until the vessel's arrival in London, that they were the charterers. He therefore claimed to be entitled to the freight, not only as first mortgagee of the vessel, but also upon the ground of his having taken possession of her, and stopped the delivery of the cargo by giving notice of his securities before the freight was paid or payable.

Mahns, Q.C. and *Druce* for the plt. contended that it was incumbent upon the deft. to have put himself in possession of the ship before the discharge of the cargo, but nothing was done on his part until after the cargo had been partly discharged; consequently he had never been in the position of a carrier, and could claim no lien on the freight. The plt. had no knowledge of the deft.'s assignment. The deft. had throughout acted with great carelessness; he had taken no steps to give notice of his charge on the freight, but had merely registered the mortgage on the ship. The plt., on the other hand, had served the charterers with due notice of his security, and had done everything in his power to insure his claim. They therefore submitted that he was entitled, as assignee without notice of any previous incumbrance, to priority over the deft. They cited

Cato v. Irving, 5 De G. & Sm. 225;
Gardner v. Cazenove, 1 H. & N. 423;
Lindsay v. Gibbs, 22 Beav. 522;
Kerrall v. Bishop, 2 C. & J. 529.

E. K. Karstake, for the deft. Tanner, argued that in equity the deft.'s assignment was of equal value with the plt.'s. A security on future freight was as good as that on freight actually being earned, and it was only where the second assignee had no notice of the previous incumbrance that he could claim priority; but here the plt. at the time of his assignment had constructive notice of the deft.'s claim on the freight; it was referred to in the deed mortgaging the interest in the vessel to the deft., and the plt., having knowledge of that deed, must

EX. CH.]

TAMVACO v. SIMPSON—ALDWORTH v. STEWART.

[NISI PRIUS.]

is presumed to have made himself acquainted with the whole of its contents. The deft. had done all that he could to perfect his security on the freight. At the time of his assignment the vessel was lying idle, and there was no one then to whom notice could be given; he could not know when the vessel was likely to be chartered without keeping an agent always on board, but as soon as he heard of the charter-party he gave notice to the charterers. Moreover, it was not essential to give notice until the freight had been actually earned. He cited

Langton v. Horton, 1 Haro, 549;

Hall v. Smith, 14 Ves. 426;

Peto v. Hammond, 30 Beav. 495;

Lindsay v. Gibbs (*supra*);

Holt v. Dewell, 4 Haro, 446;

Bulter v. Plunkett, 1 J. & H. 441; 4 L. T. Rep. N. S. 787;

Webster v. Webster, 31 Beav. 398; 6 L. T. Rep. N. S. 11;

Somersett v. Cox, 33 Beav. 634; 10 L. T. Rep. N. S. 181.

Cotton appeared for the charterers.

The VICE-CHANCELLOR.—I think that the right of the deft. as against the right claimed by the plt. as to the freight of this particular voyage cannot prevail. It is clearly established that freight by a particular voyage can be assigned, notwithstanding the fact of the ship and the freight generally having been previously mortgaged. It was so decided by the M. R. in *Lindsay v. Gibbs* (*supra*). It is in vain to say that the mere notice of the deft.'s existing mortgage can in any way affect the assignee of this particular voyage. The assignment to Tanner was an assignment of all freights to be earned after 1862, but he took no steps to secure his claim, and it was not until the plt. had given notice of his security that he exercised his right to take possession. I consider that the question has been already disposed of by the decision in *Lindsay v. Gibbs*, but the principle, which is of much older date than that case, amounts to this, that the right of a first mortgagee who does not choose to secure his incumbrance cannot prevail as against the right of a second mortgagee who has taken that trouble. There must be a decree for the plt. with costs. The plt. will pay the charterers their costs in the first instance, and recover them afterwards from the deft. The charterers must pay over the freight after deducting all proper disbursements.

Solicitors for the plt., *Cotterill and Sons*.

Solicitor for the deft., *T. Baker, jun.*

EXCHEQUER CHAMBER.

Reported by W. MAYD, Esq., Barrister-at-Law.

ERROR FROM THE COMMON PLEAS.

Monday, Feb. 5, 1866.

TAMVACO v. SIMPSON.

Ship and shipping—Charter-party—Freight—Advances on freight—Lien—Court of competent jurisdiction—Estoppel.

A charter-party contained a clause that freight should be paid "on unloading and right delivery of the cargo, less advances in cash at current rate of exchange; one-half of the freight to be advanced at freighter's acceptance at three months, on signing bills of lading." The charterer gave his acceptance accordingly, and received from the purchaser of the cargo the agreed price of the cargo, less the amount of freight remaining to be paid to the captain on delivery at Alexandria, the port of discharge. Before the acceptance became

due, and before the vessel arrived at Alexandria, the charterer became insolvent, and executed an inspector-ship-deed. The captain, having heard of the insolvency, refused to give up the cargo without payment of the whole freight, which was ultimately guaranteed by persons at Alexandria, at the request of the purchaser of the cargo. The captain sued them in the Consular Court of Alexandria, and they, by the authority of the purchaser of the cargo, paid him the whole amount of the freight. The charterer's acceptance came to maturity after the captain had obtained the guarantee for payment of the whole freight, and was dishonoured:

Held, first, that the purchaser of the cargo was entitled to receive it on payment of half the freight:

Held, secondly, that the proceedings in the Consular Court did not debar him from recovering in this court the amount paid to the captain in excess of what he was entitled to demand.

Error on a judgment of the C. P. on a special case, a full report of which will be found in 13 L. T. Rep. N. S. 160. The judgment of the court below was for the plt.

Lewers appeared for the plt. in error, and Mellish Q. C. (*Bidder* with him) for the deft. in error.

POLLOCK, C. B.—We are all of opinion that this judgment must be affirmed, and as the court below entered so fully upon the question I do not think it necessary to say more than that, in my opinion, the bill of exchange was not given as an advance to be repaid, but as an actual prepayment. It is so stated in the receipt which was indorsed by the shipowner upon the bill of lading, which bill was passed to the plt., a *bona fide* indorsee, before the bill of exchange had been actually dishonoured, and he was entitled to have the cargo upon paying the residue of the freight.

MARTIN, B.—I give my judgment for the plt. in the court below on the ground that there was no lien on the cargo at Alexandria on account of the insolvency of De Mattos, and the probable dishonour of the bill consequent upon it.

BLACKBURN, J.—I also shall express no opinion as to whether the bill was a prepayment of freight or a mere advance, but I agree in thinking that there was no lien while the bill was current. I cannot conceive it to have been the intention of the parties that the shipowners should receive both the bill and payment. The vessel arrived before the bill was dishonoured, and there was a conversation of the cargo; therefore the plt. is entitled to recover.

Judgment of the court below affirmed.

NISI PRIUS.

HOME CIRCUIT.

SURREY SUMMER ASSIZES, 1866.

Guildford, Wednesday, Aug. 8, 1866.

(Before CHANNELL, B.)

ALDWORTH v. STEWART.

Ship—Power of the captain—Assault and imprisonment.

The captain of a ship has authority to exercise so much force as is necessary for the safety of the ship.

To imprison a passenger in his cabin for seven days for alleged insolence to the captain personally is an excess of such power, and an action for the false imprisonment will lie.

NISI PRIUS.]

THE DAPPER v. THE LADY NORMANBY.

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This was an action for an assault and false imprisonment, to which deft. pleaded that he was the captain of a passenger ship trading between Melbourne and London, and that the plt. was a passenger in the ship, and misconducted himself towards the deft., and so behaved himself that it became necessary for the preservation of due discipline on board the ship, and for the safe and proper conduct of the ship, that the plt. should be taken to and confined in his cabin; and that deft., when the plt. had been requested to go and had refused, "gently laid his hands upon the plt. for the purpose of compelling him to go to his cabin, using no unnecessary violence, and by reason of the plt.'s wrongfully struggling and resisting, the deft. necessarily and unavoidably a little assaulted him, and for the preservation of due discipline necessarily imprisoned him and kept him imprisoned."

Replication, first, denying the plea; secondly, that deft. used excessive and unnecessary violence.

Murphy appeared for the plt.

Sir Geo. Honyman appeared for the deft.

It was proved that the plt. had resided in Australia for thirteen years, and in June last was a first-class passenger to England in the *Red Rover*, a ship of which the deft. was the captain. Soon after embarkation the plt., who was accompanied by his wife, complained of the provisions; the deft. was much offended, warm words were used, and ultimately the plt. was by the deft.'s order taken forcibly to his cabin, and kept there for seven days. The heat was very great, and the close confinement affected his health. On his representing this to the captain, and on the petition of others of the passengers, he was released. The official log contained the following entry: "Whereas on the 2nd May 1866 Mr. Aldworth, a saloon passenger, was confined to his cabin for his insolence for putting his hand to his nose to the captain, which was witnessed also by Richard Rogers, apprentice, and he is required there to stay until he writes an apology for his insolent conduct." The plt. denied this alleged act, but admitted that he laughed and grinned at the deft. A fellow passenger was called to confirm his story, and the captain and the boy Rogers affirmed the accuracy of the log; that it had been read to plt., and an offer made to him to come out if he would tender an apology.

In answer to a question by the Judge, the deft. stated that he knew of no custom or usage in the Australian passenger line of imprisoning passengers for alleged insolence to the officer in command; but he said that he had known it to be done.

CHANNELL, B.—There is a distinction between merely excluding a passenger from the dinner-table if he did not conduct himself properly and imprisoning him. He believed the custom in the East India passenger ships is to exclude from the table.

Sir G. Honyman, for the defence, said it was an action of a trumpety character, a case for merely nominal damages. The captain had a difficult and responsible duty, and the necessary discipline of a ship could not be preserved unless he had power to some reasonable extent to punish for insolence.

Murphy, in reply, said that it was a case of the utmost importance as well as novelty, and it would practically determine whether the captains of passenger ships were privileged to beat and imprison passengers at their own will.

CHANNELL, B., in summing up, said that it had been rightly termed a case of great importance. The deft. was not responsible for bad provisions;

that fault was with others. But the question for them was, whether the deft. had supported his plea justifying the assault, which was not denied. This was the point to which he would direct their attention. It was undoubtedly necessary that the captain of a ship should be intrusted with considerable authority, and it was true as a general proposition that the captain had some authority over the passengers as well as over the crew. But this authority was based upon necessity, and was limited to the preservation of necessary discipline and the safety of the ship. It was true that the captain was not bound to wait for actual mutiny, and he might arrest any movements towards it on the part of the passengers or crew. But then there must be some as calculated, in the apprehension of a reasonable man, to interfere with the safety of the ship or the due prosecution of the voyage. He referred to the authorities cited in Maude and Pollock's *Treatise on Merchant Shipping Law*. The necessity for exercising a due control over the use of this arbitrary authority was all the greater, because it was exercised on the high seas, on a sort of floating territory, perhaps thousands of miles from land, without any opportunity, until weeks or months afterwards, of appealing to the law for redress in case the authority should be abused. The deft., in his evidence, admitted an assault and a false imprisonment, and of a very serious character, and for which he must be liable, unless he made out his justification. Upon that the question was whether, in view of the seriousness, it was really necessary for the safety of the ship, or the due prosecution of the voyage, that the plt. should have been thus seized and imprisoned. The jury would bear in mind that the ship was one of considerable magnitude, and must have had a considerable crew; and could they say that they were satisfied that the plt.'s conduct, whatever it was, rendered such measures necessary for the safety or due management of the ship? He denied the particular act alleged, but even assuming it had been committed, did it raise any necessity for such treatment? Even if there was any necessity for the exercise of the captain's authority, was the necessity made out to the extent to which it had been exercised? For the plt. not only denied the alleged justification, but set up excess. Those, then, were the two questions which arose—had there been any necessity for the exercise of the authority? and, even if there had been such a necessity, had there been excess beyond what was necessary?

Verdict for the plt., damages 25l.

COURT OF ADMIRALTY.

Saturday, July 29, 1865.

(Before the Right Hon. Dr. LUSHINGTON.)

THE DAPPER v. THE LADY NORMANBY.

Admiralty regulations—Costs—Rules of the road—Construction of—Sailing ships meeting end on—Collision.

11th regulation: If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helm of both shall be put to port, so that each may pass on the port side of the other.

12th regulation: Where two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side; except in the case in which the ship with the wind on the port side is close-hauled, and the other ship free, in which case the latter ship shall keep out of the way; but if they

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have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.

Brett, Q. C. and E. C. Clarkson for the *Dapper*.

Deane, Q. C. and Vernon Lushington for the *Lady Normanby*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the owner of the brig *Dapper*, 177 tons register, from Sunderland, coal-laden for Ipswich, against the brig *Lady Normanby*, 237 tons register, from Havre de Grace, in ballast, for Newcastle, to recover for a total loss resulting from a collision between them off Kettleness, near Whitby, about seven p. m. on the 23rd Feb. last. For the *Dapper* the wind was stated as W.S.W., the weather as dark but fine; for the *Lady Normanby* the former was represented as W. by S., and the latter as clear. The case for the *Dapper* was that, the tide being the last quarter ebb, and of the force of about one knot, she was under double-reefed topsails, on the starboard tack, going at ten four and five knots, steering S.E., carrying proper lights, when those on board her observed three green lights on her starboard bow, at distance apart, and apparently 'belonging to vessels, proceeding so as to pass clear of her starboard side, and she kept her course; that the first two of such vessels did pass clear of her on her starboard side, but that the last—the *Lady Normanby*—which, when her green light was first seen from the *Dapper*, was distant about a mile, about three points on her starboard bow, after continuing for some time with her green light only in view, opened her red light and shut in her green light to the *Dapper*, and caused danger of a collision with the *Dapper*; and thereupon the helm of the *Dapper* was ported, and afterwards put hard a-port, notwithstanding which the *Lady Normanby* ran against and with her port bow struck the *Dapper* a violent blow on her port bow and stove it in, and did her so much damage that she soon began to sink. It was then alleged that the *Lady Normanby* at once sailed away without rendering or attempting to render any assistance to the *Dapper* or those on board her, although those in charge of the *Lady Normanby* could, without danger to the *Lady Normanby* or her crew, have rendered such assistance, and although the *Lady Normanby* was loudly hailed from the *Dapper* and requested to stand by her; that endeavours were made by the master and crew of the *Dapper* to save her, but such endeavours were ineffectual, and they were compelled to take to the long boat and leave her, and she was totally lost, with everything on board her, the long boat being taken in tow by a brig, and towed until she was off Whitby, when she was cast off, and pulled into that place by the master and crew of the *Dapper*; that just before the collision the *Lady Normanby* appeared to have luffed, and her green light was again seen from the *Dapper*; that those on board the *Lady Normanby* did not keep a proper and efficient look-out; that the helm of the *Lady Normanby* was improperly ported; that the helm of the *Lady Normanby* was improperly starboarded; that the collision was occasioned by the negligent and improper navigation of the *Lady Normanby*, and that no blame with regard to the collision is attributable to the *Dapper*, nor to any one on board her. The answer of the *Lady Normanby* pleaded, that it was about low water, and she was proceeding under two double-reefed topsails, jib, foretopmast staysail, foresail, mainsail, and trysail, close-hauled on the port tack, heading N.W. by N., going five knots, carrying the Admiralty regulation lights, when the red and green

lights of the *Dapper* were perceived a mile to a mile and a half off, bearing about one point on her port bow; that shortly afterwards the *Dapper* shut in her red light, and advanced, with her green light visible, in a direction to pass the *Lady Normanby* on her starboard side; that the *Lady Normanby* kept her course close-hauled to the wind, exhibiting her green light only to those on board the *Dapper*; and that when the vessels were a short distance only from each other, the *Dapper* ported her helm and exhibited her red light to the *Lady Normanby*, and rendered a collision between the two vessels imminent, whereupon the helm of the *Lady Normanby* was put hard a-port, notwithstanding which the *Dapper* with her port bow struck the *Lady Normanby* on her port bow with great violence, stove in the same, broke her foreyard, and rendered her unmanageable, so that she was unable to heave to. It was then pleaded that the collision was occasioned by the negligence or improper navigation of the *Dapper*, and that it was not in any way occasioned by the *Lady Normanby*. There was extreme difficulty in ascertaining what was the truth amidst this conflicting evidence, because it appears to the court that the evidence on both sides was incumbered with much improbability. Looking to the Act of Parliament, how does the case stand with respect to the obligations imposed on the one party or the other? Does the case fall within the statutory regulations or not? Now, one of these vessels was pursuing a N.N.W. course, and the other was originally pursuing a S.S.E. course, but just about the time of collision a S.E. course. That being so, what says the 11th article: "If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." If these two vessels were approaching each other in the manner which is stated in this article, then, of course, the duty was imposed upon both of porting at a reasonable opportunity and time; and if that they did not do, both would be to blame. If the case does not fall within the 11th article, does it fall within the 12th? "When two sailing ships are crossing so as to involve risk of collision, then if they have the wind on different sides the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled and the other ship free, in which case the latter ship shall keep out of the way." Now, if these vessels were not meeting, were they crossing so as fairly to bring the case within the provisions of this article. If they were crossing so as to come under the regulations prescribed by this article, then it is clear that, as the *Lady Normanby* was close-hauled on the port tack, and the *Dapper* was free upon the starboard tack, it was the duty of the *Dapper* to keep out of the way; but attached to that there is another consideration, which is, if the case falls within this 12th article, not only was the *Dapper* bound to keep out of the way, but the *Lady Normanby* was bound by the 18th article to have kept her course. I will assume that neither of these articles applies, and that the vessels were sailing, meeting in parallel courses, so that there was no real risk of collision if both kept their courses. Then I apprehend neither of these articles would directly apply, but that in that case the vessel would be to blame which deviated from her proper course, and so produced the collision. These are the three sets of circumstances I request your consideration upon. You will also judge from the circumstances in evidence whether the *Lady Normanby*, as charged, heartlessly abandoned her duty of giving assistance. It appears that the *Lady Normanby* was on the port tack close-hauled bound

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for Newcastle, and the *Dupper* was sailing free, bound for Ipswich; and, according to the case made against the *Lady Normanby*, it is this, that the two other vessels that were in company with her passed straight on without any difficulty, and went past this vessel and proceeded on their voyage, but that she unnecessarily ported her helm in order to pass a vessel which was ahead about seventy fathoms off the *Dupper*. I cannot understand upon what possible view of this case it is consistent with probability that a vessel close-hauled on the port tack should, in order to pass another vessel which, according to the case made, there was no reason to suppose she would come in contact with, port her helm, and endeavour to cross the bows of that vessel, except it is that she would lose her way, and have to make it up afterwards. The case made by the *Lady Normanby* against the *Dupper* is, that she was sailing on a south-east course, and when there was no probability of conflict she without rhyme or reason ported her helm, and so brought about the collision.

The Court was assisted by Captain Farrer and Captain Close, of the Trinity-house.

Wednesday, Jan. 31, 1866.

(Before the Right Hon. Dr. LUSHINGTON.)

THE ALLAN v. THE FLORA.

Rules of the road—Admiralty regulations—General construction of.

The 19th article of the Admiralty Regulations of the rules of the road, which directs that "in obeying and constraining all the other and previous regulations, due regard is to be had to all dangers of navigation, and to any special circumstances existing in any particular case, rendering a departure from such rules necessary, in order to avoid immediate danger," does not prescribe any specific course to be adopted or pursued, since such prescription would necessarily involve on many occasions the destruction of the very ships it was framed to preserve.

Brett, Q. C. and E. C. Clarkson appeared for the *Allan*.

Milward, Q. C. and Vernon Lushington for the *Flora*.

Dr. LUSHINGTON gave judgment in this case, which was a suit instituted by the British ship *Allan*, 924 tons register, from the Gulf of St. Lawrence to London, with a cargo of deals, against the Spanish barque *Flora*, 320 tons register, from Havannah to Hamburg, with a cargo of tobacco, for a loss resulting from a collision between them about fourteen miles south of the Eddystone Light-house, on the morning of the 16th Nov. last. The *Allan* represented that the weather was clear, with light clouds and stars visible, and a strong westerly swell. The *Flora* stated the night as dark. The case for the *Allan* was, that the tide being flood running half-knot, she was under all plain sail, close-hauled on the starboard tack, steering E. by S. $\frac{1}{4}$ S. making four knots, carrying her proper lights, when the green light of the *Flora* was seen, distant about a mile, and about three points on her lee bow; that she (the *Allan*) was kept as clear to the wind as possible, and as the *Flora*, which was on the port tack, continued to approach the *Allan* without any apparent change in her course, those on board the *Allan* hailed the *Flora* loudly and repeatedly, notwithstanding which the *Flora* ran aftermost hawse of the *Allan*, and with the fore shroud of her starboard main rigging carried away the *Allan*'s jibboom and bow-

sprit, and being entangled with the wreck thereof swung round with her starboard bow into the starboard main chains of the *Allan*, and there lay beating for nearly two hours, doing a great deal of damage; after which the *Allan* was drawn clear astern by setting her main and mizen topsails, the top-gallantsails braced all aback, all the canvas having been taken in on her foremast directly after the collision to save such mast from being carried away; that as soon as the two vessels were clear of each other the crew of the *Allan*, as she still lay aback, proceeded to secure her foremast, the headstays of which were all adrift, and while engaged in doing so the *Flora* ran down towards the *Allan*, and owing to the negligence and mismanagement of those on board her caught the port bow and anchor of the *Allan* with her port main-rigging, and did further serious damage to the *Allan*, and was finally got clear by cutting away some of her said port main rigging; that the collision and the damages arising therefrom, were occasioned by the neglect and improper navigation of the *Flora*, and no blame in respect thereto is attributable to any of those on board the *Allan*. The defence of the *Flora*, on whose behalf a cross-action was brought, set forth that she was close-hauled on the starboard tack, heading E.S.E., carrying her regulation lights brightly burning; that she was taken aback, and having come round on the port tack she proceeded on that tack, heading W.S.W., for some time, to get sufficient way on the barque to tack her; that the barque being ready to tack, and the sea appearing clear for that purpose, the *Flora* was put in stays, all hands being on deck; whilst in stays a light was suddenly seen by Antonio de Gonilolo, the look-out man, on the barque's starboard side, and immediately afterwards the barque was struck on her starboard quarter with great violence by the stem of the *Allan* coming up channel, and on board of which no regulation lights could be seen; that the two vessels fell alongside, head and stem, and remained in contact for nearly three hours; that the vessels at last got clear, and the *Allan* dropped clear astern for some distance. The *Flora* having lost nearly all her sails, lay quite powerless. It was then alleged that the *Allan* then gathered way, and by bad management advanced and came with great violence into the port side of the *Flora*, and did much further damage; that after the vessels finally cleared, the *Flora* put into Plymouth; that the collisions were both caused by the improper navigation of the *Allan*, and by the negligence of those on board her, and were in no degree the result of any neglect on the part of the *Flora*. The questions for our consideration are, which of these two vessels was to blame for the collisions which have occurred, or whether they were both to blame on the same account. It appears that the *Flora* intended to go into stays, and was, according to her own account, in stays. The question will be, whether she took those measures which were proper to be taken preliminary to going into stays, and whether she did that after having taken a proper survey of the state of the sea immediately surrounding her, so as not to run the risk of a collision in case of a vessel being near her. According to the *Flora*'s own statement, she had one person on the watch at the time in question, and, according to her own statement, from the admitted facts, and according to her own plea, the *Allan* was not seen coming, although she was a large vessel. Why did she not see the *Allan*? Assuming for the moment the *Allan* carried lights, why did she not see those lights? There was nothing in the state of the weather to prevent her seeing them, because, taking the whole of the evidence together, it is clear that it was an ordinary night, and you might see a vessel carrying

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lights at the distance of a mile, and she does not see them. Provided she could have seen them at that distance, I apprehend she would have avoided, or might have avoided, by adopting proper measures, the collision altogether; that is to say, she probably need not have gone into stays in the immediate neighbourhood of a vessel that was coming down upon her. What must be the reasons, and the only reasons, why the lights were not seen in due time? Either there was an insufficient look-out on board the *Flora*, or there were no lights burning brightly on board the *Allan*. There are three witnesses to whom it would be unfair to impute perjury from the *Allan*, who state that the lights were burning at the time, and there is nothing to negative that on the other side. It was said by them that the lights were not seen, and under the circumstances the balance of evidence is in favour of the *Allan*, that she had her lights burning at the time. If the *Flora* ought to have seen the *Allan* in due time, and if she had so seen her, she might and ought to have taken measures to avoid the collision; there can be no other conclusion than that the *Flora* was to blame. Then it may be asked, was or was not the *Allan* to blame for the course she pursued? It is abundantly clear that, in the first instance, she did that which was right, because she was on the starboard tack close-hauled, and according to the 12th Admiralty regulation she was bound to have kept her course. She did keep her course; and was she to blame in not taking any other measure to avoid a collision? It may be that the circumstances are such in a case like this that a departure from the strict rule of road as laid down in the Admiralty regulations is justified, and the question before the court as far as the *Allan* is concerned is, whether there was such a justification for departure from the rule in the present case. I have no doubt, looking at the 19th Admiralty regulation, that if the circumstances of the case were such that there was immediate danger, perfectly clear to the apprehension of those present, the *Allan* would have been justified in departing from the strict letter of the 12th rule. The 19th rule does not prescribe any particular measures that should be adopted in departing from the strict terms of any of the previous regulations that it governs, but it merely states that in construing and obeying these regulations, as far as possible, you may take into consideration urgent attendant circumstances. I believe that is common sense, for if any rule were laid down by Parliament or any other authority that could never be departed from in certain states of circumstances, such a rule would necessarily involve, on many occasions, the destruction of those ships, which it was intended to preserve. Upon a careful consideration of the evidence on both sides, the Court is of opinion that the *Flora* was solely to blame, and there must be a decree to that effect.

Wednesday, March 28, 1866.

(Before the Right Hon. Dr. LUSHINGTON.)

THE UNITED KINGDOM, THE HERCULES, THE RESOLUTE, AND THE RELIEF v. THE SYRIAN.

Salvage claim—Duration of service and extent of property rescued.

In awarding the amount for salvage services well performed, the Court holds the shortness of the duration of such services as an element of meritoriousness; and where the amount of property saved is very large, the Court will not take advantage of the extent of such amount further than to give a liberal reward, according to the meritoriousness of the services actually performed.

Aspinall, Q. C. and Cohen appeared for the *United Kingdom*.

The *Queen's Advocate* and F. C. Clarkson appeared for the *Hercules*.

Deane, Q. C. and Butt appeared for the *Resolute* and the *Relief*.

Milward, Q. C. and V. Lushington appeared for the *Syrian*.

Dr. LUSHINGTON gave judgment in this case, which was an action for salvage compensation against the screw steamship *Syrian*, of 1500 tons, from Alexandria to Liverpool, with cotton, by the steamships *United Kingdom*, *Hercules*, *Resolute*, and *Relief*, for services rendered to the steamer at the entrance of the Mersey on the 24th Nov. 1865. From the evidence in the case it appeared that the *Syrian*, on-coming into the Mersey, grounded on the Zebra Flats, the sea being at the time very heavy, and the wind W.N.W. After remaining for some time in this position, and failing to get off, she made signals for assistance. These eventually were answered by the *United Kingdom*, which, coming up, made fast to the *Syrian*, and assisted in partly removing her from her position on the bank. The steam-tug *Hercules* then came up, and the *United Kingdom* and the *Hercules* succeeded in getting the *Syrian* off, but she afterwards touched on the Little Burbo Bank. The steam-tug *Resolute* then came up, and the three tugs, by their united efforts, got the steamer into the channel; the steam-tug *Relief* then came up, and it was alleged that by the assistance she gave, she in reality rescued, or prevented the steamer from getting on the Taylor Bank until the other tugs helped to tow her up the Mersey to the Birkenhead Docks. The *Syrian*, however, being a long ship, could not be taken into the lock leading from the low-water basin into the Birkenhead Docks, and she was therefore taken by the *Resolute* and the *Relief* to the Morpeth Dock, where she was moored in safety. It was alleged in the evidence on the part of the salvors that some of the crew of the *Syrian* were so alarmed for their safety at the time the steamer was on the Zebra Flats, that they made preparation for effecting their escape by lowering a boat, and that this boat, just when the *United Kingdom* arrived, was capsized, those in her having previously got back to their ship. It was also alleged that the *Syrian's* steering apparatus was out of order, and that her engines were defective in action. Great labour and exertion were attendant on the performance of the services of the tugs, and damage arose to the tugs in rendering such services, from the destruction of their hawsers and other gear. The pilot of the *Syrian* was examined on behalf of the *United Kingdom* to show the extent of the services rendered by that vessel; and the damage alleged to have been sustained by the tug in giving assistance was admitted on the part of the steamer, and the representations of the tug's crew were in this respect taken as true. The value of the property saved was 120,000*l*. On the part of the owners of the *Syrian*, it was admitted that a salvage service of great merit had been rendered, and for which the salvors should be liberally remunerated; but it was contended that many of the facts alleged by the tugs as to the extent of the services rendered by them were greatly exaggerated. All that had to be considered was the fair result of the evidence of the pilot, the extent of the danger actually incurred, and the extent of the services actually rendered by each of the tugs employed; and these considerations would enable the court to arrive at something like an equitable conclusion as to the quantum of salvage to be given for the whole

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service, and the proportion in which the amount awarded should be divided amongst the different claimants. The court had to consider also the state of the weather at the time when the service was rendered, the condition of the steamer in respect to her steering powers, and whether the locality where the transaction took place was peculiarly dangerous or not. The danger of the steamer beating to pieces on the Zebra Flats, the probability of the statement that she was in still greater danger when on the Burbo Bank, the quarter from which the wind blew, and the services then undoubtedly rendered by all the tugs, must also be well weighed. It was urged that the service of the *Relief* tug, when the steamer was in danger of getting on the Taylor Bank, were very prominent, and they certainly seemed to have been very prompt and energetic. As to the period of time which the salvage services occupied, the court had often had occasion to observe that the shorter the period occupied in rescuing a ship from distress the more meritorious was the service. In dealing with the present case, the court also bears in mind that there is a large amount of property saved; but for the single purpose of remembering that it is enabled out of an ample fund fitly to remunerate meritorious services well performed; and the court does not hold the large value of the property saved as a ground for attempting to extort from the owners of that property or from the underwriters, as the case may be, more than full recompense for such services. In this case there are sufficient ingredients to show that a considerable amount of salvage ought to be given. And, looking at the danger with which the property was threatened, and the risk to life that might have occurred to those on board the steamer, the Court, under the advice and concurring with the opinion of the learned assessors, awards to the *United Kingdom*, 8000*l.*; to the *Resolute*, 2800*l.*; to the *Hercules*, 2500*l.*; and to the *Relief*, 2000*l.*, besides damages and costs.

Tuesday, April 17, 1866.

(Before the Right Hon. Dr. LUSHINGTON.)

THE ESTHER v. THE CONCORDIA.

Admiralty regulations as to rules of the road—Construction of — “Steamships meeting end on” — Collision.

13th regulation: If two ships meeting under steam are crossing so as to involve risk of collision, the helm of both shall be put to port, so that each may pass on the port side of the other.

14th regulation: If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of the way of the other.

19th regulation: In obeying and construing the above rules due regard is to be had to all the dangers of navigation, and to any special circumstances which may exist in each particular case rendering a departure from such rules necessary in order to avoid immediate danger.

Deane, Q. C. and E. C. Clarkson appeared for the *Esther*.

Milward, Q. C. and V. Lushington for the *Concordia*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the owners of the French screw steamship *Esther*, 261 tons register, with a general cargo from London to Rouen and Paris, in charge of a duly licensed pilot, against the General Steam Navigation Company's paddle steamship *Concordia*, 326 tons register, from Bou-

logne to London with passengers and cargo, to recover for the loss resulting from a collision between them off St. Katherine's wharf, in the river Thames, between twelve and one p.m. on the 16th Nov. last. The *Esther* represented the wind as easterly, and the weather as fine and clear; the *Concordia* stated the former as westerly, very light, and the latter as fine, but hazy. The case for the *Esther* was, that the tide being nearly high water, and of the force of about one knot per hour, she was under steam proceeding down the river nearly in mid-channel, and at the rate of about three knots an hour, when the paddle-wheel steamer *Concordia* was seen coming up the river under steam, nearly a-head of, and at a distance of about one-third of a mile from the *Esther*; that the helm of the *Esther* was ported, and afterwards put hard a-port, but that those on board the *Concordia* did not port the helm of the *Concordia* as they ought to have done, but, on the contrary, improperly starboarded the same, and although the engines of the *Esther* were stopped and reversed, the *Concordia*, without having duly stopped and reversed her engines, came into collision with the *Esther*, the starboard fore sponson of the *Concordia* taking the stern of the *Esther*, and thereby great damage was occasioned to the *Esther*. It was then alleged that the collision was occasioned by the improper conduct of those on board the *Concordia*, in neglecting to keep a good look-out and port their helm, and improperly starboarding it, and in neglecting to duly stop and reverse their engines, and by improper navigation. The defence on the part of the *Concordia* was, that she was being navigated very carefully and slowly up the river to the south of mid-channel, making two knots, and frequently stopping on account of the craft in the river. Just shortly before the screw steamer *Esther* was observed, the helm of the *Concordia* was put hard a-starboard to avoid a barge; that the *Esther* was then noticed coming down the river, about a quarter of a mile distant, on the *Concordia*'s starboard bow; that if the *Esther* had kept her course there would have been no risk of a collision, but the *Esther* would have passed well clear on the starboard hand of the *Concordia*; that the *Concordia*'s helm was accordingly kept hard a-starboard, but as she had very little way through the water her head did not pay off considerably; that the *Esther*, however, improperly, and without any reason, put her helm hard a-port, and came towards the *Concordia*, whereupon the *Concordia* stopped, and reversed her engines, but that the *Esther*, notwithstanding she was hailed, drove stem on with great violence into the starboard fore sponson of the *Concordia*; that the collision was wholly occasioned by the improper navigation of the *Esther*, and by the negligence of those on board her, and was not occasioned by those on board the *Concordia*. The evidence is more unsatisfactory and more difficult, if not impossible to be reconciled. I see no reason to impute to any of the witnesses on either side an intention to deceive the court. I believe they are all entitled to the benefit of intentional veracity, though they differ so much among themselves, and are contradicted by others. You will not forget, in considering this case, the usual state of the river, and the circumstances occurring at the time requiring great care, and no doubt being matter of difficulty as proved by the evidence; and you will regard all the occurrences that happened at the moment in question. The true question raised is, whether or not the *Concordia* was not bound to have ported her helm, and whether the *Esther* was not to blame for having improperly ported her helm so as to produce this collision. The first point upon the law that arises is, whether these two steamships were meeting end on, or merely end on so as to involve risk of collision, in the words of the 13th article of the

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ing Rules and Regulations; because, if they meeting, then the directions are, that the of both ought to be put to port, so that each on the port side of the other, and it is clear be helm of one was not put to port. There are ions to this rule, which are contained in the rticle, which states that "due regard must be any special circumstances which may exist particular case, rendering a departure from e necessary"—mark the next words—"in avoid immediate danger." The next point here there existed any special circumstances a departure from the 18th article. What e danger there was on the present occasion ed to the fact alleged, that there was a the way, and, if the *Concordia* had star- she would have run over it, and probably ed destruction of life as well as property. ne difficulty upon this point, for I am trace through the evidence what became arge. If the case was that the *Concordia* had e barge and got ahead of it, then of course d be no immediate danger. If it were put eather there was any immediate danger of nto contact with that particular barge, I y there is not evidence to satisfy my mind ct. The evidence of Mr. James, the har- ster of London, was, that there was quite a e barges round, so that neither could the ntinue her course straight down the river ection she was going, nor could the *Con- ove* because of the vessels round her. ing the vessels round the *Concordia* there is h evidence, except that there was ample e of there being vessels to the south. As to d from where the *Esther* was down to where cordia was when she starboarded, the other o is directly opposed to that of Mr. James. s abundant evidence to the effect that that e way was clear, and that not only might her have pursued her course, but that the dia might also have gone on. It appears to ty well agreed that the distance between the and the *Concordia* when the *Esther* was first ved from the *Concordia* was about a quarter of , and the question is whether she had then ured her helm. Though it is a matter I to you which is exceedingly in doubt, yet, as ehend, it was after she had starboarded that r the *Esther*. If the *Esther* was aware at the hat the *Concordia* was merely dead in the and utterly unable to help herself, and if she pable, and had the power of seeing and ng what the *Concordia* was doing, and the a she was in, then, notwithstanding the rule , and though the vessels might be end on, yet d not be justified in porting and running in e *Concordia*. The *Concordia* represents that she t moving at all, or not perceptibly moving, ght to have been treated almost as a vessel at . Supposing these two ships were crossing o involve risk of collision within the meaning words of the 14th article, and the ship which other on her own starboard side should keep the way, what would then be the state of e? The real is, question whether or not there ficient evidence to establish that there was e of immediate danger so as to justify the ia in departing from the regulation which es that two vessels approaching each other end on shall port when there is a risk of . It was stated for the *Concordia* that there rges in the way which prevented her from ing with the statute. I am of opinion that s not sufficient evidence to establish im- danger so as to justify a violation of the rule; er deliberation by the elder brethren of the -house, they have confirmed my opinion, and

I must therefore pronounce against the *Concordia*.

The Court was assisted by Capt. Pigott and Capt. Webb, of the Trinity-house.

Tuesday, July 4, 1866.

(Before the Right Hon. Dr. LUSHINGTON.)

THE *UNA* v. THE *THOMAS LEA*.

Steamers and sailing ships—Collision—Admiralty regulations—Construction of the 15th, 18th, and 19th articles.

Regulation 15:—If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship should keep out of the way of the sailing ship.

Regulation 18: Where, by the above rule, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article, viz.:

Regulation 19: In obeying and construing the above rules due regard must be had to all the dangers of navigation, and due regard must also be had to any special circumstances that may exist in any particular case rendering a departure from such rules necessary in order to avoid immediate danger.

Case of the "sailing ship" (a) in default.

Denne, Q. C. and Vernon Lushington appeared for the *Una*.

The Queen's Advocate and E. C. Clarkson for the *Thomas Lea*.

Dr. LUSHINGTON gave judgment in this case, which came before the court on an action brought by the owners of the late brig *Una*, 246 tons, from London, in ballast for the Tyne, against the screw steamship *Thomas Lea*, 486 tons, from Newcastle, coal laden, for London, to recover for a total loss resulting from a collision between them in S.W. reach of the Swin; about a mile from the Middle Light, at a quarter past five p.m. on the 21st of last December. The wind was stated by both parties as being N.W. by N. For the brig, the weather was represented as fine and clear but dark, with a moderate breeze; and for the steamer, as dark and rather hazy, blowing a strong breeze. The case for the *Una* was, that the ebb tide was just commencing, and she was proceeding at the rate of about five knots, heading N.E. by N., close-hauled on the port tack, and carried her coloured lights fixed and screened as required by law, burning bright and clear, when the red and white lights of the steamer were observed by those on board her below the Middle Light vessel and about a point on her starboard bow, and distant about two miles; that she kept her course without any alteration, and the steamer, with her red and white lights alone visible, got clear on to the weather bow of the brig, which still kept her course until the hull of the steamer became visible, and she appeared to be passing so close as to be dangerous, whereupon the helm of the *Una* was ported a little, but that the steamship suddenly starboarded her helm, and ran at full speed across the hawse of the brig, the stem and starboard bow of which came violently in contact with the starboard side of the steamship abaft her midships, whereby everything forward on the brig was carried away. The *Thomas Lea*, on whose part a cross-action was brought, pleaded that the tide was about

(a) For a case of a "steamship" being in default under these regulations, see "Maritime Law Cases, vol. 2, part 6, p. 289.

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high water, and she was steering S.S.W., making seven to eight knots under steam alone, exhibiting the Admiralty regulation light, when the green lights of two vessels, one of which was rather astern of the other, were seen on her starboard bow, and at the distance of about one mile, and directly afterwards the bright light of a vessel riding with her head to the northward was seen ahead, and thereupon her helm was starboarded to pass clear of the vessel riding; that the foremost of the two vessels carrying the green lights kept on her course to pass the steamship on her starboard side, but the sternmost of them (which proved to be the *Una*), instead of keeping also on her course, altered her course under a port helm, and notwithstanding that the helm of the *Thomas Lea* was put hard a-starboard, the *Una* ran into and struck the *Thomas Lea* on the starboard side, about twelve feet before the poop, and stove in her side, and did her so much damage that her cargo ran out of her hold, and she had to be run aground on the Maplin Sand to prevent her from foundering. By the rules established by the authority of Parliament in that case, the duty imposed upon the steamer was to give way, and to keep out of the way of the sailing vessel, and the sailing vessel was directed to keep her course. That being so, the first inquiry was, whether the *Thomas Lea* did all in her power to keep out of the way of the sailing vessel, whether the measures she took for that purpose were the right measures or not, and whether the collision was brought about by the violation by the sailing vessel of the 18th of the rules, whereby she was directed to keep her course, unless she was compelled, with a view to avoid immediate danger, to adopt a different mode of proceeding. The burden of proof first lies upon the *Thomas Lea*. She was bound to show she took all the proper measures in order to avoid the collision; but if it should appear that she did not take the proper measures to avoid the collision, and that also the sailing vessel was to blame for altering her course, it signified not whether she ported or starboarded, but that she altered her course, and thereby contributed to the collision. The result would be simply that both the parties would be to blame. With regard to the steamer the statement from the evidence of the second mate was very justly relied on by the Queen's Advocate, and from this it would appear that the steamer came round the Middle Light under a starboard helm, and that as soon almost as she came round the Middle Light, notice was given by the look-out man that there were two green lights two or three points on the starboard bow, and it was admitted on all hands, and had not been questioned in any way whatever, that the sternmost of those green lights was the *Una's*. The questions to be determined are: first, what, if anything, ought to have been done on board the steamer; and it is not an unimportant question to understand at what distance they were at the time. The evidence was not very clear as to that distance, but it was probably a cable or cable and a half. Before anything was done with regard to the *Una*, a report was made that there was a bright light right ahead, upon which an order was given by the master to starboard the helm, and the helm was subsequently starboarded, and the consequence was she passed by the bright light, leaving it upon her starboard hand. It appeared, therefore—for there did not appear to have been any alteration made in the course of the steamer at the time—that she would be from originally two to three points, having the *Una* upon her starboard bow, and she would then be from four and a half to five points. Under these circumstances, so far as can be gathered from the evidence, the steamer proceeded straight on, keeping her course until she approached the *Una*. Then arose the question as to whether the steamer did

everything in her power to avoid the collision whether the statement she gave of the collision the *Una* was consistent with truth or not was also another consideration, viz., according to the *Una's* own statement of it she was or was not to blame. If the *Una* was fairly ported, and thus contributed to the collision then for that she was to blame. If she was under pressure of expectation of necessity that did not contribute to the collision, then slightly porting would not affect the result. After giving the most careful consideration to the evidence adduced on both sides, the Court of Admiralty is of opinion that the *Una* was solely to blame for the collision that had occurred, and there was no decree to that effect in both actions.

The Court was assisted by Captain Dr. Close, of the Trinity-house.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., Barrister-at-Law.

Saturday, Aug. 4, 1866.

(Present—The Right Hon. Lord CHELMSFORD, Lord BRUCE and TURNER, L. J., Sir COLERIDGE, and Sir E. V. WILLIAMS.)

THE HELENE.

OHRLOFF v. BRISCALL.

Ship—Charter-party—Leakage—Negligence in stowing of oil—Action by assignee of bill of lading.

B. shipped forty-seven casks of oil from Legh, Liverpool, the bill of lading having on the margin the words "not accountable for leakage." The oil was stowed in the same hold with rags and wool, which formed part of the cargo that was taken on board at the desire of the charterers, and nearly half of the oil leaked during the voyage, owing to the heat on board the ship. Neither shippers nor shipowners were liable for the risk of stowing oil with wool. The oil was frequently on board during the loading, and there was no fault or complaint as to the mode of stowing.

Held (reversing the decree of the Court of Admiralty), that, first, the fact that the shipowners were not liable for the risk of stowing the two materials in the same hold was no evidence of negligence on the part of the shipowners. Secondly, even if they had known such risk, the fact of the shipowner not putting up bulkheads (which must have been expensive) was no evidence of negligence. Thirdly, the word "leakage" in the bill of lading was not confined to "ordinary leakage," but included leakage without any limit. Fourthly, the memorandum of lading protected the shipowner as to leakage except that caused by negligence, and there was no negligence shown, there was no action.

Quere, whether, if a plea of leave and licence is pleaded against the shippers, such plea would be allowable against the indorsees of this bill of lading.

This was an appeal from a decree of the Court of Admiralty.

Messrs. Briscall and Co., of Liverpool, and assignees of the bills of lading of certain goods carried into the port of Liverpool in the *Helene*, of which Ohrluff and others, of Liverpool, were owners, brought an action against the shipowners under the 6th section of the Admiralty Court Act 1861.

The *Helene* was a Prussian ship, and at the time of the institution of the suit no owner of the ship was domiciled in England.

On the 6th July 1864 she was lying in the

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ghorn, and her master entered into a charter with Lloyd and Co., who were merchants and owners of oil at Leghorn. Under that charter Lloyd and Co. from time to time loaded on the ship various goods, and on the 10th Aug. shipped on board thereof forty-seven casks of oil, for which the master of the ship signed a bill of lading in the usual form, and on which was this memorandum—"Weights, measurements, and contents unknown, and not accountable for leakage."

The bill of lading was indorsed in blank by the owners, and assigned to the resps.; and at the time of the institution of the cause the resps. were alleged to be owners of the said olive oil and assignees of the bill of lading.

Messrs. Thomas Lloyd and Co., under the charterparty, appointed one Tito Mirandolie as head stevedore, to superintend the stowage of the ship, and accordingly superintended such stowage; and Lloyd and Co., or persons acting on their behalf, were continually on board the ship, and saw how the cargo of the ship and the oil were stowed, and no complaint of, or objection to, the manner in which the same were stowed was at any time made by the master or mate, or any of the crew of the ship.

After the casks of oil and the cargo of the said ship had been loaded and stowed, the said Tito Mirandolie, at the office of Lloyd and Co., and with their knowledge and assent, gave the master of the ship a certificate certified by the British consul at Leghorn.

The cargo of the ship was received on board, and stowed as it was presented for shipment by the said Messrs. Thomas Lloyd and Co.; and, amongst other goods, 111 bales of wool, and thirty-four bales of rags, were so received and stowed, and the master of the ship was necessarily obliged to stow the wool and rags in the same hold with and near the oil.

The ship sailed from Leghorn on or about the 28th Aug.; and in the course of the voyage she on several occasions met with and experienced gales of wind, bad weather, and heavy seas, and in consequence pitched and laboured excessively, and quantities of oil were pumped up.

She arrived at Liverpool on or about the 19th Oct. 1864; and on delivering her cargo it was found that a large quantity of the oil had leaked out, and that many of the casks were wholly or partially empty. And the resps. alleged that there was a loss of 2001½ gallons of oil out of 4888½, or thereabouts.

On behalf of the resps. it was alleged that this leakage was not leakage within the meaning of the bill of lading, but that it arose in consequence of the said bales of wool and rags being stowed in the same hold with and near the oil; and that the wool and rags, in the course of the voyage, having become soaked, the staves of the casks were thereby dried up, and the casks rendered leaky.

The stowage of the cargo of the ship was admitted by the resps. to have been in all other respects good.

On the part of the apps. it was contended that the leakage had been occasioned by the slackness and badness of the casks, and had not been occasioned, as alleged, by the resps.; and even if it had been so occasioned, they were not responsible, inasmuch as the said Thomas Lloyd and Co. could not have complained of such stowage, and the resps. were in no better position.

No evidence was given by the resps. as to the state of the casks when shipped at Leghorn, or as to the quantity of oil in them.

The said certificate of the said Tito Mirandolie was tendered in evidence in the court below, but, being objected to on behalf of the resps., the learned judge rejected it.

Evidence was tendered by the resps., objected to by the apps., and received by the learned judge, as to the price at which the empty casks, in which the oil had been contained, were sold.

The following were the material parts of the judgment of

Dr. LUSHINGTON.—The plts., Messrs. Briscall, oil merchants at Liverpool, in June 1864, purchased there a quantity of oil of the agent of Messrs. Lloyd and Co., of Leghorn, a firm largely engaged in the oil trade. In July following Messrs. Lloyd chartered the Prussian barque the *Helene* to proceed to Liverpool, and they shipped on board her the oil purchased by the plts. In October the vessel reached Liverpool. The oil shipped to be delivered to the plts. was 4888 gallons. The whole quantity actually delivered was less than that quantity by 2000 gallons. The plts. were the assignees of the bill of lading, and also the proprietors of the oil. For the deficiency they bring this action against the ship, in effect against the owners. The first question which arises is, What was the cause of this deficiency? And that question being decided so far as the materials before the court enable it, the next question is, Assuming that the court is right in its opinion as to the facts, whether upon such a given state of facts the plts. are entitled to recover? As to the facts, it is a case of conflicting evidence, and therefore, as I apprehend, it behoves the court to consider at every step on whom the *onus probandi* rests. The bill of lading is in the ordinary form. It states that the oil was shipped in good condition, that the master is to deliver it in the same good order and condition, save the dangers of the seas; and also that he (the master) is not accountable for leakage. If the master does not so deliver the oil, I apprehend that it lies upon him to allege and prove a legal excuse. He must prove the facts to exonerate him from his obligation to deliver, more especially if such facts, generally speaking, can be proved from the ship only. It is proved in this case, and there is no contradictory evidence, that ordinary leakage does not exceed one per cent. The leakage in this case is therefore extraordinary leakage, and must be accounted for by some extraordinary cause. The plts. allege that the oil was improperly stowed, and particularly that large quantities of rags and wool were stowed in the same hold, near the oil, whereby the damage was occasioned wholly or in part. The defts. allege that the leakage arose from the slackness of the casks, their defective state increasing by bad weather, and they aver that the cargo was well stowed. It is not denied that independently of the mixing rags and wool with the oil casks, the cargo was well stowed. The two principal questions of fact then for consideration are, first, the condition of the casks; and second, the effect of stowing wool and rags in contiguity with, or in the immediate neighbourhood of, the casks of oil. If the casks were defective, it is not and cannot be contended that any loss arising from that cause should fall upon the shipowners; it is the fault of those who shipped the oil. Now it is to be observed that according to the bill of lading the oil was shipped in good order and condition. So far, therefore, as was apparent, the casks must, I think, be assumed to have been in that state. The shipowner, however, cannot be responsible for secret defects, nor can he in his own defence be stopped from proving them. The non-discovery of secret defects cannot be negligence, nor can it be a part of the contract of the shipowner to protect the shipper from the consequences of his own defective merchandise. I incline to think that the *onus probandi* upon this point of the condition of the casks is first upon the shipowner, who asserts the affirmative that the casks were defective. The court has, I regret to say, to deal

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with very conflicting evidence, and that, too, as to simple facts between witnesses of respectability, and some of great experience. The true issue, however, it must be observed, is not whether the casks in question were the best possible casks, but whether they were of the usual and ordinary kind, of ordinary material, strength, and goodness. How this is to be ascertained is, I feel, a question of some difficulty. It is left in some doubt whether mere inspection of the casks would lead to a satisfactory conclusion, or whether nothing short of chipping the casks would enable an experienced person to form a judgment. There is no evidence as to the condition of the casks at Leghorn, except the assertion in the bill of lading; the evidence is all as to their condition on their arrival at Liverpool, which I will now proceed to state. [After stating the details of the evidence the learned Judge continued:] I think the result of the evidence is properly expressed by one of the witnesses, when he said that the storing wool with oil is risky. Then how does the case stand? It is clear that there was great leakage, and that it was not occasioned by the weather. Two causes only for the leakage are suggested—the state of the casks and the effect of the wool. I am of opinion that the casks were not so defective as to occasion the whole of the extraordinary leakage. Then the only remaining possible cause is the effect of the wool upon the oil; and though some of the evidence denies that the wool was the cause in this particular case, all agree that wool might heat and occasion oil casks to leak. Under these circumstances I am compelled, by what I must term the exhaustive method of reasoning, to conclude that the stowage of the wool in the hold with the oil was the cause of this leakage. It is possible that in some degree this leakage may have been occasioned by the defective state of one, two, or more casks; but it is wholly impossible for me in this judgment to pursue inquiry as to the particular casks. Assuming, then, that the loss was occasioned by reason of improper stowage, by want of sufficient separation of the oil and wool by bulkheads, or otherwise by want of ventilation, the question arises, Have the plts. a right of action against the ship in this court? This is denied on the part of the defts. Their argument, if I understand it aright, is as follows: By the 1st section of 18 & 19 Vict. c. 111, the plts., as indorsees of the bill of lading, to whom the property in the goods has passed by reason of the indorsement, have had transferred to and vested in them all rights of suit and liabilities in respect of such goods as if the contract contained in the bill of lading had been made with themselves. Then by the 6th section of the Admiralty Court Act 1861, practically the plts. acquire the same rights against the vessel itself; consequently, the plts. have no better right than Messrs. Lloyd and Co., who shipped the oil. Then it is argued that Messrs. Lloyd and Co. would have had no right; and, therefore, that the plts. have none. The ground on which it is contended that the shippers, Messrs. Lloyd and Co., would have had no rights is, that they, and not the master, were responsible for the defective stowage; for it is said Messrs. Lloyd and Co. were the charterers; by the terms of the charter they furnished the whole cargo, that is, not only the oil sold to the plts., but the rags and wool also; and by the charterer also, the cargo was to be taken alongside, and from alongside the ship by the merchants at their own risk and expense, and to be received and stowed by the master as it might be presented for shipment. But though this was so, and although the shipping of oil with wool is, as I think it is proved by the evidence, a hazardous measure; yet if the master of the vessel will take them both together, I apprehend he is bound to take extraordinary precautions to prevent mis-

chief, and cannot protect himself by showing that both kinds of goods were sent on board by the same person; for an authority by the shipper or charterers to stow the goods clearly does not amount to an authority to stow them in a careless or negligent manner; for which I cite *Hutchinson v. Guion*, 5 C. B., N. S., 149-162. Again, it is said that the whole cargo was, in accordance with the charter, stowed by a head stevedore appointed by the charterers, and therefore that the master could not be liable for bad stowage. But, on reference to the charter, it appears that the terms were, "the charterers being allowed to appoint a head stevedore at the expense and under the inspection and responsibility of the master for proper stowage." These words appear to me to answer the objection, and remove the case out of the authority of *Blake v. Stenbridge*, 6 C. B. 804, where similar words were not contained in the charter-party, and where the court held the true construction of the charter-party to be, that the cargo was to be brought alongside at the risk and expense of the charterer, and that it was to be shipped and stowed by his stevedore, and consequently at his risk, though at the expense of the shipowner, and subject to the control of the master, on behalf of the shipowner, to protect his interest. There seems, therefore, no reason for saying that Messrs. Lloyd and Co. would have been estopped from suing the master for damages on account of improper stowage. But even if they would have been estopped, why should it follow that the plts. would be estopped also? The shippers and the assignees of the bill of lading do not stand to each other as agent and principal, but as vendor and purchaser. The rights and the liabilities which the assignee of the bill of lading under the 1st section of 18 & 19 Vict. c. 111, has transferred to him, are the same rights and liabilities in respect of such goods as if the contract contained in the bill of lading had been made with him; but in them cannot be included the rights and liabilities as between the shipper and the master *dehors* of that contract in respect of other goods, or of the charter party. If so, the bill of lading would always incorporate the charter-party, which it never does unless expressly stated: (*Chapple v. Comfort*, 10 C. B., N. S., 802.) I think the rights of the plts. as assignees of the bill of lading could not be curtailed by any liability of the charterers towards the master, not being a liability imposed upon the plts. under the bill of lading. The objection, therefore, to the plts' right of action, I think, fails on every ground; and there must be judgment for the plts. with costs, and a reference to the registrar.

The plts. now appealed to Her Majesty in Council.

E. James, Q. C. and R. G. Williams for the apps.—The bill of lading, having the memorandum upon it, "weight, measurement, and contents unknown," evidence ought to have been given by the resps. as to the state and contents of the casks when shipped, and no such evidence was given. The loss in question, being *prima facie* a loss by leakage, for which, by the bill of lading, the apps. were not responsible, it lay upon the resps. to show affirmatively that such loss was occasioned by the negligence of the apps. or their servants, and not upon the apps. to negative any such negligence, or to show affirmatively how the loss had been occasioned. The evidence on the part of the resps. was wholly insufficient to establish such negligence, and at all events was rebutted by the evidence on the part of the apps., and the judgment was against the weight of evidence. The only negligence alleged by the resps. being the stowing of wool and rags in the same ship with oil, evidence ought to have been given by

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the resps. to show that such stowage was negligent and improper, whereas it appeared that such stowage had been approved of and sanctioned by oil merchants of long standing at Leghorn, and that a cargo such as that carried on board the said ship was a usual cargo, and did not contain a larger proportion of wool or rags than usual. There was no evidence that the master, or mate, or any of the crew of the said ship knew that there was any risk in stowing oil and bales of wool and rags together, or that there were any usual or reasonable precautions which they might have taken to prevent the loss in question, and which they did not take. There was no sufficient evidence that the wool and rags had become heated in the course of the voyage, and in fact it appeared that upon the hatches being opened upon the arrival of the ship at Liverpool, there were none of the usual signs of heating. Moreover, the master and mate were not cross-examined on behalf of the resps. upon this point. It appeared that the leakage in question was occasioned by the slackness or badness of the casks in which the oil was contained, and was increased or partly occasioned by the bad weather which the ship encountered. The cargo was stowed by and under the superintendence of a stevedore appointed by the said Thomas Lloyd and Co., and the apps. are not responsible for any loss occasioned by such stowage. Messrs. Lloyd and Co. having approved of and assented to the manner in which the oil and cargo were stowed, could not recover for any loss thereby occasioned, and the resps. were in no better position. Messrs. Lloyd having, as they were entitled to do under the charter-party, required, and caused, and occasioned the shipment and stowage of oil, and wool, and rags together, they could not recover for any loss thereby occasioned, and the resps. were in no better position. Lloyd and Co. were the agents of the resps. for the shipment of the oil, and the apps. were bound by their acts. The stowage complained of was no breach of the contract contained in the bill of lading:

Hutchinson v. Guion, 5 C. B., N. S., 149;

Blake v. Stembridge, 6 C. B. 894;

Chapple v. Comfort, 10 C. B., N. S., 802;

Phillips v. Clark, 2 C. B., N. S., 156.

Brett, Q. C. and Lushington for the resps.

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LORD CHELMSFORD.—This is an appeal from a judgment of the High Court of Admiralty in an action brought by the resps., under the provisions of the Admiralty Act 1861, as owners and assignees of the bill of lading of forty-seven casks of oil, against the *Helene*, of which the apps. were owners, and in which the oil had been carried from Leghorn to Liverpool. When the ship arrived there many of the casks were partially empty, and this action was brought to recover damages for this leakage of the oil, as having been occasioned by negligence and breach of contract, and breach of duty on the part of the apps. The great question in the action was one of fact, viz., what was the cause of the leakage which was the subject of complaint? The learned judge of the Court of Admiralty decided this question, after a most complete and able examination of the evidence, and we see no reason to find fault with his decision. The evidence, in his opinion, established that the leakage was caused, not by the perils of the sea, not by the defective quality of the casks, but by their being stowed in the same hold with some rags and wool which formed part of the cargo that was taken on board at the desire of the charterers. Assuming that this was the cause of the leakage, the apps., the shipowners, deny that they are responsible for it, because by the memorandum in the margin of the bill of lading, the ship-

owners are not to be accountable for "leakage." On the argument different views were suggested by counsel as to the meaning of this word "leakage." For the resps. it was contended that the word means only ordinary leakage (which, according to the evidence, amounts to 1 per cent.), and does not extend to extraordinary leakage, such as that in question, amounting to an alleged deficiency of 2000 gallons. On the part of the apps. it was denied that, according to the natural and ordinary meaning of the words employed, the amount of leakage was at all limited in quantity; but it was conceded that, in accordance with the case of *Phillips v. Clark*, 2 C. B., N. S., 156, the words in the margin did not protect the shipowners from responsibility for leakage occasioned by their own negligence. It was, however, contended, on behalf of the apps., that the plts. must, in order to entitle themselves to the action, give satisfactory proof of such negligence, and that they had failed to do so; and after a careful consideration of the case, we have come to the conclusion that this case is well founded. Notwithstanding the evidence of the notoriety at Liverpool of the deleterious consequences of the collocation of oil in casks with rags and wool, or other matters tending to generate heat, we do not believe that either the shippers or the shipowners in this case were aware of them. If the shippers knew of them, they also knew that the wool and rags which they made a part of the cargo must necessarily be stowed, and were, in fact, stowed, in the single hold of the ship; and with this knowledge we think it impossible that they should have abstained from mentioning the inevitable leakage in the then condition of the ship, and from requesting some means to be applied to prevent it, such as dividing the hold by bulkheads. Nor do we think the shipowners were in a better state of knowledge on the subject. Had they been so, it is inconceivable, as it seems to us, that they should have received a cargo so composed without some remonstrance with the shipper for selecting such mischievous companions to form part of the cargo with the oil. If the shipowners were ignorant of the consequences of taking such a cargo, we do not think it amounted to culpable negligence on their part to stow, in the only place they could be stowed, the goods which, under the charter-party, the charterers had a right to insist, and did insist, should form a part of the cargo. On this question it is, in our opinion, very material to consider not only that the charterers so insisted, but also that the cargo was according to the terms of the charter-party received on board, and stowed as it was presented for shipment by them, and that they were shown to be very frequently on board as the stowage progressed, and were well acquainted with the mode of stowage (which was effected in a masterly way), and never made any complaint of or objection to it. Nor do we think the ignorance of the shipowners in itself amounted to negligence. It can hardly be imputed as misconduct that the shipowners should be ignorant of latent mischief of this nature, when Lloyd and Co., who are proved to have had very great experience as oil merchants, were in the same state of ignorance. But even if the apps. knew, or ought to have known, what the consequences of such stowage must be, we are not prepared to say that they were guilty of negligence in not putting up bulkheads. Assuming that they could have been so constructed as to protect the part of the hold where the oil was stowed from the influence of the heat generated by the wool and rags, still this could not have been done without much trouble and considerable expense, which we cannot concede that the shippers had a right to throw on the shipowners because the shippers chose to load the ship they had chartered with a cargo of such a nature. And to this we may add that, even supposing the ship-

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owners to have been aware of the usual consequences of stowing such a cargo in the same hold, they might have well come to the conclusion that the shippers were also aware of them, and would not have put such a cargo on board unless they had been assured that the casks were of such extraordinary strength and goodness as to be capable of resisting the usual influence of a heated temperature. For these reasons we think the resps. failed to prove that the leakage was caused by the apps.' negligence. It may be observed that the learned judge of the Admiralty Court appears to have adopted the construction of the word "leakage" contended for by the resps., viz., that it means "ordinary leakage" only, and consequently the judgment adverts but little, if at all, to the question whether negligence on the part of the shipowners had been proved. But we do not think such a construction allowable. The condition that the shipowners are not to be accountable for leakage does not, in its ordinary and grammatical sense, put any limit to the quantity of leakage; and on principle, therefore, we do not think it would be justifiable to add any such limit to its terms. Nor are we aware of any authority for doing so. It follows that, in our judgment, the memorandum protects the shipowner as to all leakage except that caused by negligence, and therefore, if no negligence is shown, there is no cause of action. Another point was raised and argued before us, viz., that the conduct of the shippers as to the stowage was such that it would support a plea of leave and licence by the shippers, if the action had been brought by them. But it was contended on behalf of the resps. that, by reason of the Bills of Lading Act, 18 & 19 Vict. c. 3, such a plea was not allowable in an action by the indorsees of the bill of lading. It is unnecessary, however, to decide this point, as our opinion is against the resps. on the question of negligence. On these grounds their Lordships will humbly advise Her Majesty that the judgment of the Court of Admiralty should be reversed, with costs, both in the court below and on this appeal.

Decree reversed with costs.

Solicitors for the apps., *Deacon, Son, and Rogers.*

Solicitors for the resps., *Chester and Urquhart.*

Saturday, Aug. 4, 1866.

(Present—The Right Hon. Lord CHELMSFORD, KNIGHT BRUCE and TURNER, L.JJ., Sir J. T. COLERIDGE, and Sir E. V. WILLIAMS.)

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Sale—Stoppage in transitu—Bill of lading—Indorsement—Fraudulent possession—Lien.

M. shipped goods which he had sold to S., and sent a bill of lading (which was indorsed to order and assigns) to his agent A., who indorsed the same to S., taking the acceptance of S. in consideration thereof, and also getting back the bill of lading from S. to hold as security till the vessel arrived. S. next got back by fraud the bill of lading from A., and then indorsed the same to P. for value, after which M. claimed to stop the goods in transitu:

Held (reversing the judgment of the Court of Admiralty), that, as S. had transferred the bill of lading for value to an innocent purchaser, the right of M. to stop the goods was gone, and it made no difference that S. had got back the bill of lading from M.'s agents by fraud.

This was an appeal from an interlocutory decree of the High Court of Admiralty of England, in a cause instituted on behalf of the apps., Pease, Hoare, and Pease, of Hull, the assignees and owners of a bill of lading of the cargo laden on board the

vessel *Marie Joseph*, against the said vessel, her tackle, apparel, and furniture, and against Jean Marie Gloahéc, the master and owner of the said vessel *Marie Joseph* intervening, which decree pronounced against the damage proceeded for, dismissed the said Jean Marie Gloahéc and his bail from the said suit, and condemned Messrs. Pease in costs.

On the 11th Feb. 1864 Messrs. Maxwell and Dreossi, of Bordeaux, having sold to Messrs. Scarborough and Tadman, of Kingston-upon-Hull, six tons of linseed cake, shipped same at Bordeaux for conveyance to Hull, on board the *Marie Joseph* and Jean Marie Gloahéc, the master and owner of the said vessel, by bill of lading made on the same day, promised to deliver the same at Hull under order or assigns, he or they paying freight.

Messrs. Maxwell and Dreossi indorsed the said bill of lading to Messrs. Scarborough and Tadman, who subsequently indorsed the said bill of lading to the apps., to whom (as alleged by the said apps.) the property in the said cargo passed.

On the 5th April 1864 the *Marie Joseph*, with the said sixty tons of linseed cake on board, arrived at the port of Hull, and the apps. (as alleged by them) gave the resp. notice that they were entitled to have the said linseed cake delivered to them, and demanded the delivery thereof, which was refused by the said Jean Marie Gloahéc, though the apps. offered to pay the freight, &c.

The resp. admitted his refusal to deliver the cargo to the pils., and justified such refusal by reason of the following facts:—

In the month of Feb. 1864 Walter Stericker, of Kingston-upon-Hull, as agent for the said Messrs. Maxwell and Dreossi, agreed with Messrs. Scarborough and Tadman for the sale to them of six tons of linseed cake, they paying for the same by their acceptance at three months' date. The said linseed cake was accordingly shipped, as before stated, and the bill of lading indorsed by Maxwell and Dreossi to Scarborough and Tadman. Subsequently Scarborough and Tadman deposited the bill of lading with Walter Stericker, and agreed with him that he should hold the same as security for the payment of their said acceptance until they had sold the said linseed cake, or the ship should have arrived. On or about the 18th Feb. 1864, Mr. Tadman, one of the firm of Scarborough and Tadman, by falsely and fraudulently (as alleged by the apps.) representing to Walter Stericker that they had sold the linseed cake to a Mr. Croysdale, and that he should draw a bill on him for the price, and should therefore be enabled to pay for the said linseed cake to meet their acceptance for the price, obtained possession of the said bill of lading from Walter Stericker. Thereupon Scarborough and Tadman handed over the said bill of lading to the apps., who were the bankers of the said Scarborough and Tadman, as security for the balance due to them to the apps. When Scarborough and Tadman obtained possession of the bill of lading for the same to the apps., Scarborough and Tadman became insolvent, which fact was well known to the apps. On the 7th March 1864 Scarborough and Tadman stopped payment.

The *Marie Joseph*, with her cargo, arrived at the port of Hull on the 5th April 1864, and Walter Stericker, as the agent of Maxwell and Dreossi, lawfully claimed and received the said linseed cake at which time the same had not come into possession of, nor been lawfully claimed by, the apps.

The reply of the apps., among other things, denied that, when they received the bill of lading from Scarborough and Tadman, or that Scarborough and Tadman stopped payment, they had any knowledge of the transaction.

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man and Stericker in respect

announced against the claim of a ground that the bill of lading having been obtained back from him by false representations, it was out Stericker's consent or the terms of the cake, and contrary to the agreement between Scarborough and the fraudulent conduct of Tadman; indorsement of the bill of Pease & Co., though they were unaware of it: (see 12 L. T. Rep. N. S.

Clarkson, for the apps., comment was wrong. The bill of lading was by Maxwell and Dreossi, was obtained with the intention of transferring the linseed cake to Scarborough, delivered to Scarborough by the bill of lading was subsequently shown to Stericker, yet Stericker, back to Tadman, was acting conferred upon him by Maxwell and intended to part with all of himself and Maxwell and bill of lading and linseed cake. The bill of lading had been handed back by him, no further consent either Maxwell and Dreossi was to enable Scarborough and to state the said bill of lading. *in fide* holders of the bill of consideration without notice of Scarborough and Tadman, and that had taken place between Stericker, and Tadman and Maxwell and Dreossi had not as a right to stop the linseed cake Scarborough and Tadman did lading as owners of the said vessel then have held it as agents for Maxwell and Dreossi, became the cake under 5 & 6 Vict. c. 39, s. 1: 5 T. R. 683; 5 M. & S. 351; 6 Beav. 376; B. & Ald. 817; 2 Ex. 691; 3 E. & B. 633; 11 Ex. 577; B. & Cr. 42.

Cur. adv. vult.

Cur. adv. vult.

d.—This is an appeal from a decision of the High Court of Admiralty made on behalf of the apps., the terms of a bill of lading of certain goods on board a vessel called the *Marie Joseph* and against the resp., that the vessel, pronouncing against the resp., dismissing the resp. from the apps. in costs. The question is the right of the shipowner to stop the same *in transitu* under the circumstances:—In Feb. 1864 Maxwell and Dreossi, of Bordeaux, through Stericker, sold to Messrs. Scarborough, of Hull, sixty tons of linseed cake, payable by bill at three months of the bill of lading. On the 14th the goods were shipped on board the *Marie Joseph* by Maxwell and Dreossi, for the same was signed by the Maxwell and Dreossi indorsed order and assigns, and drew a

bill of exchange for the price on Messrs. Scarborough and Tadman, and sent the bill of lading and bill of exchange to their agent, Stericker. On the 16th Feb. Stericker took the bill of lading and the bill of exchange to Scarborough and Tadman, when the bill was accepted by Scarborough, and Stericker thereupon indorsed the bill of lading, and delivered it to Scarborough, together with a policy of insurance which had been effected upon the goods. A conversation then ensued between Stericker and Scarborough respecting the dealings of Scarborough and Tadman with a person named Moore, whose circumstances were supposed to be embarrassed, and Stericker asked Scarborough whether he had any objection to his holding the bill of lading. Scarborough told Stericker to take it, and delivered back the bill of lading to Stericker, who thereupon signed the following memorandum: "Hull, 16th Feb. 1864. Memorandum that I have received of Messrs. Scarborough and Tadman, of Hull, a bill of lading and policy of insurance for about sixty tons linseed cake, shipped *Marie Joseph*, dated at Bordeaux 11th Feb. 1864, and which I hold as security against their acceptance of Messrs. Maxwell and Dreossi's draft for 427l. 1s. 7d., due 14th May 1864, until the cakes are sold or vessel arrives.—Walter Stericker." On the 18th Feb. Tadman, the other partner in the firm of Scarborough and Tadman, called upon Stericker and stated to him that his firm had sold the linseed cake to a Mr. Croysdale, who would accept a draft against the bill of lading. The linseed cake had not been sold to Croysdale, nor to any other person. Trusting to this misrepresentation, Stericker returned the bill of lading and the policy of insurance to Tadman. On the same day, after thus obtaining the bill of lading, in consequence of a message received from the apps., Messrs. Pease and Co., bankers in Hull, to whom Scarborough and Tadman were largely indebted, Tadman went to the bank, and Mr. Pease called his attention to the state of his account and to the amount of bills under discount, and asked him for security. Tadman thereupon indorsed the bill of lading in the name of his firm, and delivered it, together with the policy of insurance, to Mr. Pease, and gave Messrs. Pease and Co. an unsigned memorandum authorising them to sell the linseed cake and to place the proceeds to the credit of Scarborough and Tadman on account. Moore, in whose transactions Scarborough and Tadman were supposed to be involved, became bankrupt on the 4th March, and on the 7th March Scarborough and Tadman stopped payment. On the 5th March a telegram was sent from Maxwell and Dreossi to Stericker directing him to stop the delivery of the linseed cake, and on the 7th March he received from Maxwell and Dreossi a bill of lading indorsed to himself. The *Marie Joseph* arrived at Hull on the 5th April. The linseed cake was demanded on behalf of the apps. upon the bill of lading indorsed to them, but Stericker afterwards went on board and presented his bill of lading and obtained possession of the goods under an indemnity from Maxwell and Dreossi to the resp. Upon these facts the learned judge of the Court of Admiralty was of opinion that the bill of lading having been obtained from Stericker by the false representations and fraud of Tadman, and having been afterwards negotiated without the consent of Stericker or of his principals, and contrary to the understanding between Stericker and Tadman, the fraudulent conduct of Tadman invalidated the indorsement to Pease and Co., and he accordingly pronounced against them. The question is one of nicety and difficulty, and, as was stated by the counsel in argument, no direct authority is to be found by which it can be decided. Principles, however, may be extracted from previous decisions, which will serve as guides to its right

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determination. A bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of an unpaid vendor to stop them *in transitu*. The indorsee may deprive the vendor of this right by indorsing the bill of lading for valuable consideration, although the goods are not paid for, or bills have been given for the price of them which are certain to be dishonoured, provided the indorsee for value has acted *bonâ fide*, and without notice. Although a bill of lading is a negotiable instrument, it is so only as a symbol of the goods named in it, and as was said by Lord Campbell in *Gurney v. Behrend*, 3 E. & B. 634: "Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority, and if it be stolen from him or transferred without his authority a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods." This dictum is very carefully confined in its terms to the original transfer of a bill of lading deliverable to the assigns of the shipper. In the cases which it supposes there could be no lawful assigns of the shipper, and consequently the bill of lading could have no existence as a negotiable instrument. But in the present case the shippers of the goods having obtained a bill of lading indorsed it to order and assigns, and forwarded it to Stericker for the express purpose of its being indorsed by him, and handed over to Scarborough and Tadman. By the indorsement and delivery to Scarborough and Tadman they acquired the complete property in the goods and control over the bill of lading, subject only to the right of Maxwell and Dreossi to stop *in transitu* as long as it remained in their hands. This is not denied by the resp., but his case is that Scarborough and Tadman having, after the indorsement and delivery of the bill of lading, returned it to Stericker to retain as a security for the payment of the bill of exchange accepted for the price of the goods, and having afterwards obtained it from him by a misrepresentation, they had no power to pass a title in it to Pease and Co., at least without being subject to the lien created by the deposit with Stericker, and consequently that the right to stop *in transitu* against Pease and Co., though *bonâ fide* indorsees for valuable consideration, still subsisted. There can be no doubt that although the vendors had parted with the property in the bill of lading by the indorsement to Scarborough and Tadman, they acquired a title to hold it by the terms of the agreement under which it was deposited with Stericker. These terms do not include any stipulation that the vendees should not so deal with the bill of lading as would in the event of their insolvency defeat the right to stop *in transitu*. It is not even stipulated that the vendors should hold the bill of lading till the sub-vendees should give them a bill of exchange or other security for payment. The bill of lading was not made subject to any new condition or limitation, but was merely deposited with the vendors till the arrival of the ship or the sale of the goods. Scarborough and Tadman had power to sell, not by reason of any authority arising out of the agreement, but by virtue of their ownership in the goods. The power to sell of course included a power to pledge. The vendors by keeping the bill of lading in their hands might have prevented Scarborough and Tadman from dealing with it. They chose to deliver it back to them, induced to do so indeed by the fraudulent representation of Tadman, but still consenting to their possession of it. The indorsees acquired no new title from the vendors by the fraud which Tadman practised, but merely

obtained their own property and the means of effectually disposing of it. The vendors had not, strictly speaking, a lien, which means a right to retain property against the will of the owner of it, and which is lost when the possession is parted with. They had, by the agreement of the indorsees and owners, a right to hold the bill of lading as a security. As in the case of lien so in this case, as long as the bill of lading remained with the parties who had fraudulently obtained it, the vendors who had been cheated out of the possession might have reclaimed and recovered it. But the moment it passed into the hands of Pease and Co., to whom it was pledged and indorsed for valuable consideration without notice, the right of the vendors to follow it was taken away. This is a much stronger case than that put by Abbott, C. J. in *Dyer v. Pearson*, 3 B. & Cr. 42, of the real owner of goods who suffers another to have possession of his property and of those documents which are the evidence of property, being bound by a sale which he has thus enabled the other person to make; for here the person entitled to retain the possession of the instrument which represented the goods against the real owners, relinquished the possession of it to them, and enabled them to deal with the property in their true character of owners. In the case of *Kingsford v. Merry*, 11 Ex. 577, it was held that, "When a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction, and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor." Although this case was reversed in the Ex. Ch. (1 Hurlst. & Nor. 503), yet it was upon a ground which did not affect the rule of law above laid down, but made it inapplicable, because in the judgment of the court the relation of vendor and vendee did not exist between the owner of the goods and the fraudulent possessor. Here the possession was not only united to the previous ownership, with the consent (however obtained) of the person temporarily entitled to it, but transferred for the express purpose of giving to the owner absolute dominion over his own property. An ownership which was at the time perfect at law though voidable as to part, viz., the possession, cannot in principle be treated differently from an ownership voidable as to the whole, but in the interim protected by the interposition of a *bonâ fide* purchaser for valuable consideration. For these reasons their Lordships will humbly recommend to Her Majesty that the decree appealed from be reversed, with costs.

Decree reversed with costs.

Solicitors for the app., *Clarkson, Son, and Cooper.*

Solicitor for the resps., *J. C. Dalton.*

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COURT OF QUEEN'S BENCH.

d by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,
Barristers-at-Law.

May 7 and June 13, 1866.

HIBBS v. ROSS.

Case—Ship—Registered owner—Liability of
for negligence of ship-keeper.

Production of a ship's registry, whereby a party is
to be owner, is evidence from which, when und,
a jury may properly draw the inference that
he employed the person actually in charge of

was the registered owner of a ship lying in a
the care of a ship-keeper. The plt. in crossing
(as he lawfully might), in order to get to his
el, fell down an unsecured hatchway and was

Upon an action brought for the injury against
registered owner, the jury found that the injury was
y the negligence of the ship-keeper. The only
in support of the deft.'s liability consisted in
f of his being the registered owner of the ship :

Blackburn and Lush, J.J. (Mellor, J. dis-
) that this was evidence, whilst uncontradicted
lained, upon which the jury were justified in
hat the ship-keeper was employed by the deft.

was tried before Mellor, J. at the London
ter Trinity Term 1865, when a verdict was
for the plt., leave being reserved to the
ove to enter a nonsuit.

Declaration alleged that the deft. was pos-
vessel called the the *Jarnia*, lying in the
ck, and that the plt., being the master of
hip lying alongside, was entitled to pass
cross the deck of the *Jarnia* to get to his
and that the deft. improperly removed the
rom one of the hatchways, and allowed
remain off after dark, whereby the plt.,
asion to cross over, fell down the hatch-
was injured. To this the deft. pleaded
not guilty.

ence upon the trial supported the decla-
l the register of the ship was produced,
appeared that the deft. was the registered
his was the only evidence to establish his

med judge was of opinion that this evi-
not sufficient for the purpose, but he
ss left the fact of negligence to the jury,
hether or not there was contributory

y returned a verdict for the plt., stating
jury was caused by the negligence of the
r, and that there was no contributory

enter a nonsuit having been obtained,

per and Kenealy showed cause.

C. in support of the rule.

gments of the learned judges are so
it it is unnecessary to give the arguments

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—BLACKBURN, J.—In this case, tried
brother Mellor, it appeared that the
lawfully passing over a ship then
ck, under the charge of a ship-keeper, in
each his own vessel which lay on the
de. In so doing he fell through an un-
chway, and sustained considerable injury.
evidence, proper to be left to the jury,
cident was occasioned by the negligence
iving charge of the ship, over which it

was known that the plt. might pass, in not
keeping it reasonably safe; and the evidence was
such as to make it a question for the jury whether
the plt. had or had not himself contributed to
the accident by the want of reasonable care on his
part; but the only evidence to connect the deft.
with those having charge of the ship was the
production of the ship's register, by which it ap-
peared that the deft. was the registered owner
of the ship in question. It was objected that
there was no evidence to fix the deft., and my
brother Mellor was of that opinion; but in order to
avoid the expense of a new trial, he reserved leave
to enter a nonsuit, and left to the jury the question
whether there was negligence in the ship-keeper
occasioning the accident, and whether the plt.
could by due care have avoided the consequences of
that negligence. Both of these questions the jury
found in favour of the plt. No question was
left to the jury as to whether they thought
that in fact the deft. was the employer of the
ship-keeper, nor was my brother Mellor asked to
leave that question to the jury. A rule nisi was
obtained to enter a nonsuit on the ground that
there was no evidence to fix the deft., which
was argued before my brothers Mellor and Lush
and myself. I have come to the conclusion that the
registry was evidence which would have justified
the jury in finding that in fact the deft.
employed the ship-keeper, if that question had been
left to them, and consequently, that the rule to
enter a nonsuit should be discharged; but under
the circumstances, I think the deft. ought to
be permitted, if he desires it, to have a new trial,
costs to abide the event, in order to have the ques-
tion of fact more distinctly raised and determined.
I do not think that any liability attaches to the
def't. merely as owner of the ship. The ques-
tion I think is, whether he employed the ship-
keeper as his servant. In all cases in which the
owners of a ship are sought to be made liable,
either in contract for necessities supplied on the
order of the captain, or in cases of collision for
the negligence of the crew, or as in the present case,
for the negligence of the ship-keeper, I think that
the question really is, whether the persons sought
to be charged were the employers of the captain
who made the contract, or the masters of the per-
sons who were guilty of the negligence, and that
the liability does not depend on the title to the ship.
In cases of contract a further question sometimes
arises, as to whether the shipowner may not have
clothed the master with apparent authority, so as
to be precluded from disputing his authority, but
in cases of tort the question can only be, whether
he in fact employed those actually guilty of negli-
gence. But whilst agreeing that the ownership of
the ship does not render the owners liable, either
in contract or in tort, for the acts of the master
and crew, or other persons in charge of the vessel,
unless the owners are the employers of those per-
sons, I think that the ownership is a very important
piece of evidence, tending to show that the persons
who are proved to be owners of the ship are, in fact,
employers of those who have the custody of the
ship. Ships are most commonly in the possession
of their owners: and those who have the actual
custody of the ship are most commonly in the em-
ployment of the owners, and consequently proof of
ownership is evidence tending to prove that the
persons proved to be the owners of the ship are
employers of those having the actual custody of the
ship, and the register being evidence to the title of
the ship is, I think, evidence that the registered
owners are in possession, and employ those having
the actual custody. It is by no means conclusive.
The ship may be demised (though that is very
rarely the case) and the persons navigating her may

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be employed by the lessee, or by a person who has purchased her, but not yet paid the price, and consequently not had the ship conveyed to him, as was the case in *Frost v. Oliver*, 2 E. & B. 301; 22 L. J. 353, Q. B.; or, as is the most common case, they may be employed by one who is in fact a mortgagor in possession, though the mortgagee is registered as absolute owner. And when the ship is like the one now in question, not being navigated, but laid up in dock, there is the additional possibility that the ship-keeper may be the servant of the dock company, or the ship's broker, or any one else with whom the owners may have made an arrangement to keep his ship for him as a bailee of the ship. But those are all exceptional cases, and the facts lie so entirely in the knowledge of the deft., and may so easily be proved by him, that I think a jury would be fully warranted in acting on the *prima facie* inference that the persons having the actual custody of the ship are employed by the owners, unless some evidence to the contrary is given. The case in this respect in principle somewhat resembles those in which it has been held that evidence of possession of demised premises is sufficient proof that the person in possession is assignee of the lease, in the absence of any evidence of facts tending to show that he is in possession as sub-lessee, or otherwise (*Doe v. Williams*, 6 B. & C. 41); or the cases that establish that, though dealing with the goods of the deceased is quite consistent with the person who does so being agent for a lawful executor, or claiming the goods as his own, yet in the absence of anything to explain it, the fact is sufficient to charge the deft. as executor; "for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof;" (2 Bl. Com. 507.) If, instead of considering the case on principle merely, we look to the cases decided as to ships, I find none in which it has been held that the title to a ship is not some evidence that the owners were the employers of the person who acts as captain; and several which as it seems to me are authorities for saying that it is sufficient *prima facie* evidence that they are his employers. At one time it was a common idea that even if it was proved that the owners did not employ the captain, yet that the ownership of the ship conclusively made them liable to those who supplied necessities on the order of the captain. That, it is now established, was a mistake; the persons liable are those who really were the captain's principals when he made the contract, or who have precluded themselves from denying that they were so; but in all the cases on the subject there was evidence that the persons who were on the register as owners were not, in fact, employers of the captain. In *Abbott on Shipping* (5th edit. p. 18) Lord Tenterden states his view of the law thus: "The title to a ship may furnish evidence that repairs are made, or stores furnished under the authority and upon the credit of the legal owner, as, in fact, they generally are, but it does no more; and therefore, if it appear that they were made or furnished under the authority and upon the credit of another, the legal owner will not be answerable." In *Jennings v. Griffiths*, Ry. & M. 42, Lord Tenterden left the case to the jury, using expressions which (though not quite bearing out the statement in the marginal note) seem to me, when taken in conjunction with this passage, to show that, in Lord Tenterden's opinion, the title of the ship was evidence that the owners employed the captain, and so gave him authority to order necessities for them, though this evidence might be rebutted. This must be because he is in the control of their ship, and they can explain how that is if he is not their captain. The same principle applies where the person in control is not the captain, but one

acting as ship's husband. That was the case in *Fletcher v. Reid*, R. & M. 202, and *Cox v. Reid*, R. & M. 199. In *Fletcher v. Reid* the plts. rested their case on an admission that necessary repairs to the extent of 540l. were done by them to the ship *Asia*, and the bill rendered to one Bulmer, and that defts. during the time when the repairs were done were registered owners; Lord Gifford, after objection, decided that this was sufficient to call on the defts. for an answer; the defts. failed in proving, what it subsequently appeared was the fact, that they were only mortgagees, Bulmer being, in fact, not their agent, but a mortgagor, and the plts. obtained a verdict. In *Cox v. Reid* (a similar action against the same defts.) they were provided with evidence that the transfer to them was only intended to be a mortgage, though the then Registry Act made it operate in law as an absolute transfer; Best, C.J. told the jury that the owner of a ship is *prima facie* liable for repairs, but it was for them to say whether that presumption was not met by the facts of the case, and the defts. obtained a verdict. These were but *Nisi Prius* decisions, but no attempt was made to disturb either verdict. The whole law on this subject was discussed in the two cases of *Frost v. Oliver*, 2 E. & B. 301; 22 L. J. 353, Q. B.; *Mitchison v. Oliver*, 5 E. & B. 419; 25 L. J. 39, Q. B., and as these are the latest cases on the subject, and the latter was the decision of a court of error, it is important to see what really was decided in them. In *Frost v. Oliver* the question arose on a rule to set aside the verdict obtained by the plt. for misdirection in leaving the case to the jury at all, on the ground that there was no evidence on which the verdict could be supported, the Court having refused a rule as against the weight of evidence. The evidence, as the court then took it to be, is reported by Lord Campbell in the beginning of his judgment. The evidence on the trial of *Mitchison v. Oliver* came before the Court of Ex. Ch. on a bill of exceptions, and is set out in the beginning of the report of *Mitchison v. Oliver*, and was not quite so favourable to the plt. as that stated in *Frost v. Oliver*, though in substance not different. Lord Campbell based his judgment mainly on the ground that the facts were such that Oliver was precluded from denying that Thompson was his captain, even if the jury believed that, in fact, Thompson was not his captain; the decision of the Court of Error was, that in this he was wrong. Wightman, J., after stating that "the legal title to a ship will furnish *prima facie* evidence that repairs are made under the authority and for the benefit of the legal owner, but if it appear that they were made under the authority and for the benefit of another, the legal owner will not be answerable," proceeds to state, as the basis of his judgment, that there was in this case evidence of a holding out by the deft. of himself as the beneficial owner, and "to have held Thompson out to the world as his captain." The Court of Error decided that in *Mitchison v. Oliver* there was no evidence of any such holding forth as his captain, but they did not impugn the earlier part of his judgment. Crompton, J. did not base his judgment on this erroneous ground. He states the question to be whether there was "evidence of any authority on the part of the master to pledge the credit of the deft. by giving the general orders for the supply of the rigging in question." He says: "It does not follow from the ownership or interest in the ship not determining the question of liability, that it is not a material circumstance in ascertaining the question of credit and contract;" and he proceeds in a very able and instructive judgment to show that they did make a *prima facie* case, though liable to be rebutted, and then asks, "How is the *prima facie* case to be

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attested? Surely by proof of all the circumstances which the contract is proved to have been made by and the credit given to another, and not to the plaintiff owner, and all the facts on the one side and other as to such contract and credit must be for the jury." He pretty plainly insinuates that in his opinion the verdict was against the weight of evidence, but that there was evidence for the jury to, in fact, Thompson was acting by the plaintiff's authority. This judgment was certainly not overruled in the Court of Error, and is, in my opinion, correct in point of law. Erle, J., who differed from a majority of the court, does not question that there was *prima facie* evidence of authority, but states, as the basis of his judgment, "I take it to be a general principle that, if direct evidence of the matter to be proved (here of the making of the contract, and of the giving of authority for that purpose) is adduced and believed, the circumstantial evidence from which the matter to be proved might be inferred in the absence of direct evidence then becomes immaterial and irrelevant." This the Court of Error decided to be correct, and I think the only difference between Erle, J. and Thompson, J. was, that the latter thought the rule could not be made absolute in its then shape, because he questioned whether the rebutting evidence was believed could not be withdrawn from the jury, though, if the rule had been granted on the ground that the verdict was against the weight of evidence, he should have thought that there ought to be a new trial, because they did not believe it. In *Mitchison v. Oliver* the Court of Error had to decide on the exceptions taken to the summing up of Lord Campbell, as appearing on the bill of exceptions. One of those was that there was no evidence to go to the jury. As to this, Parke, B., in delivering the judgment of the court, says: "Lord Campbell desires the jury to consider whether, upon the evidence upon both sides, they were of opinion that the defendant had authorised the goods and work to be applied and done on his credit, and the goods and work had been supplied and done on his credit. Thinking that as a detached part of the summing up affected by what went before, that is unexceptionable, for, no doubt, if the jury disbelieved the facts the case that made for the defendant, and drew the *prima facie* inference from the ownership and other facts, there was evidence on which they might find that Thompson was in fact master for the defendant, and it being so, we cannot agree with the exceptions that there was no evidence to go to the jury." I do not think that I am entitled to rely upon this as a decision of the Court of Error, that the ownership alone would be evidence from which, whilst explained, the jury might draw a *prima facie* inference that the persons actually in the possession of the ship were employed by the owner, for the Court of Error may have proceeded on the other facts set out in the bill of exceptions, though, on examining the statement of the evidence in the bill of exceptions, I find very little more than that the plaintiff was owner, and was, as such, in possession of the ship before the orders were given and the work was completed; but I think I am entitled to rely upon the authority of Crompton, J., and the cases he refers to as not impeached or shaken by the decision of the Court of Error. I therefore think that the plaintiff was evidence from which, when unexplained, the jury might properly draw the inference that the plaintiff employed the person actually in charge of the ship; but that it was only evidence quite capable of being explained or rebutted, and therefore the defendant may, if he so elects within a fortnight, have a new trial, costs to abide the event; otherwise I think the rule should be discharged, and brother Lush desires me to say that he agrees with this judgment. The rule will therefore, in conformity with the opinion of the majority, be discharged, unless the defendant elects, as mentioned, in which case the rule will be moulded accordingly.

formity with the opinion of the majority, be discharged, unless the defendant elects, as mentioned, in which case the rule will be moulded accordingly.

MELLOR, J.—In this case the defendant is sought to be made responsible for an accident which happened to the plaintiff in lawfully crossing a ship called the *Jarnia*, lying in the Surrey dock, to get from another ship called the *Moulsie*, lying alongside, to the quay. It must be taken for granted, upon the finding of the jury, that the accident was occasioned by the negligence of the ship-keeper of the *Jarnia*, which ship was then, and had been for some time, laid up in the dock for the winter. The only evidence to fix the defendant with liability was the proof of the register in which he was described as owner. There being no other evidence, I was of opinion that the registry of ownership without more was insufficient for that purpose, but I left questions as to the fact of negligence and of contributory negligence to the jury, who found their verdict for the plaintiff, and assessed the damages at 450*l.*, and I thereupon reserved leave for the defendant to move to enter a nonsuit, in case the court should be of opinion that there was not sufficient evidence for me to leave to the jury to entitle them to find for the plaintiff. A rule to set aside that verdict, and to enter a nonsuit pursuant to leave reserved, was obtained by Mr. Brett, and the question now arises whether the mere proof that the defendant was the registered owner of the ship is *prima facie* sufficient to fix him with liability for the negligence of the ship-keeper. I retained the opinion which I formed at the trial, viz., that such evidence alone was not enough to submit to the jury to support the allegation in the declaration that "the defendant negligently removed the hatches," whereby the accident complained of happened. In order to make the defendant liable, it was incumbent on the plaintiff, upon whom the burden of proof rested, to show affirmatively that the ship-keeper was the defendant's servant. This depends upon the ordinary principles of law applicable to the case of master and servant, and is not embarrassed by considerations arising out of the peculiar relation which the captain of a ship in general bears to the owner, and upon which the liability of the owner of a ship for repairs done to it, or for necessities supplied to it by the captain's orders, may depend. Even in that case it would appear to be incumbent upon the plaintiff, who seeks to render an owner liable, to show affirmatively that the master who gave the orders was the master appointed by or sanctioned by the owner, as to make him, in the particular case, "his master" (*Mitchison v. Oliver*, 5 E. & B. 419); as was said by Erle, J., in *Frost v. Oliver*, 2 E. & B. 319: "The doctrine that the legal ownership of the ship is proof that the master has authority to contract for such owner has been repeatedly negatived." That it is a material circumstance as a step to proof is undoubted, and coupled with evidence that the repairs were done for the benefit of the ship, or the stores were supplied for its use, may in general be a sufficient *prima facie* case to call for evidence, by way of explanation or answer; but I apprehend that the present case differs materially from that. Here the registry is the only evidence, and I cannot conceive that the simple fact of ownership raises a presumption that the man in charge of the ship was the servant of the owner, or appointed by him. And unless there is a presumption of fact arising out of the mere ownership of the ship to that effect, the rule to enter a nonsuit ought to be made absolute. The ship was not in the course of navigation, and there was absolutely nothing to show that the owner ever came near to the ship, or knew that it was in the dock. Whether the ship was in the possession of

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the owner, or of a mortgagee, or of the dock authorities, or of a broker, or of any other person, did not appear. In the case of *Mitchison v. Oliver*, 5 E. & B. 445-6, Parke, B., in delivering the judgment of the Court of Ex. Ch., says, in remarking upon a passage of Lord Campbell's summing up, in which he had put it to the jury, whether, upon the evidence on both sides they were of opinion that the deft. had authorised the goods and work to be supplied and done on his credit, &c., proceeds as follows: "No doubt, if the jury disbelieved the parts of the case that made for the deft., and drew the *prima facie* inference from the ownership and other facts, there was evidence on which they might find that Thompson was, in fact, master for the deft." It appears to be clear, I think, that Parke, B. did not consider that the mere fact of ownership, without "the other facts," would have afforded even *prima facie* evidence that Thompson was the deft.'s master. The action was for ordinary repairs done to the ship, and for goods supplied to it upon the orders of the registered master; and there were other circumstances tending to raise an inference as to the liability of the deft.; but it never appears to have been contended by the counsel, or suggested by any of the judges, that the registry alone would have been sufficient proof that the captain was the captain of the owner, so as to bind him. However this may be in the case of repairs done to a ship or stores supplied to it for the apparent benefit of the owner, the same reason does not apply to the present case. I think it would be unduly shifting the burden of proof to call for an answer to the mere fact of ownership; and I cannot see why any presumption should be made which would dispense with the necessity of further proof. Possession may be presumptive evidence of title, but the converse does not necessarily hold, viz., that title is presumptive evidence of possession. It is obvious that in the case of things which are constantly the subject of demise, charter, mortgage, or the like, the presumption that the actual possession is in the owner cannot but be weak, and is not to be classed with those strong presumptions which shift the burden of proof from a plt. to a deft. There exists an exception to the general rule that a party who alleges a matter must prove it in cases in which the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties. In this case there is no peculiar knowledge on the part of the deft. within the meaning of that maxim. In one sense, in almost every case, the deft. has peculiar knowledge affecting his relation to the act complained of, but that is not the knowledge referred to. Here the ship-keeper could have proved by whom he was appointed, and so have laid a good foundation for the plt.'s case, if appointed by him. Why should the burden of proof shift in such a state of things in order to compel a deft. to disprove that which it was incumbent upon the plt. to prove, and I am not aware of any case in which such evidence has been held sufficient, and I think that all experience at *Nisi Prius* is against it. For these reasons, I am of opinion that this rule should be made absolute, but as a majority of the court is of a different opinion, the rule will of course be discharged.

The deft. elected to take a rule for a new trial.

Attorneys for the plt., *Wood and Willicombe.*

Attorneys for the deft., *Marshall, Westall, and Roberts.*

COURT OF COMMON PLEAS.

Reported by W. MAYD and W. GRAHAM, Esqrs.
Barristers-at-Law.

Jan. 29 and 30 and May 8, 1866.

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Marine insurance company—Construction of p

A vessel was chartered from the China Islands United Kingdom, loaded a cargo of guano, former place, and proceeded on her voyage, going round Cape Horn was so damaged that she put in at Rio, where she was abandoned. The however, was transhipped into another vessel at home; the chartered freight exceeded the expense transhipment, and the freight from Rio was by the assured.

The present action was brought on a policy of ance to recover the expenses of transhipment as warding, and the question was, whether the in the policy was applicable to the circumstance contention being, that the charges came under th of particular charges, and not of particular an

The following were the terms of the warranty: from particular average, from jettison, and and ship be stranded, sunk, or burnt:—

Held, first, that the expenses incurred were with clause; secondly, that the occasion upon which were incurred was such as to be within it; and t that the application of the suing and labouring was not excluded by the warranty against par average.

This was a rule calling on the plt. to show why the verdict found for him at the trial: not be set aside and entered for the deft. The of the case are sufficiently set out in the judgment

Edward James, Q. C. and Honyman showed c

Mellish, Q. C. and Cohen appeared in support of the rule.

The following cases were cited in the construction of the argument:

Mount v. Harrison, 4 Bing. 388;
Stuart v. Steele, 5 Sco. N. R. 927;
Farmouth v. Hyde, 34 L. J. 207, C. P.; 12 Rep. N. S. 231;
Great Indian Peninsular Railway v. Sandham, & Sm. 41; in Ex. Ch. 2 Best & Sm. 266;
Shipton v. Thornton, 9 A. & E. 814;
Philpott v. Swan, 16 C. B., N. S., 772; 5 L. T. N. S. 183;
Vlierboom v. Chapman, 13 M. & W. 230;
Taylor on Evidence, ss. 1059-1063;
Clayton v. Gregson 5 A. & E. 302;
Benson v. Chapman, 2 H. of L. 696;
Michael v. Gillespie, 26 L. J. 306, C. P.;
Emerigon, translated by Meredith, ch. 17; o work, sect. 7, p. 690;
MacLachlan's Arnould on Insurance, p. 789;
Parson's Maritime Insurance, 338;
De Quadra v. Swan, 16 C. B. 772.

WILLES J. now delivered the judgment of the court.—This was an action on a policy of insurance for 2000l. from South America to the United Kingdom. The vessel procured a charter from the China Islands to the United Kingdom, for cargo of guano there, and on going round Cape Horn suffered damage so serious that she had to put in at Rio, where she was abandoned, and it must be for the purpose of this case, was totally lost cargo, however, was transhipped into another vessel and sent home, and the chartered freight, amount equivalent to the chartered freight, being to the construction to be put on the

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exceeded the expenses of transhipment, and the freight from Rio to Liverpool was received by the assured. The action was brought by the assured to recover the expenses of transhipment and forwarding. At the trial evidence was given to show that the warranty in the policy on which the question turned was not considered applicable to the circumstances. The warranty was free from particular average, from jettison, and unless the ship be stranded, sunk or burnt, neither of which happened. The evidence given was for the purpose of showing that the charges of transhipping and forwarding had been considered what was called technically particular charges, not as particular average so as to be within the warranty. The verdict passed for the plt. affirming the existence of the usage at the time when the policy was made, subject to leave reserved to the defts. to move to enter a verdict, which they accordingly did, and that rule was discussed last term before the Lord Chief Justice, my brothers Keating, Smith, and myself, when we took time to consider. At the sittings after term we discharged the rule, not stating our reasons, but promising to state them during this term, and that promise I am now about to fulfil. Many points were made upon the argument of this rule, upon one of which it is only necessary to pronounce an opinion. That turned upon the construction of the suing and labouring clause in the policy, and it may be considered under the following heads: First, whether the expenses incurred were of a character to be within the clause; secondly, whether the occasion upon which they were incurred was such as to be within it; thirdly, whether, if such, the application of the clause excluded by the warranty against particular average. As to the first question it was hardly disputed that the expenses incurred were of a character to be within the clause; without incurring them the subject-matter of the insurance could never have had any complete existence. They were incurred in order to earn it, and they presented so much labour beyond and besides the ordinary labour of the voyage rendered necessary for the salvation of the subject-matter of insurance by reason of a damage and loss within the scope of the policy, the immediate effect of which was that the subject-matter insured would also be lost, or rather would never come into existence, unless such labour was bestowed. As the goods lay at Rio no part of the chartered freight had accrued due and no freight even *pro rata itineris* could have been claimed by the shipowner. His only right in respect of chartered freight was to detain the goods for a reasonable time in order to send them on in another vessel to their destination, and then claim an amount equal to that of the chartered freight. In order to do so, labour must be used and expense incurred. It can make no difference whatever whether the shipowner happens to have at the port of distress a vessel of his own which he can employ in this service—in that case the labour of forwarding would be strictly that of himself or his servants—or whether he forwarded in the vessel of another upon payment for his labour and that of his servants; nor can it make any difference in the application of the clause whether, as here, the goods are in a port of large resort, where, by reason of the rate of freight, a forwarding vessel is easily procured, or whether the vessel becomes a wreck in an out-of-the-way place and by unusual enterprise and skill the master is enabled to communicate with a vessel either of his owner or of some other person, by which he forwards the cargo to its destination. The amount of labour is different in degree in the two cases, but in each it is a consequence of a peril insured against, it is incurred in preventing the destruction of the subject-matter, for which, in the event of its loss, the underwriters must be answer-

able. There is, in each case, a loss or misfortune threatening the safety of the subject-matter of the insurance, and by the operation of which, unless averted by labour, that subject-matter will be imperilled, and the underwriters may become liable. As to the second head, whether the occasion upon which the expenses were incurred was such as to be within the suing and labouring clause, this depends upon the true answer to the question so thoroughly discussed in the course of the argument, namely, whether the clause ought to be limited in construction to a case where the assured abandons, or may perchance abandon, so that the expense incurred is not only in respect of a subject-matter in which the underwriters are interested, but upon property which, by the abandonment, actually becomes or may become theirs; or whether it extends to every case in which the subject of insurance is exposed to loss or damage, for the consequences of which the underwriters would be answerable, in warding off which labour is expended. In the former construction the clause is inapplicable to the present case; in the latter it is applicable, and the assured is entitled to contribution. The question manifestly depends upon the construction of the language of the clause; and, quite apart from the proved usages, we think the latter is the true construction. The words of the ordinary suing and labouring clause (to which in this policy is superadded an express provision as to abandonment, upon which we need only say, in passing, that it does not alter the question in favour of the underwriters) are used in the same form as must have been in common use before 1783, when Emerigon published his great work on insurance, in which, amongst the various forms of the clause used at different periods, that of the London Policy then used is given (2 Emerigon, by Boulay Paty, 239); the words are quite general, and ought to be so construed, unless some good reason is given for restraining them, that in case of any loss or misfortune it shall be lawful to sue labour, and travel in and about the defence, safeguard, and recovery of the subject-matter, without prejudice to the insurance—not abandonment, as in the French Ordonnance hereinafter cited—the charges whereof the said company will bear in proportion to the sum hereby insured (not the amount saved, as in the French Ordonnance). Up to this point there is not a word about abandonment; and this is the whole of the usual clause. The meaning is obvious, that if an occasion should arise in which, by reason of a peril insured against, unusual labour or expense is rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwriters will contribute, not as part of the sum insured in case of loss or damage, because it may be that loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part as persons who have avoided detriment by the result in proportion to what they would have had to pay if such detriment had come to a head for want of timely care. Take for instance the case of a policy on goods warranted free of average under 5 per cent. wetted in a storm which drives the ship into a port of distress, where, by drying at an expense less than 5 per cent., the goods might be saved or damaged under 5 per cent., whilst if not dried they would decay and become damaged over 5 per cent. they existing in specie, so that freight would be payable, in this case there is no abandonment and may be no prospect of one, and yet it is manifestly the duty of the master to use all reasonable means to preserve the goods, and obviously for the interest of the underwriters to encourage him in the performance of that duty by contributing to the expense incurred. Not only the generality of the words, but also the subject-matter

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to which they relate here, points to the application of the clause to all cases in which the underwriter is saved from liability to loss, whether partial or total, and whether an abandonment does or may possibly take place or not. There remains to be considered, thirdly, whether the application of the suing or labouring clause is excluded in this particular case by the warranty against particular average, "warranted free from particular average, also from jettison, unless the ship be stranded, sunk, or burnt," and this depends upon whether the expression particular average in the context, and construed according to the golden rule by what goes before and follows in the policy, includes expenses which fall within the suing and labouring clause, so that in fact that suing and labouring clause is expunged by the warranty. This is a question the answer to which involves important consequences, because, if the warranty against particular average, or, to use a more accurate expression with the same meaning, the warranty against total loss, only excludes the operation of the suing and labouring clause, even where an impending total loss is averted by extraordinary exertion and expense, it must be because the word average has some fixed and definite meaning so rigid and unelastic that it cannot be modified or limited so as to apply to loss of or damage to the things insured (the sense in which it has been hitherto understood by average staters), but that it must needs also include contribution to any labour incurred in the defence and safeguard of the thing insured, so that even an express clause left standing in the policy without reference to such labour (the suing and labouring clause) must be rejected as inconsistent with the warranty. If this be so, it must equally be true of all memorandum goods which are warranted free from average under a certain percentage, and the operation of this would be so general, if not universal, that the suing and labouring clause would be confined to the cases excepted in the memorandum alone. Two results would follow, both novel in practice, and one at least very remarkable. The first would be unfavourable to the underwriters, because the memorandum was framed to protect the underwriters from frivolous demands in respect of small losses, which are most likely to have arisen from natural deterioration, or wear and tear. The exception of stranding tends to show that this was the scope of the memorandum, for it is the exception of such a loss as makes it probable that the deterioration of the goods, though under the percentage, was nevertheless not to be attributed to the perishable nature of the goods themselves. Accordingly the rule has been to pay for damage to memorandum articles only when it exceeds the specified percentage, and not to allow this percentage to be eked out by expenses falling within the suing and labouring clause. Thus, in the case of goods already put, of goods wetted by a storm, the amount of expense reasonably incurred in preserving the goods is, according to the present practice, contributed to under the suing and labouring clauses, however small in the result the loss or damage to the goods, and the loss of or damage to the goods is paid if it amounts to the stipulated percentage, but not otherwise; and the amount of expenses is not added in order to make up that percentage; thus the agreed percentage at 5 per cent., if the expense amount to 2 per cent. and the loss or damage to 3 per cent. only, the expenses are paid and not the average; but if we hold that the warranty excludes the application of the suing and labouring clause the whole must be paid, and the underwriters will be exposed to the very inconvenience which the memorandum has been supposed to obviate. Upon the other hand, if the expenses should be less than the percentage and the loss is thereby prevented, either

altogether or to an extent less than the percentage, as if in the case put the expenses were 3 per cent. and the damages only 1 per cent., according to the present practice the underwriters would pay the expenses; but if we decide for the present defendants, the underwriters, although saved from loss, would be altogether exempt from contribution. In our view, however, we are not compelled to adopt so inconvenient and impracticable a conclusion. The word average, so far from being a term of art (except in so far as, according to the evidence, usage may have limited its meaning to loss or damage to the goods themselves), a word with a rigid unchanging signification necessarily including expenses in the defence or safeguard of the subject-matters insured, is a word used in a great variety of phrases as applicable to different subject-matter, and not with any fixed or settled application. It would be tedious to go through the various uses to which it is applied, and we need no more than refer to the instances cited in argument, and more especially to the very learned notes of Mr. MacLachlan, in *Arnould on Insurance*, 3rd ed. p. 730, which exhausts the subject as far as novelty is concerned. Amongst the various uses to which the word has been applied, no doubt that of small expense is one, as in the usual clause in a charter party. So in the case of insurance itself, expense must often be taken into account in determining whether there has been a loss or not, but only because a thing is lost in insurance law which cannot be got back except at an expense equal to its value when recovered. The question here, however, is not as to the extension of which the term average is capable, but of the sense in which it ought to be understood in the particular context with which it is to be reconciled, and, if possible, read so as that effect may be given to every provision in the instrument. Nor is it to be forgotten that the suing and labouring clause which, for the reasons already stated, specially provides for those cases, has been allowed to remain a part of the policy, and that special provision as to a particular subject-matter is to be preferred to general language which might have governed in the absence of such a special provision: *generalia specialibus derogant, specialia generalibus derogant*. In our opinion, quite apart from usage, the true construction of the policy is reconciling and giving effect to all its provisions, as if the warranty against particular average does no more than limit the insurance to total loss of the freight by the perils insured against without reference to extraordinary labour or expense which may be incurred by the assured in preserving the freight from loss, or rather from never becoming due by reason of the operation of the perils insured against, and that the latter expenses are specially provided for by the suing and labouring clauses, and may be recovered thereunder. Much reliance was placed for the defendants upon two recent decisions which were said to have determined that there could be no liability under the suing and labouring clause when there was none under the policy: *The Great Indian Peninsula Railway Company v. Saunderson*, 1 B. & S. and in error, 2 B. & S.; and *Booth v. Gair*, 33 L. J. 99, C. P., the first of which cases was decided before and the other after the date of the present policy. Before these decisions the liability of the underwriters appears to have been universally admitted and acted upon even in the cases where the expenses were incurred to forward goods existing in specie at the port of distress, and warranted free from particular average, so that no liability could accrue to the underwriters by their not being forwarded. Probably the underwriters up to the time of the first of those decisions thought it so important to encourage honest efforts to preserve and forward the cargo, or otherwise to

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reserve the subject-matter of insurance, that they preferred paying in all unsuspecting cases without nice inquiries as to whether the expenses had in the particular instance averted liability. In so doing they not only acted with liberality, but no doubt also best studied their own interests, and whilst they calculated the premium so as to include a remuneration for the extra liability which they were satisfied to incur, they probably found that the encouragement to fair dealing thereby afforded was their best security against the more serious losses that might rise from neglect of precautions of which the expense is thrown upon the assured. This practice, however, could not prevail to alter or enlarge the application of the suing and labouring clause, because, although usage may improve a meaning upon a word, such as average, it cannot alter the rules of construction, and in the cases referred to the decision and the sole decision was, that freight and other expenses of forwarding from a port of distress to the port of destination goods warranted free of particular average under circumstances in which the underwriters could not have been liable if the expense were not incurred, was not within the true intent and meaning of the suing and labouring clause, which in the context of a policy of insurance could only extend to suing and labouring by means of which the underwriters might obtain a benefit. In the *Great Indian Peninsula Railway Company v. Saunders* the goods were iron rails for Bombay, shipped to be paid for lost or not lost. They were insured with a warranty free of particular average unless the ship should be stranded, sunk, or burnt. The vessel on her way put into Plymouth, when she was a total loss, but she was not stranded, sunk, or burnt. The rails were saved and sent on in other vessels, and for the freight paid upon such forwarding the underwriters were held not to be liable; and Blackburn, J., in delivering the judgment of the court, carefully abstained from expressing an opinion upon the question, because it did not arise in that case, and he founded his judgment on the circumstance that the underwriters had not obtained any advantages. That judgment was affirmed in the Court of Ex. Ch. in the 2nd B. & S. Erle, C. J. also guarded himself against deciding that in a case such as the present the underwriters were not liable. That case was followed by *Booth v. Gair*, in which a similar question arose with respect to some bacon which was taken into a port of distress at Bermuda, and was there abandoned, so that there was no total loss. The bacon was landed in specie, and was not totally lost either constructively or otherwise. No expenses appear to have been incurred in saving the goods from a total loss, which was negatived; but certain expenses were incurred in the way of extra freight, transhipment, warehousing, and conveying, and cooperage, all of which were treated as expenses of forwarding the goods. It was further proved that it was the practice of underwriters on goods to pay such expenses under like circumstances under the name of particular charges. The judgment was for the underwriters upon the grounds stated by Erle, C. J., namely, that what the master did was in discharge of his duty in ordinary course, and there was no peril creating a risk of a total loss from which the underwriters were saved by the expenses in question. There were no other perils than such as are always attendant on the transit of goods by the voyage in question. No notice appears to have been taken of the practice of underwriters, for the reasons already mentioned, that although usage would give to the words "average" or "particular average," or "average" unless general, a conventional meaning, so as to make it include partial loss or damage of the subject-matter only, and not what are known as particular charges which

fall within the suing and labouring clause; yet such usages could not control the construction of the policy, by which that clause must be limited in application to cases in which the underwriters might incur liability, and therefore might derive a benefit from the extraordinary exertion. That is the circumstance which distinguishes these cases from the present, that the usage of underwriters, already brought to the attention of the court in *Booth v. Gair*, could not affect the decision in that case. These decisions are therefore inapplicable to the present case, and, when examined, proved to be anything but authority for the defendants. Passages from Emerigon were cited by the defendants' counsel, and much relied upon, in which a contrary opinion is supposed to have been expressed to that upon which we found our judgment. In the first volume, page 600, of Boulay Paty's edition, treating of general and particular average, he says, "Les frais faits pour sauver la marchandise sont avaries simples pour le compte des propriétaires." In that passage he was treating of general average as between the owners of goods and the owners of the ship and freight, and he was not giving an opinion upon the construction of a policy, but he refers to the 17th chapter, sect. 7, for a discussion of the question of liability as between the insurer and the assured, either with or without a suing and labouring clause, in which the matter is thoroughly discussed, and which is the part of the work applicable to the present subject in which he throughout treats the question as one depending upon the very words of the suing and labouring clause. Nothing can make this more clear than a reference to his treatment of the question, "Si les frais de sauvetage excèdent la valeur des effets sauvés, cet excédant est-il à la charge des assureurs?" To which he answers: "Suivant les clauses insérées dans les formules de diverses places de commerce, les assureurs indépendamment des sommes par eux assurées, sont tenus de payer l'excédant des frais de sauvetage." He then sets out the form of the suing and labouring clause by Boulay Paty, used at Antwerp, Rouen, Nantes, and Bordeaux, and a similar one. He refers to a more ancient one, which is to be found in Loccenius, 981, by which the underwriters undertake for expenses incurred in the safeguard of the goods, even although no benefit should follow, and he remarks upon that, "Par ces formules les pourvoirs les plus libres sont donnés à l'assuré et à ses représentants afin de les inviter à travailler au sauvetage sans être arrêtés par la crainte d'en supporter eux-mêmes les frais; mais les assureurs, en souscrivant pareils pactes, contractent à l'aveugle un engagement dont les conséquences sont indéfinies." He then gives the London form under the head of forms of special claims against underwriters even to expenses beyond those from which they could derive any benefit. Nothing can be stronger to show to what Emerigon thought that suing and labouring clause belonged. Having given that, he proceeds to say that the *Marseilles Policy* (with which he was so familiar) contained nothing of the sort, and that an express authority to sue and labour was necessary in order to charge the *Marseilles* underwriters with the expenses. This view, as far as it bears upon the present argument, is in accordance with the view of the London average staters, and favours a distinction between loss and damage to the thing assured and expenses incurred in its protection, and to a separate provision for the latter. In fact, the key to the French authorities is to be found in the positive law of France upon the subject, by which, in the absence of express contract, contribution on the part of the underwriters was enforced in the cases of shipments stranding, and then only to the value of the property recovered for the underwriters. I need only refer to the *Or-*

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donnance de la Marine, clause 45, which is followed closely, though not exactly, by the present commercial Code of France, art. 382, each of which makes it the duty of the assured to labour and sue at the charge of the underwriter only in case of shipwreck or stranding. Read by the light of the Ordonnance, the views of Emerigon, so far from being opposed to, are in favour of the construction which we adopt. Hitherto we have only adverted in passing to the evidence, and the finding of the jury upon the understood meaning in the business of marine insurance of the phrase "particular average." If necessary we should have been prepared to hold that the evidence established such an understood meaning according to which particular average does not include particular charges, and to act upon such usage is equally sound with the express part of the contract. It is needless, however, to enlarge upon this part of the case, because, upon the facts proved and the true construction of the policy itself, we have, for the reasons already given, come to the conclusion that there was a danger of the total loss of the freight by reason of the loss of the ship by the perils insured against; that the measures taken by the plt. to avert the loss, and the expenses incurred thereon, were taken and incurred for the benefit of the underwriters in averting a loss for which they would have been liable, and so that they were within the suing and labouring clause; and that the underwriters are liable to contribute thereto. It is satisfactory, however, to think that, in arriving at this conclusion upon the meaning of the contract into which the defts. have entered, we are deciding also in accordance with the approved usages of commerce. The verdict for the plt. was therefore right, and these were the reasons why the rule to enter the verdict for the deft. was discharged.

Rule discharged.

May 30 and July 10, 1866.

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Average contribution—General and particular average.

In order to make a jettison of cargo the subject of a general average contribution, the facts must be established that there was a maritime peril; that the sacrifice made was to avert a danger common to the whole adventure, and that such sacrifice was voluntary.

A ship on a voyage from Quebec to London, laden with timber, was overtaken in a gale, and in order to enable the pumps to work—the working of them was impeded by the deck cargo getting adrift—the master threw such cargo overboard:

Held, that such jettison was made to avert a danger common to all the interests concerned, ship, freight, and cargo; and that the timber so jettisoned, not being at the time "wreck" within the received meaning of that word, and the sacrifice of it being voluntary, the loss accruing on the same must be held to be "general" average, and that all interests must contribute to make it good.

This suit came before the court in the form of a special case, as follows:—

The plt. are the owners of a ship named the *Shooting Star*; and the deft. is a merchant carrying on business in London under the name of E. H. Chapman and Company. On the 26th May 1863 a charter-party was executed by the plt. and the deft., to the effect that the *Shooting Star* was to proceed to Quebec, "and there load from the factors of the charterer (the deft.) a full and complete cargo of deals, including a deck load, one-half of the cargo to be floated deals at the bottom, and the remainder dry deals, and deal ends and staves as required by the master for broken stowage, not

exceeding what the ship can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so laden, shall proceed to London, or so near thereunto as she can safely get, and deliver the same on being paid freight." In pursuance of this charter-party the *Shooting Star* proceeded to Quebec, and loaded there from the deft.'s factors a full and complete cargo of deals and stores, including a deck load, and, being so loaded, duly proceeded, in pursuance of the said charter-party, to London. During the voyage from Quebec to London certain portions of the deck load on board the *Shooting Star* were jettisoned, and the circumstances under which this took place were those stated in the protest, all the facts being taken as admitted, and to form part of the special case. All the goods loaded on board the *Shooting Star* at Quebec had been duly delivered to the deft., with the exception of those goods which had been jettisoned as aforesaid. The plt. contend that the loss of the goods so jettisoned is a particular average loss, in respect of which no contribution is due from them to the deft. The deft., on the other hand, contends that the said loss is a general average loss in respect of which contribution is payable to the plt. to the deft. It is admitted that hitherto has been the practice of average adjusters not to allow as general average the jettison of such part of the deck load as is immediately before the jettison in a state of wreck, but this admission is to be taken without prejudice to the right of the deft. to contend that such practice cannot affect the result. The question for the opinion of the court is whether the deft. is, under the circumstances of the case, entitled to any contribution from the plt. in respect of the goods jettisoned as aforesaid.

The material facts are thus given in the protest. On the 3rd Nov. 1863, the master of the *Shooting Star* appeared before a notary public, and, as such, appeared, declared, "That the ship being tight, staunch, and strong, and well and sufficiently manned, and having received, and well and properly loaded, and stowed away aboard of her at Quebec a cargo of deals and staves with the deck load and boats properly secured for London, did, on the 5th Oct. set sail from Quebec. That on the 13th Oct. it blew a gale from the W.S.W., and the ship laboured and strained excessively, and though sail was reduced, it took so many seas on board, that her decks were continually flooded, and the deck load was broken adrift, whereupon the same was secured as well as possible. That at dusk of the same day she had made three feet of water in the well, which, though all hands worked at the pumps, had increased by midnight to ten feet. That on the following day the gale raged with unabated fury, accompanied by a tremendous heavy cross sea, which broke over the said ship in such immense bodies as to keep her deck continually inundated; and the said ship labouring and straining excessively, and sucking a great deal of water, and the deck load constantly breaking adrift, and having damaged one of the boats, the said appearer was compelled, for the safety and preservation of the said ship, her cargo, and of all on board, to throw part of her deck load overboard to prevent it doing further damage. That his ship nevertheless made bad weather of it till the gale abated, and at six p.m. the same day the pumps sucked, and the crew were sent below. That on the 20th of the same month she encountered another gale, and made very bad weather of it, shipping such immense bodies of water that her pumps were kept constantly going. That the next day she continued to make fearful weather of it, and at 2.30 a.m. shipped a very heavy sea on the port beam, which stove the long-boat in bits, split the whale-boat, and stove in the gig, knocking the port quarter away, and breaking the gunwales, and damaging a fourth boat, at the same

C. P.]

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[C. P.]

me shifting the deck load against the pumps on both sides so that they could not be worked, and filling the cabin with water, and doing other considerable damage. That as soon as possible the deck load was secured as well as circumstances would permit, and the pumps set to work, after which the gale abated. That on the 23rd of the same month she encountered another strong gale, and suffered bitterly, which said gale, on the 24th of the same month, increased to a perfect hurricane, and being accompanied by a tremendous high and heavy sea, which broke over the said ship in such immense bodies as to flood her deck, her deck was again broken adrift, and knocked against the pumps on both sides; and the said appraiser was compelled, in order that the crew might work the pumps, and to prevent damage to the bulwarks and pumps, and for the safety and preservation of the said ship, her cargo, and of all on board, to throw a further portion of her deck load overboard; and the said ship, shipping and making so much water, there being five feet six inches in the well, the pumps were of necessity kept going. That the following day the gale abated, and sail was made, the pumps being at all times carefully attended; and that finally the said ship arrived in safety at the port of London on the 2nd Nov." And lastly, the appraiser declared that the loss and damage to the ship, her appurtenances and cargo, were solely and entirely owing to, and occasioned by, the gales.

Verdict for plts.

Jury for George Honyman and Lodge for the defts.

JULY 10.—WILLES, J. delivered the judgment of the court:—In pronouncing judgment for the defts. in this case—and for the defts. the judgment must be—the Court deems it right to mention, to any confusion should appear to be introduced into the law by its decision, that the Court does not mean to throw doubt upon the propriety of the practice of average staters in allowing for that which can properly be called "wreck." That appears to be a very general practice, and it is a practice which has found its way into the various treatises on the subject. The question is, what is "wreck?" In order to make the subject of a general average contribution, two conditions must be fulfilled: first of all, there must be a common danger; it must be a maritime peril, and it must be common to the whole adventure, which would exclude some of the cases, which counsel very ingeniously put, of a subject-matter that had within itself the elements of destruction which developed themselves during the storm; as, for instance, cotton which was caught on board in a damp state bursting out into flame, and being thrown overboard: you cannot say there is in that case a common danger, but a peculiar danger from the fault of the person putting on board. And then, secondly, there must be a sacrifice in the sense of intentional sacrifice. That is a second condition which must be fulfilled; and that seems to exclude all those cases in which the average staters ought to refuse to allow a contribution upon the ground of wreck. Certainly the reasoning is all consistent. All the writers in this country and abroad appear to be agreed that the question is, whether there is common danger, and whether there is a voluntary sacrifice. They are all agreed, it must be admitted, upon the application in practice of these rules. But there is one case upon which our average staters appear to be agreed—that is to say, if a mast were sprung, and part of it were to go overboard with a quantity of masts and sails attached to it, hanging on by a rope which must give way in a minute or so, whilst, in the meantime, by battering

against the side of the vessel, it adds to the danger; and if the stays were cut to let it go at once, it would be very difficult to say that that was anything more than wreck. A lawyer could not lay down as a matter of pure law that all lumber cut loose is wreck. But what I say is, it was virtually lost, if not recoverable; if the act of cutting the rope was only hastening the moment at which it would be lost, you would properly call that wreck, and you would not say it was general average. The reason given is, because you cannot keep it. There is no intentional sacrifice in cutting it away. You must lose it; and the losing it a minute or two sooner can make all the difference of its doing great injury or not, but you cannot help losing it. But if, instead of cutting away what is virtually lost only, you cut a portion of what is still on board and safe, except for the common danger, for instance, a mast or bowsprit, for the purpose of facilitating the getting rid of the wreck, which is only incumbering the vessel, if you do that, you ought to receive average in respect of the portion you so cut away, because that you do sacrifice. It may be also exceedingly difficult, in some cases one can conceive it must be, for average staters consistently to apply the principles; but the principle appears to be clear that if the danger is common and the thing is voluntarily sacrificed, it is contributed for rateably. In this case there was a deck cargo; and the first observation would naturally arise upon its being a deck cargo, and upon the exception with regard to deck cargoes; but that is taken out of the case most effectually by reference to the charter-party. This is an action by the shipper of the cargo against the shipowner; and the charter-party contemplates a deck cargo. It is not suggested there is any statute to make a deck cargo illegal; therefore, it seems something more than custom to have deck cargoes. I think it was from Quebec; but it is not necessary to refer to any custom affecting the voyage, because according to the contract between the parties there was to be a deck cargo. Then immediately you find that the deck cargo is within the contemplation of the parties, you must deal with it as if shipping a deck cargo was lawful. When you have established that it is a deck cargo lawfully there by the contract of the parties, it becomes the subject of the rule of general average. Now, dealing with this case, and taking one of the jettisons, because, I presume, there was enough thrown overboard on each occasion to satisfy the plts.' claim if the defts. was liable to contribute; the question is, whether there was any liability for any jettison? If so, the amount is agreed on in the case. Therefore, I take only one of the jettisons, and take the one Mr. Cohen himself most insisted upon, that is, most addressed himself to in his argument, and which was most striking. The cargo appears to have broken away, appears to have got loose on deck; it was not washed overboard; it had not become valueless; it was not spoiled with the water; and if the weather had been fine it would have been restowed, and it might have come on and been just as valuable except getting a little wetting with salt water. It was in fact once restowed, or part of it, during the voyage, so that it clearly was not in a state of wreck, in the sense of having become lost property, which they could not recover, or make use of if they recovered it. Then there was this peculiarity about it being thrown overboard; it not only incumbered the working of the vessel, but it interfered with the pumps, which it was particularly necessary at that time to work. The persons on board the vessel naturally selected that part which was near the pumps as first to throw overboard, and no doubt they would throw over the rest if there

Ex.] HAUGHTON AND OTHERS v. THE EMPIRE MARINE INSURANCE COMPANY (LIMITED). [Ex.]

was imminent danger of its getting loose and taking the same course as the first part. But the same sort of question might arise in various forms as to cargo stowed in the hold. For instance, if there were an exceedingly heavy part of the cargo below, and the vessel was labouring very much—when I say very heavy I mean heavy in the sense of great specific gravity—and working upon a particular part of the vessel it had strained the vessel, and so threatened to let in the water and sink her, if you took that and threw it overboard, in no other sense can it be said the cargo in question, or that part of the cargo so thrown overboard, to be more precise, was exposed to danger different from the rest of the cargo, except in that circumstance—the circumstance that it was, by reason of its weight and position, the best thing to choose to throw overboard, and the thing which, in that sense, it was especially necessary to throw overboard for the benefit of the whole concern. Was the jettison in this case voluntary? was it to ward off a common danger? It is only necessary to look at the protest to find the answer. The danger was caused to all—both ship, and cargo, and crew—by the storm; and to save the whole adventure from that storm the timber was voluntarily thrown overboard, and it was not wrecked. In short, the special danger caused to and by the timber was only a circumstance of the common peril to which the whole adventure was exposed. For these reasons we think that our judgment ought to be for the debt.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUXLEY, Esqrs., Barristers-at-Law.

Nov. 22, 1865, and Feb. 26, 1866.

HAUGHTON AND OTHERS v. THE EMPIRE MARINE INSURANCE COMPANY (LIMITED).

Marine policy—Construction of—Meaning of words "at and from"—"First arrival" in harbour—Commencement of risk.

A vessel of the plts., insured by a valued policy "lost or not lost, at and from Havana to Greenock," upon arriving in good safety inside the heads in the harbour of Havana, was towed, in charge of a pilot, up the harbour, and when past the thick of the shipping above the city, and beyond the spot where her cargo was eventually discharged, and near the "Regla Shoal," she began to stir the mud up, whereupon, by order of the pilot, her anchor was let go, and she settled down on the anchor of another ship, and sustained the damage to recover which, under the policy, the present action was brought; and upon a rule to enter a non-suit or a verdict for the debts, it was

*Held (a) (discharging the rule), that a marine policy is to be construed on the same principles as other contracts, and its language is to be taken in its plain and ordinary sense. The word "at" in the present policy must therefore be read in its ordinary and geographical sense, and the ship being insured "at" Havana was insured all the time she was there, the risk commencing and the policy attaching at the moment of her "first arrival" within the entrance of the harbour, as laid down by Lord Hardwicke, C.J., in *Motteux v. The London Assurance Company*, 1 Atk. 545.*

All the limitation imposed by the law, as to the time of the commencement of the risk in such a case, is, that the ship should arrive at the port "at" which she is

*insured in a state of sufficient seaworthiness to be enabled to lie there in reasonable security till properly repaired and equipped for her voyage. (See per Lord Ellenborough, C. J., in *Parmeter v. Cousins*, 2 Camp. 235.)*

Declaration on a valued policy of insurance is 3000*l.* on the ship *Urgent*, "lost or not lost at and from Havana to Greenock," whereby it was (*inter alia*) declared and agreed that the said ship should be and was warranted free from particular average below water, unless caused by injury to the stem or sternpost, or by fire, grounding, or contact with some substance other than water; and that ship and freight should be and were warranted free from average under 3 per cent., unless general, or the ship were stranded, or sunk, or burnt. Averment that the said ship, when at Havana as aforesaid, after commencement of and during the continuance of the said risk, sustained injury by perils insured against, such injury being caused by grounding and contact with some substance other than water within the true intent and meaning of the said policy in that behalf, and thereby sustained average loss and damage exceeding 3 per cent—that is to say, to the amount of 1000*l.*

Averment of performance of all conditions, Breach, neglect, and refusal of debts. to pay, according to the terms of the policy, and averment of damage to plts. by reason thereof.

Second count, for money payable and mon due on accounts stated. Claim 1000*l.*

Pleas:—1. To first count, that the said ship d not when at Havana, after the commencement a during the continuance of the said risk, susta injury by the perils insured against as alleg 2. To the first count, that the said ship was n after the commencement and during the con nuance of the said risk, stranded, sunk, or bur within the meaning of the said policy; and th the said loss and damage in the said first cou mentioned did not constitute a general average loss and amounted to less than 3 per cent. 3. To the fr count, that plts. were not, nor any of them, i terested in the said ship, as alleged. 4. To the residue of the declaration, never indebted. On which pleas issues were joined.

The action was brought by the plts., merchants at Liverpool, to recover 353*l.* 3*s.* 1*d.*, the sum found due from debts. under a *pro formâ* average adjustment which the plts. had caused to be prepared by average adjusters of Liverpool, under the above policy, and at the trial before M. Smith, J. and a special jury, at the Liverpool Summer Assizes 1865, the debts did not dispute the accuracy of such adjustment, but contended that, at the time of the happening of the damage, the vessel was not covered by the policy, inasmuch as she had not then arrived "at" Havana, but was still on her voyage to that port.

The facts as they appeared from the evidence of the captain, which was taken *vide* *supra* were under a judge's order before a commissioner at Liverpool on 8th April 1865, were as follows:—On the 5th May 1864, the *Urgent* arrived off the harbour of Havana, and as soon as she got inside the heads in the harbour the captain took a pilot and engaged a steam-tug to take her up to a spot where she could obtain clear anchorage. The ship was then towed up through the harbour past the thick of the shipping above the city, and beyond the spot where eventually her cargo was discharged. When past the thick of the shipping and near a spot called the "Regla Shoal," at the head of the harbour, the ship began to stir the mud up, but she never stopped and was not felt to take the ground. The pilot then gave orders to let go the anchor, and to the steamer to let go the warp. The anchor was let go, but the steamer tug

(a) In delivering his judgment in this case, Channell, B. stated that he was not aware whether Pollock, C. B. concurred with the judgments of Pigott, B. and himself, or not; and that Martin, B., not having heard the whole of the argument, would take no part in the judgment, which at any rate, his Lordship added, "is the judgment of the majority of the court."

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ging ahead, and the ship ran out some fifteen fathoms of chain. The hawser then broke and the ship being starboarded by order of the pilot, the ship swung round three or four points. The pilot then went on shore without giving any further orders, leaving the ship anchored as she was; and she lay till the next morning (May 6th), when the captain attempted to get her round head to land, but failed to do so, and subsequently on the same day he discovered that the cause of her not swinging round was that she had settled down on the anchor of another ship, which had caused her to sustain serious injury in the starboard after-run. He was on the following day, the 7th, at high water, agged off and towed into deep water to a spot selected by the purchaser of the cargo, nearer the mouth of the harbour than the "Regla Shoal" was, and there her cargo was discharged, and she was afterwards taken into a dry dock where her injuries were repaired.

The entry in the official log under date of 5th May merely stated the simple fact that "at 4 p.m. the pilot ran the ship aground on the Regla Shoal and left us."

The only question was whether, at the time that the ship received the injury, the policy had attached.

The verdict was entered for the plts. for 3531.8s. 1d., subject to leave to the defts. to move to enter a verdict or a verdict for defts., the court to draw all necessary inferences, and a rule to that effect having been obtained in Michaelmas Term, on the ground that the policy never attached, the vessel not having arrived at Havana within the meaning of the policy.

Brett, Q. C. and Baylis now (Nov. 22) showed cause against it on behalf of the plts.—It was immaterial whether the injury occurred before or after the ship was finally and properly anchored, though the facts showed that it occurred after; the pilot had left her, and she was brought up swinging by her own anchor. The policy attached the moment the ship was within the natural and artificial entrance of the harbour, and she was then, in nautical phraseology, "at Havana." There was a difference between "off" and "at" a place. A ship when lying in the Sloyne was at Liverpool; a ship anchored in the river at Gravesend was at London, though she had not reached her ultimate place of destination, the London-docks. But a ship in the Dover-roads was "off" Dover, and not "at" it until she was within the entrance of the harbour. No doubt, in order for the policy to attach, the ship must be at the place in a seaworthy condition, and that was the case here; but in simply ascertaining whether in fact she were at the place, the second question of seaworthiness may for the moment be dismissed. Had she been insured on the outward voyage to Havana the policy would have covered her until she had been safely anchored for twenty-four hours. It was now decided that the home policy attached before the outward policy was at an end, the two policies thus overlapping each other. It was clear that here something was insured plus the home voyage, or it would have been "from" Havana only. [POLLOCK, C. B.—Has it not been decided that to be "at" a place the vessel must be there in safety; that the dangers of the voyage must be over and at an end?] In Arnould on Marine Insurance (3rd edit. by MacLachlan), p. 339, it was said to be now settled that where a ship was insured "at and from" a foreign port with a view to cover the home voyage, she must have once been at the outward port, the *terminus a quo*, "in good physical safety," before the homeward policy can attach; and *Parmeter v. Cousins*, 2 Campb. 235, and *Bell v. Bell*, 1b. 475, were there cited as authorities for that proposition,

and the ruling of Lord Ellenborough there had been upheld in *banco*. But it was enough if the ship, while at the *terminus a quo*, was in a condition "enabling her to lie there in reasonable security till properly repaired and equipped for her voyage;" (per Lord Ellenborough, C. J., in *Parmeter v. Cousins*, *ubi sup.*) In policies like the present, in the words "at and from" a place, "first arrival" was implied, and always understood;" (per Lord Hardwicke, C. J. in *Motteux and others v. The Governor and Company of the London Assurance Company*, 1 Atk. 545.)

Patrick v. Ludlow, 3 Johnson's New York Cas. 10; *Seamans v. Loaring*, 1 Mason's Circuit Rep. 127 (per Story, J.);

Palmer v. Marshall, 8 Bing. 79; 1 L. J., N. S., 19, C. P.;

Smith v. Surridge, 4 Esp. N. P. C. 25; and 1 Phillips on Marine Insurance, 3rd edit. (Boston), sects. 932, 933, 934.

were all authorities to the like effect. None of the cases gave a satisfactory definition of the meaning of the word "at." The court, therefore, must take it in its plain, popular, and geographical sense, and not complicate the case by adopting an unnatural, strained, and artificial interpretation of so clear and simple an expression.

Potter (with him E. James, Q. C.), contra, for the defts., contended that the ship was not at Havana within the meaning of the policy. If this had been an outward policy only it would have expired when the ship had been safely anchored for twenty-four hours, the voyage would then have been concluded and the underwriters discharged. But even admitting that there might be an overlapping of the two policies, there must be a time when the outward liability ceased, and surely the homeward liability must begin at that same time. The vessel could not be said to be at Havana, unless she were there, so that twenty-four hours afterwards the outward liability would cease; but here the outward liability remained until the ship had been twenty-four hours at the spot where her cargo was discharged. The letting go the anchor by order of the pilot was the necessary consequence of the momentary emergency, and was a temporary and not the final anchoring. It might be that it was not necessary to the homeward policy's attaching that the outward voyage should have expired, but it was necessary that such a time should have arrived that the outward underwriters could or might be discharged, and that time had not arrived here; in fact, the outward voyage must be at an end before the homeward voyage commenced. The ruling of Lord Tenterden, C. J., in *Samuels v. The Royal Exchange Insurance Company*, 8 B. & C. 119, showed that the word "London" might, for the purposes of the policy, be restricted to a particular dock there, and that a ship which had not arrived at her place of discharge had not been anchored for twenty-four hours in good safety at her destination, and to that effect was the case cited in Phillips on Marine Insurance, sect. 968. "At Havana" meant, therefore, at the place of discharge, the ultimate destination of the vessel.

Cur. adv. vult.

Feb. 26.—The following judgments were now delivered:

CHANNELL, B.—The question in this case is whether or not the policy had attached at the time when the damage occurred to the ship *Urgent*? The facts are before us on the notes and in the documents. In my opinion the ship was then at Havana, and consequently the policy had attached. The damage occurred "at Havana," speaking in a geographical sense, and there is nothing in my judg-

[Ex.] HAUGHTON AND OTHERS v. THE EMPIRE MARINE INSURANCE COMPANY (LIMITED). [Ex.]

ment to show that the parties, at the time the policy was underwritten, had any other meaning of the word "at" in contemplation. All the limitation which it seems has ever been imposed by the law, as to the time of the commencement of the risk in such a case as the present, is that the ship should arrive at the port "at" which she is insured in a state of sufficient repair or seaworthiness to be "enabled to lie there in reasonable security till properly repaired and equipped for her voyage: (*Par-meter v. Cousins, ubi sup.*, and *Bell v. Bell, ubi sup.*), in the latter of which cases Lord Ellenborough's ruling at Nisi Prius was subsequently upheld by the court in banc. In the present case, however, there appears to be no doubt that the ship was really within the harbour in good safety, and that the loss occurred from a peril in the harbour, and in no way from any injuries that she had received before her arrival. The ship being insured while at Havana, is evidently (in the absence of any express provision to the contrary) insured all the time she is there, and therefore the risk commences, as was said by Lord Hardwicke in *Motteux and others v. The London Assurance Company (ubi sup.)*, on her "first arrival" there. Unless, therefore, we can say that her "first arrival" at the port is when she casts anchor there, instead of when she enters the port, our judgment must be for the plts. In many cases the nature of the port may be such that the two events may be identical. There may be nothing to show the arrival of the vessel till she casts anchor. But here we have evidence as to the port of Havana, which is sufficient, in my judgment, to show that the arrival was before casting anchor. Mr. Potter has argued that the first arrival, which must no doubt be in good safety, must be identical with the mooring in good safety usually named in outward policies. But I think we cannot construe the terms of one contract by reference to those of another not referred to in it. And it is clear that there is no usage that the duration of the outward and homeward policies should not overlap, because the outward policy usually extends to twenty-four hours after the vessel is moored in good safety. During those twenty-four hours there is no question that there is a double insurance, and therefore I see no ground for saying that the parties contracted subject to any usage that such a policy would not attach until the previous one had determined. If they had wished to make such a condition it could easily have been done; or, if having in view any special dangers, as shoals, or the like, within the port of Havana, they had chosen to make the risk date from the vessel being moored in safety, they would have done so; but as it stands it is from her "first arrival," which, as a matter of fact, I think to be on her entering the port. My judgment is, therefore, for the plts. that the rule be discharged.

PICOTT, B.—(After recapitulating the facts, his Lordship proceeded to deliver his judgment as follows):—The sole question in this case is, whether the policy had or had not attached at the moment when the mischief occurred? I am of opinion, in conjunction with my brother Channell, that it had. I agree with the plts.' counsel, and think that the language used by the parties ought to have a plain construction put upon it, and that as the ship had arrived, geographically speaking, within the harbour of Havana, and was in safety there before the injury was received, the risk had then commenced. A policy of insurance is to be construed by the same rules and on the same principles as other contracts, it being the duty of the court to collect the meaning of the parties by taking the language employed in a plain and ordinary sense, and not to speculate on some supposed meaning which the parties have

not expressed. It was argued for the defts. that Havana being an outward port, as far as regards this vessel, the words "at and from" Havana must be construed to mean that the risk should commence when the ship had so far performed her outward voyage that nothing remained to determine the outward policy, but that the twenty-four hours after her arrival should expire, and that, so construed, this policy had not attached, inasmuch as the ship had not arrived at her place of discharge. But this, it seems to me, would be a very artificial mode of construing the policy in question, nor have we any safe guide to conduct us to it. With equal plausibility it might be argued that the risk "at and from" a port should not commence till the insurance "to" that port ceased, which is at the end of the twenty-four hours, and not at the commencement of them. The answer to both these arguments seems to be, that the construction of this contract cannot depend upon the contents of another and distinct contract which is wholly unconnected with it, and that the court is not called upon to know or assume that, in fact, any outward policy existed. This view is sanctioned by the authority of Lord Hardwicke in *Motteux v. The London Assurance Company (ubi sup.)*, where his Lordship mentions a case tried before him at Guildhall, in which he says, "It was debated whether the words 'at and from' Bengal meant the first arrival of the ship at Bengal;" and he adds, "It was agreed the words 'first arrival' were implied, and always understood in policies." Now, there can be no question about the sense in which Lord Hardwicke uses the words "first arrival," viz., in contradistinction to her being moored in a particular place, or discharging her cargo. In *Par-meter v. Cousins (ubi sup.)* Lord Hardwicke's report of the above case is mentioned, and the learned reporter adds, "There seems no doubt that the rule laid down by Lord Hardwicke, qualified by the principal case (to which the note is appended), is to be considered as established law upon the subject." The qualification there alluded to is, that the ship shall be once in good safety at the port, a matter not in dispute in the present case. This doctrine, and the authority for it, are to be found in several of the text-books on insurance, and may be then taken to have been long considered as the meaning of those who so word their policies. In Arnould on Insurance, p. 28, s. 25, 2nd edit., it is the form recommended to be adopted for the advantage of the assured in protecting the ship from the moment of her arrival. I do not think it necessary to advert to the other question which has been raised, viz., whether, in fact, this ship had not anchored in the harbour before the damage was sustained, and at a place even farther within it than her place of ultimate discharge, and whether that would make any difference in the case. In my judgment the plts. are entitled to keep their verdict, and this rule, therefore, should be discharged.

Rule discharged.

Attorneys for the plts., Norris and Allen, 20, Bedford-row, agents for Simpson and North, Liverpool.

Attorneys for the defts., Chester and Urquhart, 11, Staple-inn, agents for Luce, Banner, Littlehale, Gill, and Bardswell, Liverpool.

KLINGENDER v. THE HOME AND COLONIAL INSURANCE COMPANY (LIMITED).

[Ex.

June 7 and 11, 1866.

KLINGENDER v. THE HOME AND COLONIAL INSURANCE COMPANY (LIMITED).

Insurance—Action for total loss of freight—*Constructive* total loss of ship and goods—*Proper* questions for the jury—*Misdirection*.

On a policy of insurance as for a total loss of freight to be earned in carrying a cargo of coals and from Rio to San Francisco. On the voyage the vessel received damage from heavy seas which compelled her to put into Monte Video, having previously, for the sake, thrown overboard some portion of her cargo and landed another portion at the Falkland Islands. On the ship's being surveyed at Monte Video, she was found to be incapable of pursuing the voyage the cargo on board, and no other vessel could be taken to take the cargo on. The cost of warehousing the cargo so great at Monte Video that in a few days it would have equalled the value of the cargo, owing to the town being in a state of siege and local revolution, it was unsafe to land the cargo leave it unwarehoused; under these circumstances the captain, being in want of money, sold the cargo and used the proceeds to the ship's purposes, and then sent her back in ballast to Liverpool for repairs.

The learned judge left two questions to the jury: first, was there a constructive total loss of the goods? secondly, was there a constructive total loss of the ship? The jury answered both questions in the affirmative and found a verdict generally for the defendants upon a rule to set the verdict aside for misdirection on the part of the judge in telling the jury that these were the only questions for consideration, it was

held, that there was no misdirection, and that the two questions submitted to the jury were, under the circumstances, proper questions for the determination of the jury.

It was held, nevertheless, that the question of total loss of freight would not, in every case of an action on a policy for a total loss of freight, be necessarily concluded by the decision of those two questions.

A rule is that to entitle the assured to recover upon a policy, the loss must be the direct and immediate consequence of the peril insured against, and not a remote one.

This was an action on a policy of marine insurance recover 1500*l.*, as for a total loss of freight, the freight insured being a freight to be earned by the ship *Mary Sparks* in carrying a cargo of coals and from Rio Janeiro to San Francisco; and the declaration, which was in the usual form in such cases, alleged that "whilst the said ship was proceeding on the said voyage, and during the continuance of the said risks so insured against, the said ship with the goods on board, and likewise the said freight which the plt. should otherwise have earned by the carrying of the said goods as aforesaid, were by the aforesaid perils of the sea wholly and totally lost, and all things happened, &c., to entitle plt. to recover from defts. as in respect of a total loss of the said insurance freight to amount insured thereupon, and to be paid the said sum of 1500*l.* by defts. accordingly, and plt. claimed 2000*l.*"

Plea, payment into court of 283*l.* 19*s.* 6*d.* as sufficient to satisfy plt.'s claim.

At the trial before Lush, J., and a special jury, at the last Lancashire Spring Assizes, at Liverpool, the following appeared to be the facts of the case:—The vessel in question, a ship-rigged vessel of 375 tons register, set sail from Rio on her intended voyage to San Francisco on the 3rd July 1864, with cargo consisting of 275 tons of pig iron and 375 tons of coal, and on her passage down the eastern

side of South America she encountered very heavy gales and seas, and received so much damage therefrom, and became so leaky, that when off Cape Horn the captain found it necessary to bear up for Port Stanley in the Falkland Islands, the nearest port of refuge. On the 20th Aug. it became necessary for the safety of the ship to ease her by throwing overboard twenty-six tons of the iron, and on 26th Aug. she came to an anchor off Port Stanley. While there a survey was had of the vessel, and in pursuance of the recommendation of the surveyors a further portion of the cargo of iron, amounting to fifty tons, was discharged and landed at Stanley; and the captain being unable to find a ship to take it on or carry it back to England, left it there in charge of the manager of the Falkland Islands Company, who consented to look after it, but without being in any way responsible for it. There were no graving docks, or other means of properly examining and repairing the vessel at Stanley, and so, after having her temporarily repaired in the best way that he could do there, and for which he expended from 120*l.* to 146*l.*, the captain again set sail on the 17th Sept. to prosecute his voyage to San Francisco. Encountering further bad weather, and the leak increasing, it was found impossible to proceed on the voyage with safety, and accordingly the vessel bore up for Monte Video, which port she reached on the 1st Oct., making water badly all the way. Upon arriving at Monte Video it was found that the place was in a state of siege, and a hostile army in the vicinity. The inhabitants were leaving the town, and the ships in the harbour were being withdrawn in order to get out of the reach of the enemy's guns. There were no means of properly repairing the vessel at Monte Video, and it was impossible for her in her leaky condition to carry the cargo farther, nor could any other vessel be procured to carry it on. Under these circumstances the captain deemed it right to discharge the crew and land the cargo and warehouse it. It was found that the cost of warehousing was so great that in a few months it would equal or exceed the value of the goods, and therefore, in Feb. 1865, the captain, who was in need of money, determined to sell the cargo, which he did, with the exception of some 300 tons of coal retained for ballast; and applied the proceeds to the ship's purposes. He then set sail in ballast for Liverpool, to be repaired, and that port, after a leaky voyage, was eventually reached. The estimated cost of repairing her at Liverpool varied from 1984*l.* to 2728*l.* To have taken her to Rio for repairs was impossible, that port being about the most expensive in the world. Money was paid into court to cover the loss of freight in respect of the portion of the cargo thrown overboard, and that which was landed at Falkland.

The learned judge left two questions to the jury: first, was there a constructive total loss of the ship? secondly, was there a constructive total loss of the goods? The jury found for the defendants, that there was no constructive loss of the vessel, and no constructive loss of the cargo; and the verdict was thereupon entered generally for the defendants.

A rule was subsequently obtained by the plt. to set aside the verdict, and for a new trial, on the grounds, first, of misdirection on the part of the learned judge in telling the jury that the only question was whether there was a constructive total loss of ship or goods, and of further misdirection in telling them to exclude from their consideration any question of risk to the goods by being left at Monte Video in its then state, and further telling them (as to part of such goods) to exclude any question of the condition of such goods at Liverpool; secondly, of the improper rejection of evidence offered on the plt.'s part to show the dealings

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of underwriters on the ship, and of plt. with the ship, at the time of and consequent on its abandonment; and thirdly, of the verdict being against the weight of evidence; and against this rule,

Milward, Q. C. and *Quinn*, for defts., now showed cause.—The attention of the jury was directed to the imperishable character of the cargo—coal and iron; but the captain's evidence was that he sold the cargo, not for the purpose of saving it or the ship, but because he wanted money for the ship's use. It was said, contra, that the proper point was not left, but it was difficult to discover from the terms of the rule what that proper point was. The questions left were: was there a loss of the ship? was there a loss of goods? and on those two the case proceeded throughout. The question of loss of freight was involved in them, and a third question, which it was not sought to put to the jury, ought not now to be discussed. The terms in which the learned judge laid the case before the jury were precisely those in *Philpott v. Scrann* in the C. P., 5 L. T. Rep. N. S. 183; 11 C. B., N. S., 270; 30 L. J. 358, C. P.; *Phillips on Insurance*, 3rd ed., sect. 1142. But it was now said there was a third question, viz., was the shipowner prevented by perils of the sea from earning freight? That was a wide general question, and was involved in the other two. If the shipowner chose not to repair or take his ship to some near port where she could have gone, then it was an abandonment, and he could not come on the underwriters. He exercised a discretion, and it was not a loss of freight from perils insured against. [*BRAMWELL, B.*—Suppose this had been a cargo of oranges or rice, and that it had not been damaged, but had been sold under the circumstances here, would that have been a total loss of goods? If it were necessary to expend more on the cargo to get it away from Monte Video than its value, then there would be a total loss of freight at Monte Video. [*CHANNELL, B.*—The plt.'s point is, that the questions of total loss of ship and total loss of goods do not exhaust the question of total loss of freight.] In the way it was put at the trial by the learned judge it was submitted that it did. It was idle to put the third question suggested by the other side, as it was involved in those which were put. The ship, if it could not be repaired at Monte Video, should have been taken to Liverpool to be repaired, and then have returned to Monte Video and picked up her deposited cargo, and resumed and completed her voyage. The jury had found no constructive loss of either ship or goods, and therefore there could be no total loss of freight. The judge was not dissatisfied with the verdict. They cited

Mordy v. Jones, 4 B. & C. 394;
Moss and others v. Smith and another, 9 C. B. 94;
19 L. J., N. S., 225, C. P.;
Stuart v. The Greenock Marine Insurance Company,
2 H. of L. Cas. 159;
The Scottish Marine Insurance Company v. Turner,
1 Macq. H. of L. Cas. 334, 340;
Anderson v. Wallis, 2 M. & S. 240;
McCurthy v. Abel, 5 East, 388;
Atkinson v. Abbott, 11 East, 135; 1 Camp. 135;
Atkinson v. Ritchie, 10 East, 530;
Rosetto v. Gurney, 11 C. B. 176; 20 L. J. 257, C. P.;
Arnould's Insurance, by MacLachlan, 724, 977, 987.

Brett, Q. C., *Mellish, Q. C.*, and *C. Russell*, for plts., contra, in support of their rule.—There were no means of repairing the ship at Monte Video, nor was it safe to leave the cargo there, and the cost of warehousing it would have exceeded its value, and no vessel could be found to take it on. Of necessity, therefore, the captain sold it for the ship's purposes. The shipowners might be debtors to the cargo owners. Even an improper sale by the cap-

tain would not alter the question as between owner and underwriters. What was not reasonable in a commercial and business sense, having regard to the interests of the owners of the ship and the goods, was not practicable. It was not a mere question of "prudent owner." If the act were done for the benefit of all concerned, then the voyage was at an end, and the freight prevented from being earned by perils of the seas. That point was settled by *Blasco v. Fletcher*, 9 L. T. Rep. N. S. 169; 11 C. B., N. S., 147; 32 L. J. 284, C. P., a case which showed what was the proper question to have been left here. The defts.' contention, that after repacking at Liverpool, the shipowner was bound to send her back to pick up the cargo and finish her voyage, and that the goods owner was to keep the goods there in the meantime, no matter at what cost, was absurd. Then, if there were no such obligation, it was clearly a total loss. If either the goods owner was entitled to send them on by another ship, or the shipowner was not bound to go back to resume the voyage, then, as a matter of common sense, the original freight was prevented from being earned. A constructive loss of the ship involved a loss of freight; and if the goods were properly sold the freight was lost, though the converse of those propositions did not necessarily follow. If perils of the sea (which were what were insured against) was the origin of the interruption of the voyage, it was immaterial what intervened: (*Naylor and others v. Palmer and another: the Coddles case*, 8 Ex. 78; 22 L. J. 829, Ex.) [*MARTIN, B.*—Surely, *proxima non remota spectatur* is the rule?] Yes, but it was a question, what was the proximate cause of taking it out of the owner's possession: (*Lindley v. The Universal Marine Insurance Company: the Cape Hatterus case*, 8 L. T. Rep. N. S. 765; 11 L. J. 170, C. P.; 14 C. B., N. S., 259.) It was wrong to assume that the captain sold for want of money, nor did the fact that he wanted it prevent a total loss. One of three things must be done, either to send the goods, or to send them on by another ship, or a *dernier ressort*, to sell them. No doubt the question of loss of goods and ship might be put so as to include the question now insisted on, but the learned judge put it so as to confine it to those two questions. The delay here was not unreasonable, and that question ought to have been submitted to the jury; the proper question for them being, whether by perils of the sea, having regard to delay, expense, and risk, it was not rendered impossible in a mercantile point of view for the freight to be earned by prosecuting the voyage insured against? They cited also and commented on

Bruce v. Jones, 7 L. T. Rep. N. S. 748; 1 E. & G. 769;

Shipton v. Thornton, 9 A. & E. 314 (per Lord Braman, C. J. at p. 336); 8 L. J., N. S., 73, Q. B.; *Phillips on Insurance* (3rd edit.), sect. 1638.

Trevelyan (amicus curiæ) referred to an *Anscombe case*, *Loud v. The Citizens Mutual Insurance Company*, 2 Gray's Massachusetts Rep. 221.

Cur. att. rtd.

June 11.—The judgment of the Court (*Martin Bramwell, Channell, and Pigott, BB.*) was delivered as follows by

MARTIN, B.—This case, which was very ably argued a few days ago, was a rule obtained to set aside the verdict for the defts., upon three grounds: the first was misdirection; the second was the rejection of evidence; and the third was that the verdict was against the evidence. With respect to the rejection of evidence, it seemed, without imputing any bad faith to any one, that the objection or rather the evidence was not pressed upon the learned judge in such a manner, and to such an

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could understand that it was insisted that it properly was not. But, on reference to the shorthand and the note of the learned judge, and judge himself, it seems clear to us that the counsel offering it afterwards to the jury for a new trial on the ground of its misdirection, we are of opinion that, under the circumstances of this case, there is no misdirection. We are very far from saying that, in an action on a policy of insurance for a total loss of freight, where, as in every case, the question of whether there is a total loss of the ship or a total loss of the cargo is necessarily concluded by the answer to two questions; indeed, we are of opinion that the answers to those questions might be put where the answers to them might not be conclusive at all. There are two instances put in the course of the argument which it is useless to put here. We are of opinion that, under the circumstances of this case, which were submitted to the jury for their consideration for the determination of the case, the action was on a policy for a total loss of freight. The freight was to be earned by the ship in carrying goods from Rio Janeiro to San Francisco. The cargo was coal and iron, and the circumstances of the case were that the ship set sail from Rio; and on her arrival at the eastern side of South America she sustained considerable sea damage. Some of the cargo was lost overboard, and the loss of freight was that has been paid into court. The ship was taken into a port in the Falkland Islands, and a portion of the cargo was there put on shore. The money has been paid into court in satisfaction of the freight of it. The ship then continued her voyage, and met further bad weather, the result was she put back and came to anchor at Monte Video, in consequence of the damage sustained by and by reason of the bad weather. Upon her arrival at Monte Video the cargo was this: the town was in a state of anarchy, a hostile army was in the neighbourhood, the vessels in the harbour were being withered, the town in order to get out of reach of the enemy was to be fired on from the town from the sea.

The ship arrived in the month of February, the captain thought it right to dismiss the cargo and warehouse it, and he left the ship at Monte Video till the February following. That month he took the step of selling the cargo and receiving the money; and, without having had faith to the captain, or anything to do with his own statement he says, "I sold it on the 14th Feb.; I had tried to send it on; I received a certain sum of money;" and in another part of his evidence he says, "I sold it for the purpose of getting the money for the ship's use." His statement with respect to the sale of the cargo and supposing that the matter had stood as it perfectly clear that there would be no evidence to go to the jury, upon what I have stated, that there was a total loss of the cargo by the peril of the sea, because in this case it was not brought about by a peril of the sea, but that to entitle the assured to recover on a policy the loss must be the immediate consequence of the peril of the sea, and not a remote one. Therefore, assuming there was nothing to the contrary, that I have stated, there would be no ground to go to the jury of a total loss of this cargo under those circumstances, Mr. Brett contended by reason of two circumstances which he put forward, that there was a total loss of the freight, and that there was a constructive total

loss of the ship, and if there was a constructive total loss of the ship, that that would involve a total loss of the freight insured. This was what Mr. Brett put forward as the first ground for making what occurred a total loss of freight; and the learned judge could do nothing else than leave the questions to the jury; he left all the questions to the jury whether or not the circumstances were such as to create a total loss of the ship; and the jury found they were not. Mr. Brett afterwards contended, secondly, that there was a total loss of goods, and he contended again, from what had occurred, that there was a total loss of the freight; and if he were right, it probably would be so. In my judgment, perhaps the learned judge might have been justified in withdrawing that question from the jury, and ruling, as a matter of law, that there was not a total loss of those goods. But I think there can be no objection to the judge, when the counsel states there may be a matter of law and an inference of fact, leaving it to the jury for the purpose, without himself ruling at once that there was no case to go to the jury. It seems that in this particular case, and under those circumstances, the judge did leave the proper question to the jury, assuming that this last question was a question for them at all. Therefore we are all of opinion that, under the circumstances of this case that were proved on the trial, the course taken by the judge was correct, and that there was no misdirection or any default in the mode in which he left the case to the jury. The third ground was that the verdict was against the evidence. The judge states that in his opinion the verdict was quite right, and I believe we all concur in the statement which he gives. We all concur with the learned judge in thinking that the verdict was right, and that there is no ground to set it aside on the ground stated. Therefore the rule will be discharged.

BRAMWELL, B.—I am of the same opinion. With respect to the two questions left to the jury, Lush, J. reports that he left the two questions made at the trial. He left the existence of those two grounds for the jury, and they negatived them. He did not say negatively to the jury or by implication that there could be such a total loss, but he put the only two views, on which it could have been contended that there had been, to the jury. If he would have been right in treating it as a total loss of the freight, I think there may be a fault in his summing up.

Brett, Q.C.—Will your Lordships in such a case give leave to appeal?

MARTIN, B.—Oh, no.

BRAMWELL, B.—There is great difficulty in giving you leave to appeal after the opinion of my brother Lush.

Rule discharged; leave to appeal refused.

Attorneys for plts., Gregory, Rowcliffe, and Rowcliffe, 1, Bedford-row, agents for Duncan, Squarey, and Co., Liverpool.

Attorneys for defts., Flux and Argles, 3, East India-avenue, Leadenhall-street, E.C.

CHAN.] CITY OF DUBLIN STEAM-PACKET CO. v. THOMPSON—MARGARET v. TUSCAR. [IN

EXCHEQUER CHAMBER.

Reported by W. MATD, Esq., Barrister-at-Law.

ERROR FROM THE COMMON PLEAS.

Monday, Feb. 5, 1866.

THE CITY OF DUBLIN STEAM-PACKET COMPANY
v. THOMPSON.

Ship and shipping—Register tonnage—Ships requiring propelling power—Allowance for engine-room—Power of commissioners to frame new tonnage rules—Rules ultra vires—Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), ss. 23, 29.

Sect. 23 of the Merchant Shipping Act 1854 enacts that, in estimating the register tonnage of ships requiring propelling power, allowance shall be made for engine-room, and it divides such ships into two classes, prescribing certain allowances for each class, and laying down rules for the measurement of the engine-room. Sect. 29 entitles the Commissioners of Customs, with the sanction of the Treasury, from time to time to modify and alter the "tonnage rules" prescribed by the Act. The Commissioners of Customs did, in fact, with the sanction of the Treasury, in 1860, issue new tonnage rules, which abolished the distinction between the two classes of vessels, and laid down new uniform rules for the measurement of the engine-room in all ships:

Held, that these rules were laid down by the commissioners ultra vires, and that they had no power to abolish the distinction between the classes of vessels, or the allowances to be made to each class, but only to alter the tonnage rules respecting the mode of measuring the space actually occupied by the engine-room.

Error from the Court of C. P., which will be found fully set out in 12 L. T. Rep. N. S. 849.

R. P. Collier (Solicitor-General) (*Giffard*, Q. C., and *C. Pollock* with him), for the plt. in error, contended that the 23rd section of the Merchant Shipping Act 1854 was one entire rule in itself, and that the five paragraphs were simply sub-rules, and that the commissioners, in doing what they did, were only carrying out the intention of the Legislature.

Bovill, Q. C. (*Watkin Williams* and *E. C. Brouning* with him), for the defts. in error, were not called on.

POLLOCK, C. B.—I am of opinion that the judgment of the court below must be affirmed. The real question is, whether the Commissioners of Customs, with the approval of the Board of Trade, may make such rules as they have made. When an Act of Parliament is passed which appears to give a power to any one to make an alteration in it, it should be looked at with great care, and although full effect should be given to its language, we should, nevertheless, be careful to guard ourselves against enabling a private body to make any alteration in a part of the statute which the Legislature did not intend should be altered. By sect. 29 the commissioners are empowered with the approval of the Board of Trade, to make such modifications as may from time to time become necessary in the tonnage rules. Sect. 23 directs that an allowance shall be made and that in certain cases a measurement shall be made according to "the following rules," of which there are five. Now the paragraphs A. and B. in the case do not come within these rules, and in altering the provisions of those paragraphs, the commissioners have acted ultra vires and consequently the judgment of the court below must be affirmed.

Judgment affirmed.

ADMIRALTY COURT (IRELAND)

Dublin, Friday, Feb. 3, 1866.

(Before KELLY, J.)

THE MARGARET v. THE TUSCAR.

Ship's lights and rules of the road—Steamers and vessels on their fishing grounds.

First, although it is the duty of steamers and to keep clear of fishing vessels on their fishing, yet this fact does not excuse the latter from observance of the 5th and sixth regulation Admiralty rules, which enact: 1. That *saits* under way or being towed shall carry the as steamships under way with the exception white masthead lights, which they shall *see* 2. That whenever the green and red lights be fixed, then lights shall be kept on their respective sides of the vessel *ru* instant exhibition, and shall on the approp to any other vessel be exhibited on their n sides in sufficient time to prevent collision, manner as to make them most visible, and so green light shall not be seen on the port side red light on the starboard side. To make th these lights more certain and easy they shall painted outside with the colour of the light i pectively contain, and shall be provided with screens.

Secondly, in every case of collision, if it apper court that the violation of the Admiralty reg as to lights has contributed to such collision, which has been guilty of that violation shall b to be in fault, except it is shown to the satisfi the court that the circumstances of the cas departure from the regulation necessary.

Dr. Townsend, *Dr. Corrigan*, and *Dr. Boyd* s for the Margaret.

Dr. Todd and *Dr. Elrington* for the Tuscar.

KELLY, J.—In this case the owner and of the *Margaret*, of Kingstown, a full-decker of 41 tons, has filed his petition agai *Tuscar*, of Glasgow, a screw steamer of 1 belonging to the Clyde Shipping Com recover the value of his vessel and her fish estimated at a sum of 700*l.*, all of which w lost by the collision. The facts, as establ the evidence, are as follows:—On the m Thursday, the 14th Dec. last, between five o'clock, a fleet of trawlers, about forty in lay about half way between Howth and waiting for daybreak to cast their nets. them had lights, some none, and all were over two or three miles of that part of the The weather that morning has been vari scribed, the petitioner stating it to have b and starlight, with moonlight; the de dark scft morning, overcast towards the with a little clearing behind the wind, w N.W. Truth may lie between these, t events it is beyond dispute that the moon in her last quarter, and within four days a and that sunrise was not until eleven min eight o'clock. There is also a difference o as to the distance at which a vessel witho could have been seen that morning, the asserting it to be a mile, the defts. length only. Other portions of the however, may serve to test the accuracy wise of these respective statements. On scattered fleet of trawlers, and about th S.W. of Lambay, was the *Margaret*, e town, the petitioners in this case. *En*

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Kingstown harbour about one hour before, with nice sailing breeze, at a rate of four knots, and one of those in the fleet which had not any lights exhibited. Her crew, which consisted of six hands, immediately after clearing the harbour, was disposed of as follows: the skipper, with one man and a boy, below asleep; the only remaining hand, the liver, on deck at the helm. The evidence of the liver, the only witness to the earlier part, and the only witness to the entire of the matter now in question, is, that being at the helm at the time of leaving Kingstown until the collision, when he arrived at the fishing ground, he saw the three lights of the *Tuscar* between three and four miles off; he was steering east, the *Tuscar* to starboard, and end on. He saw her change her course to half or a quarter of a mile off, and when on his *Margaret's* port quarter, and port to go N.W., (Oliver) shouted to the crew below for the lantern, which it was the habit to keep below until required. The boy brought it up with a small red candle in it, of about ten to the pound. It was about ten minutes before the collision, it was there held by the boy over the trawler's bow, burning bright. In seven or eight minutes the steamer again altered her course, and started, opening her three lights. When the steamer changed her course a second time, he (Oliver) ordered to the skipper to bring up the torch (afterwards extinguished), which was held over the port side of the *Margaret*, amidship for two or three minutes before the collision. The skipper shouted to him to a-port, but no sooner was the helm up than the steamer, which had been coming on at a rapid pace, into the *Margaret* on the port side, and in a few minutes she went to the bottom. Now, this evidence—corroborated, as to the latter part, by the skipper and boy—if otherwise credible, supports the collision. But the depts. present a very different view of the case. All their witnesses, without exception, depose that between five and six that morning the steamer, on her voyage from Glasgow to Waterford, was on her proper course down channel for the latter, viz., S.W. and S. $\frac{1}{2}$ S., and at one mile from Lambay, the master, second mate, with the look-out and man at the wheel on the bridge, when the master, observing the lights in the fleet of trawlers right ahead, ordered to starboard, so as to keep outside them, and to keep the vessel more to the southward, and the steamer was so accordingly for about ten minutes. Then, when all the lights were seen broad on her starboard beam, the master ordered the helm a-port, and brought the steamer up to her original course. She was then carrying a topsail, and going about ten knots. Nothing was seen ahead, and she continued on her course for about three or four minutes, when the collision occurred. About one minute before the collision the master and the look-out, with the two mates on the bridge, all at the same moment of time, saw a small light about half a point on their starboard bow, about their ship's length off. The master at once ordered hard a-starboard, and, jumping to the speaking trumpet, called down to the engine-room, "Stop her, back her full speed." But the steamer was scarce out of his mouth when, looking ahead, he saw the steamer run right into the trawler amidships on her port side, the trawler having been first then seen when right under the steamer's bow. The two narratives as to the course and the changes of course of the steamer differ very materially; but there happily exist in the case certain facts by which the court, since it cannot reconcile the two, at all events, decide between them, namely, the admitted fact of that fleet of trawlers being on the fishing grounds; the undeniable duty thereby imposed upon the steamer to keep clear of them, the steamer being on her

usual trip from Glasgow to Waterford; and, lastly, her course being for that trip southerly, and not westerly, and her log as well as evidence showing it to have been S.W. and half S. Reliance, therefore, can scarcely be placed upon Oliver's evidence, that she was steering west when he first made her out, for she at that time was undoubtedly on her course as the two changes in it observed by him, and but two changes, by admission of all parties, were made in it, took place after he had first seen her; nor can it be credited that the steamer, had she been on a westerly course, would have pursued it, as by so doing she would have been brought in among the trawl fleet, which it was her duty and her determination to avoid, and still less can it be reconciled that when on the *Margaret's* port quarter, she (the steamer) ported to go N.W., still more among them. But this latter statement is to be noticed for another reason, namely, that it was upon her so porting the boy was called to bring up the lantern, and to hold it over the *Margaret's* bows, which he did for seven or eight minutes. Now, the court cannot conceive any possible reason for such being done, as the natural consequence of that port helm was to bring the steamer altogether out of the way, and it did bring her out of the way of the trawler upwards of a mile according to the steamer's rate of going. Had the steamer been meeting or crossing the trawler's course, then, indeed, the light would have been necessary in order to avoid the chance of a collision. With such views the court cannot but prefer to credit the statement of the steamer on these points. But now the evidence moves forward to the actual crisis of these occurrences. Both parties agree that it was after the second of the two changes in the steamer's course—a change by the bye which the petitioner called starboarding, but which beyond all reasonable doubt was porting—the collision, which then became imminent, occurred. Both parties agree that it took place in about three minutes after that change. The steamer, by the admission of the petitioner, had her proper regulation lights all burning in accordance with the statute. The trawler, be it kept in recollection, a full-decked sailing vessel of 41 tons, confessedly had them not, in violation of the same statute. Now I come to the provisions of that statute which have been in this instance so totally disregarded, namely the 5th and 6th articles of the regulations for preventing collisions, issued in pursuance of the Merchant Shipping Amendment Act 1862. By an Order in Council of Jan. 1863, the 5th article makes it obligatory on sailing ships under way or being towed to carry the same lights as steamships under way, with the exception of the white masthead lights, which they are not to carry. The 6th article enacts, "that whenever the green and red lights cannot be fixed, these lights shall be kept upon deck on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side." Taking for granted, then, that, from her small tonnage and her occupation as a fishing vessel, the trawler found it difficult or injurious to the handy working of the fishing gear, in compliance with the 5th article, to have her lights fixed, she has, at all events, violated the 6th one in not having kept the green and red lights on deck on the respective sides of the vessel, ready for instant exhibition. Now, in such cases the law has expressly enacted that in every case of collision, if it appears to the court by which such collision is tried that the vio-

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lation of these regulations as to the lights have contributed to such collision, the ship which has been guilty of that violation shall be deemed to be in fault, except it be shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary. Now, the court, in the case before it, has diligently examined the evidence to ascertain if such justifying circumstances rendered any departure from the regulation on the part of the trawler necessary, and has found none, except a wholesale and a continued violation of the regulation in question on the part of the trawlers could be surmised as such—in other words, that the illegal act of the many could justify the illegal act of the one. Such can never be tolerated by law, which requires obedience, and punishes its violation: for even in cases where no collision occurs it has made the carrying of any lights, except those in accordance with those regulations, a misdemeanor in the master or owner of the ship carrying such forbidden lights. In this case, where from its peculiar and disastrous circumstances—for life as well as property has been lost by the collision—perhaps too minute a detail has been gone into, the court will now conclude these observations with reading from the *Juliana* the emphatic exhortations in a case very similar to this of the eminent judge of the High Court of Admiralty in England. “I wish I could use any terms,” said that learned judge, “strong enough to induce those who navigate vessels round the coasts to believe that they must pay attention to this Act of Parliament. I regret that on so many occasions the court has seen how this statute has been disregarded. Many cases have been made to turn upon the omission to hoist the proper lights when another vessel has been seen approaching. Then arises the question whether this omission was or was not the occasion of the collision under consideration. On such questions it is often difficult to come to a safe conclusion; but there is one conclusion to which the court can come, namely, that the safeguard which the Legislature was intended to provide has been neglected. I do hope that this, amongst other instances, may be a warning to all those concerned in shipping matters that they must attend to the provisions of the Act of Parliament: for, if they do not, and their vessels are ever run down, they can neither recover in this court nor in any court whatever.” The case of the trawler, however, is that he did exhibit proper and sufficient lights. Accordingly, in support of that averment, his evidence is, that for the seven minutes subsequently to the first change in the steamer's course he exhibited over his port bow the lantern light, and that for the next three minutes that elapsed he exhibited the torch or flare-up light. Now, it is to be observed that in the article in which he alleges the light exhibited during these last three eventful minutes, the torch or flare-up light only is stated to have been held up: and as to the lantern light stated in the evidence alone as exhibited, there are grave doubts in the mind of the court that it could then have been held up in any efficient manner, so as to have shed a light of any force or continuity. The defendants, alleging that there were no proper lights, or lights in proper time exhibited, deny that any light whatever was visible or seen by them until one minute before the collision, and when all their efforts to avoid it were unavailing, because too late. It is not contended by the petitioner that the flare-up (the fresh light brought up by the skipper) was exhibited until two or three minutes before the collision. But, as the skipper stated that when he then came on deck the steamer was one-quarter of a mile off, she must have traversed that space in one minute and a half, as her rate of speed was ten

knots. It is evident that the flare-up was exhibited sooner than one minute and a half before the collision—too late to warn any approaching vessel of its vicinity. On the other hand the trawler attributes the collision to the *Tuscar* having slackened her pace, and to not having reversed, and to not having kept out of the way. But it is in proof that these latter measures were attempted by the *Tuscar*, and for the reason that they were unsuccessful. Her speed, carrying a full cargo, was, it appears, ten knots. It is therefore a question for the assessor, whether it might not have been prudent, and if prudent then necessary for her to have done so, since by having resumed her original course she drew more in shore, and so the chance of meeting some straggling vessel was increased. At the same time, even if the master of the *Tuscar* manifested in altering course and keeping out farther south for a few minutes, and then not resuming his original course until he had reasonable grounds for believing that he had left all the trawlers on his starboard beam, and safe astern. Upon a consideration of all the circumstances of the case, having the concurrence of the learned assessors, is of opinion, first, that the violation of the sixth Admiralty regulation by the *Margaret* contributed to the collision; secondly, that the violation of the seventh by the *Margaret* was not sufficient time to prevent the collision, nor in any way as to make them most visible; thirdly, that the *Tuscar* was justified in going at the speed of ten knots; fourthly, that the collision was solely caused by the *Margaret's* non-observance of the Admiralty regulations as to light, both as to position and manner of exhibition; and lastly, that the *Margaret* was solely to blame. The petitioner therefore he dismissed; but, as the owners of the *Tuscar* did not press for costs, without costs.

Dublin, Saturday, March 3, 1866.

(Before KELLY, J.)

THE *IDA* v. THE *WASA* OF NICOLAISTADT.*Rules of the road—Construction of Admiralty regulations.*

It is a general rule in the navigation of the sea, that there is nothing in the Admiralty rules of the road laid down, which will exonerate any ship or crew from the consequences of any neglect of precaution required by the ordinary practice of seamen, or by the special circumstances of any case. The Court of Admiralty will hold a vessel to blame which, insisting on her right under any rule of not giving way, makes no effort to avoid collision, where she could have done so had she given way.

Dr. Butt, Dr. Connerney, and Barry app for the *Ida*.Dr. Townsend and Dr. Elrington for the *Wasa*.

KELLY, J., in giving judgment, said:—“The British barque *Ida*, of South Shields, was damaged for damages for loss of that vessel, run down by the *Wasa* on the 29th July last. These two vessels, the *Ida*, twelve hands, and the *Wasa*, eighteen hands, had, as it chanced, been in from an early hour that morning beat channel of Tenedos, bound to Constantinople, with a fine working breeze from N.N.W., and the weather fine and clear. The *Ida* was sailing, which was about equal, was, as the most unexceptionable witnesses, we

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and it was about one hour after mid-day, when they were tacking between the island of Gadaro, lying on the port hand as they beat to windward, and the Yonkari Shoals, which lay on their starboard hand, off the mainland of Asia Minor, opposite to the island, and where the channel is but three-quarters of a mile over, the *Ida* on her port tack towards the mainland, and the *Wasa* on her starboard tack towards the island, both under all plain sail except jays, they met somewhere, being on the opposite tacks, between the island and mid-channel, and the *Wasa* striking the *Ida* went to the bottom a few minutes after in seven fathoms. These facts are undisputed. Let those which are in controversy be now considered; and in doing so a very important circumstance is to be borne in mind, namely, that the collision took place in the clear light of a midsummer day. The *Ida's* case is, that when she had come round on her port tack, about 150 yards N.E. of the east end of the island, which was as near as she could with prudence approach it on account of foul ground and a strong current running north to south, she was not under command, when the *Wasa*, although being at more than ample distance to have kept away, continued on her starboard tack, and, without adopting the slightest means of avoiding the *Ida*, ran into her. On the other hand, the *Wasa* insists that where the collision occurred was not within 150 yards, but at a quarter of a mile distance from the island, and not when the *Ida* was in stays, but after she had filled off, and was for some time under way on her port tack; and that the *Ida* meeting her end on luffed, attempting to go to windward, instead of keeping out of her way as she (the *Ida*) was bound to do, having the wind on her port side. Upon these opposing statements but one and the same question can arise for a decision between them, namely, was the *Ida* when struck by the *Wasa* under way or not? For, if under way, her case as a party solely entitled to damages is at an end, and different considerations might then arise as to whether both vessels were not in fault. A mass of conflicting and even incredible evidence produced to support each of these statements has more than usually impressed the court with the conviction that very few of the many who happen to be present on the occasion of any such occurrence possess either sufficient presence or perspicacity of mind to qualify them to be accurate observers, or that clearness of understanding, and memory to reliable narrators of it. Enough, however, can be gathered from indisputable circumstances to enable a sound conclusion to be arrived at. Now, the question as to whether the *Ida* was under way or not can be proved either by direct evidence on the point, or by the circumstantial evidence, particularly of where she went down, all the witnesses agreeing that the latter place was but two or three hundred yards E. and S. of the place where she was struck. Taking up the latter class of evidence first, what appears? The master of the *Wasa* says that he had her sails full when the *Ida* was up in the wind, and that in five or seven minutes after he met the *Ida* under way, nearly one-third channel over. Now, the master of the *Ida*, on cross-examination, says, that when going about his first order, "helm-a-lee," was three and a half or four minutes before his second order of "let go the haul," and that the second order was two minutes before the collision. Now, as the *Wasa* consumed from five to seven, say six minutes before she met the *Ida*, and as the *Ida* consumed the same six minutes in tacking, it is clear that the *Ida* must have been struck, not under way, but when occupied in the manœuvre of tacking, and therefore not under command. Now, it is admitted that the *Ida* went about for her port tack about 150

yards off the island, and the question, then, may be, was the *Wasa* able to reach to that place—say three-quarters of a mile from the Yonkari Shoals—where she went about in six minutes? That she was well able so to do is clear; Capt. Searle states that her speed then was seven knots an hour, and this speed will allow exactly six minutes for the three-quarters of a knot; so that these calculations make it very clear that the collision was at the place where the *Ida* was tacking before she was under command. Again, the master of the *Ida* says that his course was E. and N., and that when going off she fell on to E.S.E., and had come up about E. at the time of the collision. This statement, wonderfully borne out by the log of the *Wasa*, seems confirmed by it. That log had the following entry: "At one o'clock p.m. this day (the day of the collision) tacked off the Yonkari Shoal, and stood over for Gadaro Rock on starboard tack. About seven minutes after tacking met a barge on the port tack, which at that time appeared to be falling off a little, in accordance with the Admiralty rule that a ship on the port tack shall give way; but as she approached nearer she was luffed up in the wind, and, as it was impossible for us to fall off, ordered the sails to be hauled aback, but before the sails were got about the accident occurred—the ships struck each other." Bearing in mind the observations already made, that six or seven minutes would bring the *Wasa* to the ground where the *Ida* was in stays, and Searle's evidence that she was slow in coming round, it would seem as if the "falling off a little" and "the luffing-up" mentioned in the log were the very changes the *Ida* was undergoing in coming round to her course, and not her compliance with the Admiralty rule when there was no occasion, still less the violation of it, when, had she been acting under it, her own destruction would have been the most likely consequence. Again, the chief mate of the *Wasa* deposed that her bowsprit and jibboom had run in over the *Ida's* deck, between her main and fore masts; the vessels fast in each other for four minutes. And the second mate of the *Wasa* deposes that the *Wasa* afterwards backed out all clear, neither chafing her boom nor hurting her bowsprit. It is safely to be inferred from this circumstance that the *Ida* could not have been under way. Again, the log and evidence of witnesses state that the starboard anchor of the *Wasa*, hanging at the cathead when she was afterwards driven astern on the wreck of the *Ida*, hooked the maintop backway, breaking the maintop and foremast; yet the master of the *Wasa*, admitting that his bulwarks spread over his bows, denies that, when, as he stated, the collision commenced by his starboard bow bruising along the port bow of the *Ida*, some anchor, hanging in the same place, touched the *Ida*. Now, this denial, taken with the fact that the *Wasa's* stem was crushed in and not twisted, is sufficient to prove that the *Wasa* must have come stem on to the starboard side of the *Ida*, and therefore not have met her under way, end on, as stated. Now comes the direct evidence of independent witnesses, who were present in the channel of Tenedos at the very time of the occurrence, and who had been that morning beating up to windward, and also Capt. Searle of the *Prairie Gem*, and Capt. Denison of the *Austria*—British vessels. The former was standing on the poop, which was four feet above the deck of his ship, the *Ida* and the *Wasa* on his weather side, both then on the starboard tack to the island, the *Ida* about a quarter of a mile ahead of the *Wasa*, the latter in the wake of the *Ida*, he (Capt. Searle) being again in the wake of the *Wasa* and about one quarter of a mile distant on her lee quarter. This witness, thus situated, deposes that he saw the *Ida* going close over to the island, to within about 150 yards

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of it, hove in stays, fill on the port tack; that she had not gathered way upon her; and that before she got into command he saw the *Wasa* come up right under her lee, and run right into her between the two masts, and right about the centre on the starboard side. The *Wasa* had let go neither top-sails nor headsails, nor altered her course in the least, but went straight on till she struck her. The witness concludes by adding, that when the collision happened the *Wasa* was sailing, the *Ida* was stationary. The evidence of Capt. Denison, of the *Austrian* is, that he, lying about one mile to windward, saw the *Ida* as she was tacking and hoving, left the deck, was recalled by his mate in two or three minutes, and then saw her beginning to sink, "sinking and sinking," as he expressed it, till she went down, about two or three hundred yards from where he saw her tacking, with her topmasts over water; and he says that she could not have gathered way on her in that two or three minutes he was off the deck; and in the month of September after, on his return voyage, he saw the topmast in the same place. This latter evidence supplied the circumstantial evidence of the *Ida* not having been in command when she was struck, and is further corroborated by that of Capt. Campbell, of the *Balmoral*, who saw the topmast in the place described in the month of October next after. The evidence of the master of the *Wasa* upon these points, namely, the place where the *Ida* was struck, and where she went down, must be passed over by the court as undeserving of its attention. Impressed, then, with the strongest conviction of the truth of the *Ida's* statement, the court find that there is one circumstance outside of it, yet of so strong a nature that it should be adverted to. The evidence of the man at the wheel of the *Wasa* is, that when the master of the *Wasa* saw the *Ida* just two minutes before the collision he gave him orders not to give way, he (the master) adverting to the rule of the road that a vessel with the wind on her port side was the vessel to give way; that the master repeated that order two or three times during those eventful two or three minutes; and that, added the witness, had the *Wasa* given way, and had sufficient room to do so, the collision would not have occurred. The Court adverts to this to warn masters that there is another and most continuing rule which says, that nothing in the Admiralty rules shall exonerate any ship, or owner, or master, or crew from the consequences of any neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case, and that the Court of Admiralty has held that vessel to blame which, insisting on its right under an Admiralty rule of not giving way, had made no effort to prevent the collision which it thought was in her power, and which consequently it was her duty to have done. Looking at all the circumstances of the present case, and having carefully gone over the whole of the evidence with the assessors, the Court—agreeing with those gentlemen—is of opinion that the *Ida* was not under command at the time when she was struck by the *Wasa*; that the collision was attributable to the latter vessel obstinately persisting to keep her luff when a stroke or two of the weather helm would have prevented the occurrence; that, as the *Wasa* was under command, and the *Ida* powerless, the *Wasa* could easily have kept away, and did not do so; that, in fact, the *Wasa* was solely to blame; and that there must be a decree in favour of the *Ida* with costs.

The Court was assisted by Capt. Miller and Lieut. Crosby as assessors.

Dublin, Saturday, Aug. 25, 1856.

(Before KELLY, J.)

Re THE ISABELLA, OF GLASGOW.

Material men—Lien on ship for repairs and supplies.
Construction of statute 19 & 20 Vict. c. 97.

The 8th section of the 19 & 20 Vict. c. 97, is ~~referred~~ to the rights and remedies of persons having ~~been~~ for repairs done or supplies furnished to ships, ~~and~~ construed as a remedial enactment, intended to ~~relieve~~ and not restrict those rights and remedies; ~~and~~ in order to secure these rights and remedies to ~~persons~~ who had claims as material men in all parts ~~of the~~ United Kingdom not being strictly English ports ~~in the Channel Islands, the 8th section of the~~ 19 & 20 Vict. c. 97, was passed declaring all ports ~~in the~~ United Kingdom and the Channel Islands ~~to be~~ ports, and thereby enlarging in favour of the ~~claimants~~ the jurisdiction of the Irish ~~Court of~~ Admiralty in England.

Where, on a petition by material men for the ~~recovery~~ of a ship, it appears that the petitioners had agreed to the agent of the owners of the ship for ~~payment~~ the petitioners put themselves out of court as ~~claimants~~ sole, and their claim is simply one of contract.

KELLY, J., in giving judgment in this case—~~said~~:—This is a petition on the part of Messrs. ~~Steele~~ and Brazil, as material men, against the steamer ~~Isabella~~ *Isabella*, of Glasgow, for repairs and ~~supplies~~ furnished to her by them in the course of ~~the~~ month, when lying in Kingstown harbour, and praying a decree of sale against her for the payment of their several demands. The proctor for the *Isabella* has appeared under protest, and on the part of her owner has exhibited a declinatory exception, setting forth two distinct grounds of objection to the jurisdiction of this court: the first, that according to the maritime law of this realm by which the High Court of Admiralty is bound, material men supplying necessities to a British ship in a home port acquire thereby no right or lien against such ship; the second, that if this court even had jurisdiction in such matter, it had none in respect of the matters alleged in the petition in the present case. In support of the first ground of objection, the case of the *Neptune*, 3 Knapp, P. C. C., was strongly insisted upon, and the arguments so successfully used against the lien were ingeniously adopted in the argument in the present case; nor could it well have been otherwise, as all the bearings on the subject had been exhausted in that argument and on that decision. That decision was simply that material men have no lien for supplies furnished in England on the proceeds remaining in the registry of the Court of Admiralty of a ship sold under its decree. Now that decision, confined most guardedly in its language to a case of supplies furnished in England, followed, but as a corollary, the prohibitions which nearly a century and a half earlier had been granted by the Courts of Common Law in England, restraining the High Court of Admiralty of that kingdom from entertaining suits in conformity with the doctrine of foreign mercantile law, by which it was held that material men had a lien on the ship itself—that decision basing itself on the reasoning of Lord Hardwicke in *Buxton v. Snee*, and using its language, namely, "If the body of the ship is not liable or hypothecated, how can the money arising by sale be affected or followed, the one being consequential of the other?" no new principle was enunciated, but it merely carried out what had been the ground of these prohibitions—namely, that the law of England had never adopted that doctrine of the civil or foreign maritime law as to contracts made in England, deny-

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ing that material men had, in respect of such contracts, any lien upon the ship itself, and prohibiting those proceedings which could only be justified by the existence of such a lien. When, then, this court asked to receive that decision as authority in the present case, it naturally looks to the antecedent and present state of the law on this subject in Ireland, and upon the very threshold of such investigation it finds that no prohibition has been ever granted with respect to this matter in this country, but in the year 1857 the very question, similar in all respects to the present one, was raised before this court, and very ably argued. That case was the *Cinque Freres*, of Brest. Referring to my notes of the judgment then given by me, I find that after declaring that it was beyond doubt that by the general maritime law material men had a lien upon the ship itself, I added as follows:—"But in Ireland, as in England, the law of nations, of which the *lex mercatoria* is a branch, is part of the common law only so far as it is unrestrained, or as it is modified by statutes, or by the municipal courts. Now, in Ireland, which did possess its independent legislature, and still possesses its independent municipal courts, the High Court of Admiralty (unlike as in England) has been permitted to exercise a jurisdiction, carrying out to a limited extent that principle of the *lex mercatoria*, namely, that a ship itself is liable to material men with this proviso, she is a foreign, not a domestic ship. That jurisdiction no statute has been passed to alter, and no prohibition or appeal has been interposed to prevent. Influenced by such considerations, and supported by a long and unvarying course of practice, I hold myself bound to administer the law of the court as I find it, and am of opinion that I would not be justified in declining to exercise authority under it when legitimately appealed to." To these conclusions I still adhere, founded as they are upon the undeviating practice of the court for more than a century. Upon the uniform decisions of my predecessors upon this bench—and yet more upon the fact that that practice has neither been prohibited nor restrained—under such circumstances of difference, therefore, as a prohibited and an unprohibited jurisdiction, and also of the decision in the case of the *Neptune* being specially limited to supplies furnished in England, I feel justified in declining to be guided by that decision as an authority in the present case. But it has been further urged, that, admitting this practice, namely, that the ship is liable, provided she is a foreign, but not a domestic vessel, the *Isabella*, although hailing from Glasgow, is a domestic vessel, and therefore falling within the proviso, is not liable; and in support of that argument the 19 & 20 Vict. c. 97, is relied upon. Now, that statute in sect. 8 enacts as follows:—"That in relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to or for ships, every port within the United Kingdom, the islands of Man, Guernsey, Jersey, Alderney, Sark, and the islands adjacent, being part of the dominions of Her Majesty, shall be deemed a home port." The argument then is, that Glasgow, to which port the *Isabella* belongs, being, by force of the enactment, deemed a home port, the *Isabella* must be considered as a domestic ship, and therefore, not being liable for her repairs and supplies under the law as administered in this court, the persons having claims on those accounts must lose their rights and remedies against her. But the enactment in very terms relates to these rights and remedies in order to enlarge them and to abrogate them. It is a remedial enactment, and to be construed liberally, and by no force of construction can be wrested to so palpable a self-contradiction as the pro-

posed interpretation of it in this argument discloses. It is very certain that the intentment of this enactment was as follows:—The English Court of Admiralty having by prohibition and appeal totally lost its jurisdiction in material suits, it was in a short time afterwards restored to it by statute as against foreign ships, and afterwards as against British colonial vessels; but the exercise of that jurisdiction was restrained to English or home ports. In order, then, to give rights and remedies to persons who had claims as material men in all the ports of the United Kingdom not being strictly English ports, and in the Channel Islands, the enactment referred to was passed, declaring all ports within the United Kingdom and the Channel Islands home ports, and thereby enlarging in favour of that class of claimants the jurisdiction of the Irish Court of Admiralty in England. For all these reasons, then, the court overrules the first ground upon which a declinatory exception is taken. The second ground, however—namely, that the court has no jurisdiction over the matter stated in the petition—must be allowed. The petitioners alleging formally that the repairs and supplies were furnished upon the credit of the ship, distinctly pleaded in their fourth and seventh articles that they had been in communication with the agents of the owner in Kingstown; that in consequence of that they had agreed to furnish the repairs and supplies, and that, in consequence of an order to that effect from the same agents, they had discontinued their services. One of the petitioners, Sheridan, in his leading affidavit, states that when he wanted payment the master told him to apply to those very agents. Now these allegations of the petitioners themselves appear, in the judgment of the court, to present an insuperable objection to this action being maintained by them, the contract which they seek to enforce as against the ship having been entered into by agreement with the agents of the owners, the result of communication with them, and upon their responsibility. The petition and its schedules are open to other peculiar observations, but those already made with reference to the agreement with the acknowledged agents of the owners and on land sufficiently show that it is the common case of contract, and that the Court of Admiralty cannot have cognisance of such a suit. This ground of exception, then, being held good, the Court dismisses this petition with costs.

UNITED STATES DISTRICT COURT— IN ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate.

EASTERN DISTRICT OF NEW YORK.

(Before BENEDICT, J.)

THE SAXONIA.

*Collision—Steam propeller and schooner look-out—
Sudden tack of schooner.*

Where a schooner, loaded with oysters, in order to get to her pier tacked without noticing an approaching steam-propeller, and was run into and sunk:

Held, that on the evidence, the schooner was so near the propeller when she tacked across her course that the latter had not time, though she immediately reversed her engine, to stop herself:

That it was good management under the circumstances for the steamer to endeavour to stop, although when her engine was reversed she could not sheer, rather than to have endeavoured to sheer either way by keeping on at risk of loss of life:

That the steamer was in fault for not having a look-out

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especially stationed on the forward part of the vessel, but inasmuch as it was made to appear that the schooner was seen as soon as she came in view, the absence of the look-out did not contribute to the collision:

That the schooner was in fault for thus tacking so near the steamer, and she must bear the loss.

These were two libels filed by the respective owners of the schooner *Village Bride*, and her cargo of oysters; the schooner having been sunk by the *Saxonia* on the 4th March 1865, in the Hudson River in the port of New York. The testimony in the case was very voluminous, some forty-four witnesses having been examined. The main facts of the collision sufficiently appear in the opinion of the court.

For the schooner, *Beble*, *Dean*, and *Douline*.

For the steamer, *Burrett* and *Brinsmade*.

BENEDICT, J.—Since the reception of the briefs of counsel I have taken time sufficient to enable me to go over all the testimony with care, and test by the evidence itself the correctness of each proposition advanced on either side; and though the case has been examined both by counsel and by me in many aspects, I am of the opinion that its decision must turn upon the determination of a single question of fact. The undisputed facts are these. About one p.m. the *Saxonia*, having left her berth at Hoboken, was moving down the Hudson River in a straight course southerly to sea, at a speed of from four to five knots an hour. She was in charge of a licensed pilot, who stood upon the bridge of the vessel directing her course, where also her master was stationed in the discharge of his duties. The tide was flood, with a full breeze from the westward or thereabouts. The weather was fair, and no vessels were in the way to interfere with her movements or obstruct her view. About the same time the schooner *Village Bride*, bound to Pier 43, on the east side of the river, with a load of oysters, came into the river from below, and in order to make her landing at Pier 43 adopted the following manœuvres:—First she ran up somewhat past Pier 43 under full sail, and then tacked and stood southerly some distance, when coming into the wind she lowered her foresail and stood northerly again under jib and mainsail until about opposite the pier, when she again came into the wind, lowered her mainsail, and then wore and stood towards her pier on an east course under jib alone. This last manœuvre brought her upon a course directly across the course of the *Saxonia*, then coming down the river, and while so proceeding she was struck by the *Saxonia* on her larboard side about twenty feet from her stern, and cut down so that she shortly sunk. All the movements of the schooner up to the time of the blow were below the *Saxonia*; and after the foresail was lowered the course of the schooner was to westward of the steamer. At the time of the blow, however, she had nearly passed the steamer's bows on her east course, and was moving at about right angles with the course of the steamer. These various manœuvres of the schooner are shown to be the ordinary and proper manœuvres preparatory to reaching a pier in such a state of wind and tide, and they were adopted without regard to the presence of the steamer, as no person on board the schooner saw the steamer until after the mainsail was lowered and the schooner headed to the east. Under such circumstances the rights and duties of the steamer are not doubtful. She was bound to see the schooner and her various movements. So long as the schooner was heading to the northward and to west of her, she was entitled to hold a course sufficiently to the east to

pass her in safety. When the schooner changed her course to the east, it became the duty of the steamer to avoid her, if possible to do so, by sheering either to the west or east, or by stopping. The latter was the course adopted. The manifest weight of the evidence is, that when the schooner stood to the northward under mainsail and jib, she was nearly ahead of the steamer and bearing somewhat to westward; that then the wheel of the steamer was starboarded a little, but that after the schooner wore, as the witnesses say, and as the blow shows, no material change was made in the direction of the steamer. But whether the failure to attempt to sheer the steamer at this time was a fault, depends entirely upon the distance from her to the schooner at the time when the schooner wore, for the steamer was a propeller, and as is proved this class of vessels cannot be sheered with any certainty by the action of the rudder, when the screw is working backwards. She could, it appears, stop her headway in about 200 yards, and in view of the suddenness of the schooner's change of course, if the schooner was then within a short distance, I consider it obligatory upon the steamer to endeavour to stop, instead of, by keeping up her speed as would have been necessary, endeavouring to sheer sufficiently to avoid the schooner at the risk of loss of life in case of failure. If, on the contrary, the schooner did not wear within this short distance from the steamer, then the steamer could have stopped, or by keeping on have sheered enough to avoid her. The question decisive of the case then is, "What distance did the steamer pass over after the schooner wore?" The libellants say she went half a mile; the claimants say not exceeding 200 yards. Now, upon this question, the testimony of the pilot, master, mate, and others on board the steamer is very positive and clear, to the effect that the schooner wore but a short distance ahead of them, say, two ships' lengths, and so near, that although the engine of the steamer was at once stopped and reversed, there was not room to stop her headway before she reached the schooner; and this testimony I find confirmed by evidence given by witnesses produced by the libellants. Thus the master of the schooner testifies that when he first saw the steamer she was about abeam or half a point forward of his beam. McCarthy also, the hand from the schooner, says, that when the mainsail was lowered, he lowered the peak halliards, and then started forward to overhaul the chain; that when he reached midships he first saw the steamer, and she was then about abreast of him; Baker, the mate of the schooner, is positive in stating that when he saw the steamer her stem was pointing at the schooner. He also gives her bearing from him by compass as N.N.W. These statements of seamen as to the bearing of an approaching vessel are much more reliable than any estimates of time and distance; and they are inconsistent with the theory that the *Saxonia* was then any considerable distance from them. She must have been very close when abeam of them, otherwise they would have passed her bows in safety. Furthermore, the short distance which the testimony of the libellants shows the schooner to have passed after she wore, when taken in connection with her speed, shows clearly that when she wore she was close to the steamer. This distance is shown by many of the libellants' witnesses to have been not exceeding 100 yards. McCarthy who had only time to walk to midships before he saw the steamer abreast of him, says that after that the schooner ran but twenty-five to thirty yards before she was struck. Rufan, a witness who was on the deck, says the schooner went but sixty or seventy yards upon her east course. Decker says the same. Post says but twenty-five yards. In addition to these the testimony of the master and mate of the

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schooner, when examined, is found to sustain the position that the schooner did not run a distance of 100 yards before she was struck. This makes the change of course less than a minute and a half from the blow, and places the steamer at a distance of not exceeding 200 yards, for the speed of the schooner upon her east course was two and a half miles per hour, while the speed of the *Saxonia* before she slowed was five knots—the mate of the schooner says four knots—an hour. This speed of the schooner, as stated in both the libels, must be deemed conceded, notwithstanding many witnesses declared upon the trial that it was no more than one mile an hour. For the speed of their vessel was a material fact, which the libellants were bound to know and aver. It was averred at two and a half miles per hour, and the averment cannot now be disputed. While considering this point I deem it worthy of remark, as indicating an undue desire on the part of the libellants to strengthen their case, that both the libellants, who in their libels stated upon oath that their speed was two and a half miles per hour, when asked upon the stand, reduce the rate one-half, and one of them, Miller, declares, when asked, that he would not believe any man who swore the speed to be two and a half knots, although he had himself so sworn in his libel. The schooner was a good sailer. She was under a full jib in a strong and fair breeze, and there is every probability that the averment of the libels, made soon after the accident, is very nearly accurate. For the purposes of this hearing it must be taken as true. This corroborating proof of the nearness of the steamer, derived from the testimony produced by the libellants, has led me to the conclusion that upon this, the decisive point of the case, the weight of evidence is with the resps. There is indeed a numerous array of witnesses produced by the libellants, and some nineteen of them, I think, were located upon the pier or vessels near by. Most of these witnesses express the positive opinion that the steamer could have avoided the schooner with ease. None of them, however, have any practical acquaintance with the capacities of a propeller like the *Saxonia*. Most of them think she could have avoided the schooner by sheering, and their evidence amounts to little more than estimates of time and distance. Besides, the greater portion of these witnesses were oystermen waiting on the dock for the arrival of this schooner, and their estimates are quite likely to be affected somewhat by a clannish sympathy with the libellants. I have endeavoured to give to their testimony all the weight to which it is entitled, but I find it overborne by other evidence in the case. There remains but to notice two features of the case strongly commented on by the libellants. It is strenuously insisted in their behalf that the steamer should be held responsible for this loss because she was being navigated without a look-out, stationed forward, and charged with this special duty. The neglect of the steamer in this respect is clearly proved, and it is a neglect which is inexcusable. She was moving in a great thoroughfare, and was bound to have had the look-out which the law requires. Absence of the proper look-out has endangered her defence in these actions and calls upon the court to scrutinise with care her movements, and the account she gives of them; but no rule of law requires that the absence of a look-out shall entail responsibility for a collision, where it is made clearly to appear that it did not conduce to the accident. In the present case, the steamer was moving in clear weather and broad daylight, a licensed pilot and her master were both upon her bridge in a position where they could see every approaching object. Both these persons testify in the most positive manner that they saw the schooner from the time she came in sight

until the blow, and gave orders in reference to her movements which were a subject of conversation between them at the time. If these two persons did not see this schooner from the first, they have both been guilty of perjury, which I am unwilling to believe. Their statement is moreover greatly confirmed by the fact that both of them detail with accuracy all the various manœuvres of the schooner as they are proved by the crew of the schooner to have been performed. The omission to have a stationed look-out, grave and dangerous as it is, cannot then, in this case, be held to subject the steamer to the payment of the loss in question, for the reason that it satisfactorily appears that the schooner was seen at the earliest possible moment by competent persons in charge of the steamer. One other feature in the case, viz., that as the two vessels approached each other, the persons in charge of the steamer waved their hands to the schooner to starboard, is relied on by the libellants as showing that the steamer did not port, but was attempting to pass the schooner's bows. The circumstance certainly deserves attention, and if the *Saxonia* had been a side wheel steamer, might warrant the inference which the libellants seek to draw from it. But the *Saxonia* being a propeller, this action on the part of her master and pilot is entirely consistent with the theory that the schooner was waved to starboard her helm, because the propeller would not sheer while her screw was reversing, and the only way by which the collision could be avoided, in the close proximity of the two vessels, was for the schooner to sheer if she could. My conclusion therefore is, that this collision was not caused by an attempt on the part of the *Saxonia* to cross the schooner's bows when she might have passed under her stern, nor by a failure on the part of those in charge of her to see the schooner, at the earliest moment, but that it was occasioned by a sudden change of the schooner's course, which threw her across the course of the steamer, at a distance not sufficient to enable the steamer to avoid her by sheering or by stopping; and that this change in the schooner's course was made when it was, because the persons in charge of her were paying no attention to approaching vessels. Their right to cross the river to come in to their pier is unquestioned, but there was nothing to compel them to change when they did. If their mainsail had been lowered a very little sooner, or a very little later, they would have crossed to their pier without danger; and I cannot doubt but that the possibility of a collision would have been avoided, if any person on board the schooner had considered it necessary to notice what vessels were approaching, before they broke their northern tack and wore to east. The decrees must therefore be in favour of the resps., and the libels must be dismissed, with costs to be taxed.

SOUTHERN DISTRICT OF NEW YORK.

(Before SHIPMAN, J.)

THE OCEAN QUEEN.

Collision—Damages to cargo—Value to be taken at place of shipment.

Where cargo was lost by a collision and the owners brought suit to recover its value:

Held, that the damages must be computed by taking the price paid at the port of shipment, and adding the expense of lading it on board, and of navigating the vessel to the place of collision:

That the libellant was entitled to interest on that account from the time of the collision.

This was a suit brought by the owner of the

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cargo of a schooner which was sunk in a collision with the *Ocean Queen*, to recover the damages sustained. The Court made a decree for the libellant and referred it to a commissioner to ascertain and compute the damages. When the report came in the resps. excepted to it, because the commissioner had taken the price that the cargo would have brought at its port of destination, instead of the price paid at the port of shipment.

Choate for libellant.

Rapallo for resp.

SHIPMAN, J.—I think the exception is well taken. It is open to the objections stated by Story, J., in the case of the schooner *Lively*, 1 Gall. 314. Though that was not a case of damage by collision, it was a case of damage by another kind of tort. His remarks are therefore apt and to the point. To estimate the damages by what the cargo would have sold for if it had reached the port of destination, partakes in some measure of conjecture, and assumes that for certain which is after all contingent. The schooner in this case might never have reached her port of destination, even if she had not collided with the *Ocean Queen*. She was exposed to all the ordinary perils of navigation, collision, fire, and the numberless dangers which attend vessels on the sea. I understand the correct rule to be laid down by the Supreme Court of the United States in *Smith v. Condry*, 1 How. 35, which is the value of the goods at the place of shipment. To this should be added the expense of navigating the vessel to the place where the collision occurred, including also the lading of the cargo on board. On this amount the libellant is entitled to interest from the time of the collision.

COURT OF COMMON PLEAS.

Reported by W. GRAHAM and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Nov. 22, 23, and 24, 1866.

MEYERSTEIN v. BARBER.

Bill of lading—Effect of delivery of after goods landed on sufferance wharf—Pledge of goods—Constructive possession—25 & 26 Vict. c. 63, s. 67.

A bill of lading remains in force and continues to represent the symbol of the goods, so that delivery of the bill of lading is equivalent to actual delivery of the goods, at least until there has been complete delivery of the goods to a person who claims under the bill of lading.

Goods were shipped in India under a bill of lading made out in three parts, and the consignor drew against the goods on the consignee in England, and discounted the drafts with the C. Bank in India, with whom he deposited the bill of lading as security. The bank in India transmitted the drafts and the bill of lading in the ordinary course, to their agents in London. The ship arrived in London on the 31st Jan., and on the 7th Feb. the goods were landed and deposited on a sufferance wharf, and a stop was put upon them by the master to secure his freight. On the 4th March the consignee gave the bank in London a cheque for the amount due to them, and obtained from them the bill of lading, and on the same day the plt., who was not aware that the ship had arrived, advanced 2500*l.* to the consignee, and received from him two parts of the bill of lading and the invoice. On the 6th March the defts., who were not aware of the advance by the plt., advanced 1500*l.* to the consignee, and received from him the third part of the bill of lading, and on the following day the consignee paid the freight and got the stop removed, upon which the defts. advanced 500*l.*

more. On the 11th March the defts. lodged their part of the bill of lading at the wharf, and on the 13th received warrants for the goods which they subsequently sold.

In an action by the plt. against the defts. in trover for the goods and for money had and received to recover the proceeds of the sale,

Held, that while the goods were deposited on the sufferance wharf with a stop upon them for freight, there had been no complete delivery under the bill of lading; that therefore the delivery of the bill of lading to the plt. was equivalent to an actual delivery of the goods, and that the plt. was entitled to succeed on both counts:

Semble, per Erle, C.J., that the plt. would have been entitled to succeed even if there had been no stop upon the goods for freight, provided they had been held by the wharfinger deliverable to the holder of the bill of lading.

Declaration. Common counts for money had and received, for interest, and on accounts stated. Second count, trover for cotton.

Pleas:—To the first count, never indebted; to the second count, not guilty, and that the goods were not the plt.'s; and issue thereon.

At the trial before Erle, C. J., at the sittings in London, after last Trinity Term, it appeared that the action was brought to recover the value of 277 bales of cotton under the following circumstances:

In Sept. 1864 De Souza, Commiade, and Co., of Madras, consigned to Azemar and Co., of London, for sale, 277 bales of cotton, shipped per *Acastus*. The bill of lading was drawn in three parts in the ordinary form, the cotton being thereby made deliverable to De Souza and Co., or their assigns. De Souza and Co. drew on Azemar and Co. four bills of exchange, viz., one for 3000*l.*, due 12th Jan. 1865, one for 1000*l.*, due 3rd March 1865, and two for 1000*l.* each, due the 22nd March 1865, which they sold and delivered, together with the bill of lading indorsed in blank, to the Chartered Mercantile Bank of India, who in due course transmitted them to their branch in London.

At the end of the year 1864 Azemar and Co. retired from business, and Abraham, their managing clerk, succeeded them under the style of Abraham and Co., and took over all their assets and liabilities. On the 11th Jan 1865, there having been a fall in cotton, Abraham through Azemar applied to De Souza, who was then in London, to assist him; and pursuant to arrangement between the parties Azemar and Co. drew on De Souza and Co. four bills for 1500*l.* each, payable in London on the 24th March 1865, which they indorsed to Abraham and Co., who discounted three of them with Smith, Payne, and Smith. Each of those bills contained in the body of them the words, "value in ourselves which place to account of cotton per *Acastus* as advised."

On the 31st Jan. 1865 the *Acastus* arrived in London, and Abraham entered the cotton and directed it to be taken to Cotton's bonded wharf where, on the 7th Feb., it was landed and warehoused in the name of Abraham, and a stop was put on it for freight by the master of the ship. On the 9th Feb. Abraham gave a sampling order to Barber and Co., the defts., who on the following day obtained samples from the wharf and reported on the cotton to Abraham. Abraham then applied to them to advance 4000*l.* against the cotton, and they offered to advance 2000*l.*, which Abraham declined.

On the same day, the 11th Feb., Abraham indorsed and delivered De Souza's fourth acceptance for 1500*l.* to the plt., who accepted two bills for 1500*l.* each on receiving a letter from Abraham giving him a lien on cotton per *Acastus* and other

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goods, which it was stated would be handed to him when realised. These bills were paid by the plt. when they came to maturity. On the 4th March Abraham, having paid Azemar's acceptances, received from the Chartered Mercantile Bank the bill of lading, one part of which he indorsed and handed to the plt. with the invoice. The plt. then gave him his cheque for 2500*l.* and requested him to send him the second part of the bill of lading, which was accordingly sent to him on the 6th or 7th March. At that time the plt. was not aware that the *Acustus* had arrived, he made no inquiries on the subject, and did not ascertain the fact till the 11th March.

On the 6th March Abraham applied to the defts. to advance 2000*l.* on the cotton per *Acustus*; they advanced 1500*l.*, and received from Abraham the third part of the bill of lading, and on the following day, Abraham having in the mean time paid the freight and got the stop taken off, they advanced 500*l.* more.

On the 11th March the defts. lodged their part of the bill of lading at the wharf, and on the 13th received warrants for the 277 bales of cotton which they had previously sold on the 9th and 10th March.

It appeared that the plt., on the 11th March, ascertained that the cotton was transferred to the defts., but at that time he was under the impression that the defts.' advance was prior to his own, and he therefore applied to Abraham for further security, and it was not till the 25th July that he ascertained that the advances made by the defts. were subsequent to his own, upon which, after some correspondence, he commenced this action.

On these facts a verdict was entered for the plt. by consent for 2019*l.* and interest, if the court should think fit, with leave to the defts. to move.

Brett, Q. C. in this term obtained a rule calling on the plt. to show cause why the verdict should not be set aside and a verdict entered for the defts., or why the verdict should not be reduced by such a sum as the court should direct, on the grounds that, as against the defts., the plt. was not entitled to the goods or their proceeds; that there was no valid prior indorsement of any bill of lading to the plt.; that the bills of lading ceased to have effect as negotiable bills of lading on the landing and warehousing of the goods in Abraham's name; that the property in the goods never was in the plt.; that neither the plt. nor any other person had any right to or lien on the goods as against the defts.; that it never was agreed between Abraham and the plt. that the property in the goods, or any lien on the goods, should pass to the plt.; that the property in the goods passed to the defts. on the transfer of the goods into their name by the wharfinger, the depositary; that the defts. were pledgees, with possession and power of sale; and that the plt.'s rights, if any, were mere equities invalid against the defts., or were for breach of contract by Abraham; that no interest was payable; the court to draw inferences of fact, and counsel to agree to the facts, and the same to be settled in case of difference by the Lord Chief Justice.

Edward James, Q. C. and *Sir G. Honyman, Q. C.* now showed cause.—The money was advanced on the security of the goods, and the fact of their not being on board the ship cannot make any difference. By sect. 4 of the 11 & 12 Vict. c. xviii., which is an Act for the regulation of suttance wharves in the port of London, it is enacted that all goods landed on a public suttance wharf, and lodged with the wharfinger, shall be subject to the same lien for freight as such goods were subject to whilst on board the ship, and before the landing thereof; and the wharfinger is required to detain the goods till the freight is paid. Therefore it is submitted

that when goods are landed on a suttance wharf, and a stop is put on them for freight, they are in the same position as if they were on board the ship. The contract of the carrier is to carry and deliver pursuant to the bill of lading, and the wharfinger who holds the goods would be bound to deliver them to the true owner of the bill of lading on payment of freight. There was as clear a mortgage to the plt. as could be conceived, and the only question is if the deft., who made an advance on a bill of lading, which so far as Abraham was concerned was worthless, as he had parted with his interest in the goods, can claim to hold the goods against a prior mortgagee, there being no improper laches on the part of the plt. The plt. was not aware that the goods had arrived, and he gave it as his experience that the captain always retained one part of the bill of lading, so that when he asked for the second part he thought he had obtained all the parts that were in the possession of Abraham. I rest my argument on the broad principle that, Abraham having no right to the property, the plt. in the absence of any fraud was entitled to follow it into any hand into which it might come. The contention on the other side is very much like the argument for the deft. in *Short v. Simpson*, 13 L. T. Rep. N. S. 674. [*WILLES, J.*—Not exactly the same, as there there was a wrong. The real question in this case is, can a man pledge goods lying in a dock without taking out a dock warrant?] The goods being under a stop for freight, it is just the same as if the shipowner had them in his possession, and till he has parted with the possession, the bill of lading continues to be the symbol of the goods, and delivery of the bill of lading passes the property. If that is so, and the property passed to the plt., nothing can divest it afterwards, and it is submitted that all that was necessary was an intention on the part of Abraham to pass the property: (*Flory v. Denny*, 7 Ex. 581.) They also contended that the plt. was entitled to interest, as interest had been allowed by the parties on former accounts, from which it might be inferred that interest was to be allowed in this transaction.

Brett, Q. C. and *J. Brown, Q. C.* in support of the rule.—The plt. must, to support the count in trover, make out that the cotton was his property, and that he was entitled to the possession of it, though on the money counts the question of property only would arise. The first question is, was the document made use of on the 4th March made use of as a bill of lading and with the ordinary incidents of a bill of lading? I submit that the contract of the 4th March was not a contract of sale, and the parties did not intend to pass the property in the goods, but they intended to create a complete and valid pledge, which they did not succeed in doing according to law. There can be no valid pledge of chattels unless possession is given, and here there was merely an inchoate pledge which the deft. completed by obtaining possession. While goods are at sea they may be pledged by handing over the bill of lading, but the reason for that is, that that is the only possession that can be given, and when the reason ceases possession cannot be given by the bill of lading any more than by any other ordinary document: (*Blackburn on the Contract of Sale*, 297.) Here the contract of carriage was at an end, as the master of the ship had given all the delivery he was called upon to give, i.e., to deliver at one of these wharves as permitted by the Act of Parliament. The shipowner retains his lien for freight, but he can never get the goods back from the wharfinger. If the goods were burnt while on the wharf, the shipowner would not be liable on the bill of lading, as they would not be lost by a peril of the sea. The general Act as to these wharves is the 25 & 26 Vict. c. 63, ss. 67, et seq., and the effect of that

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statute is, that the goods do not remain in the possession of the shipowner, but of the wharfinger, who is obliged to hold them till the freight and rent are paid, but the shipowner could not get them back. The bill of lading had ceased to be a negotiable instrument; a bill of exchange paid at maturity is no longer negotiable, and one is a contract to deliver goods, the other to pay money: (*Allan v. Gripper*, 2 Cr. & J. 218.) Then I submit that these were only inchoate pledges, and that the defts., who completed his, is entitled to hold the goods as against the plt., who did not. It cannot be said that there was a sale to the plt. on the 4th March, as he only advanced 2500*l.* on goods worth 8000*l.* It was the ordinary contract of pledge, and the plt. got a good equitable right as against Abraham, but nothing more. You cannot mortgage chattels unless you give up possession of the goods. [WILLES, J.—You must not take that as settled. I have a strong impression that we held the other way. I do not know if that was so, but it would not be a monstrous decision.] It is submitted that there can be no pledge of goods by the law of England, unless possession is given:

Story on Bailments, ss. 297, 298;
Basset v. Neworthy, 2 Lead. Cas. in Eq. 1;
Harris v. Birch, 9 M. & W. 591;
Brians v. Nir, 4 M. & W. 775;
Marsh v. Lee, 1 Lead. Cas. in Eq. 497, 499;
Coggs v. Bernard, 1 Sm. L. C. (5th edit.) 194.

Sir G. Honyman, Q. C. called attention to the cases of

Langton v. Waring, 18 C. B. N. S., 315; and
The Tigress, 32 L. J. 97, Adm.

Nov. 24.—ERLE, C. J.—In this case a rule has been granted to show cause why the verdict for the plt. should not be set aside and the verdict entered for the defts. On the argument of that rule the question appears to me to be resolved into this, whether the pledge of the bill of lading of cotton, pledged to secure the advance made by Mr. Meyerstein on the 4th March, was a valid pledge. There is no doubt that, if the cotton had been afloat, the obtaining an advance upon the deposit of the bill of lading would have been just as valid as if it had been obtained on a deposit of the actual cotton. While the cotton is afloat, it is common knowledge—and I should not think of citing authorities to prove it—that the bill of lading represents the cotton, and the delivery of the bill of lading operates in exactly the same manner as the delivery of the cotton itself would do after the ship has arrived. Then, in this case, the money having been obtained and the bill of lading having been delivered, the contest on the part of the defts., who afterwards obtained possession of this cotton, is that the delivery of the bill of lading did not operate as a delivery of the cotton because the bill of lading was spent, and had ceased to have any operation as a bill of lading. And it is contended that this is so, because the ship had arrived at the port of destination, and had landed the cargo upon a wharf, to which I shall presently allude in describing the history of this cotton. The powerful argument of Mr. Brett, and the learned argument of the other learned counsel for the defts., have been founded on the assumption that, the cargo being landed, the bill of lading was altogether an inoperative instrument, and that the pledge of the chattel without delivery of possession was not a complete pledge. The same chattel was said to have been pledged to the defts., and it was argued that that pledge, though equally inoperative, justified the defts. in taking possession, which defeated the right of the plt. under the pledge of the bill of lading. Now, the history of the cotton disposes of the defts.' argu-

ment. The cotton was shipped in India for England. The shipper of the cotton drew against the cotton upon the consignee, and the bills of exchange were discounted by the Chartered Bank of India. The bill of lading was deposited, in the common course of mercantile transactions of that nature, with the bills of exchange, to secure payment of those bills of exchange at maturity. I call it a bill of lading, because I think the three parts constitute one bill, and nothing in my judgment turns on there having been three parts of the bill in India. Now there is no contest at all, for it is one of the most frequent and familiarly recurring transactions that can be, that the deposit of a bill of lading with the bank that discounted the bill of exchange operates as a pledge of the cotton. Nobody contended that it was a sale; it was a pledge. In case the bill of exchange was not paid, the Chartered Bank in India would have the right to indemnify themselves out of the proceeds of that cotton. The property in the cotton, subject to that pledge, was in De Souza, to whom, on the face of the bill of lading, it was to be delivered; and that property, which was in De Souza before the cotton arrived, passed to Abraham. At the time the cotton arrived in England, the state and history of it, as I call it, was that the Chartered Bank in India remitted to the Chartered Bank in London, their agents, the bills of exchange, with the bill of lading, to secure the payment of those bills of exchange, and subject to a pledge of the cotton by the deposit of that bill with the Chartered Bank, the property was in Abraham. The cotton arrived on the 4th Feb. in the following year, and Abraham came forward as owner of it, as he had a right to do, and made the entry at the Custom-house, and accompanied that entry with a note that it was to be taken to Cotton's wharf, a suffrance wharf. The course of business at the Custom-house was, that if the party interested in the cargo gave an intimation at the Custom-house of the suffrance wharf where the goods might be deposited, the Custom-house and the proprietors of that wharf, by intercommunication, passed the cargo from the Custom-house to the suffrance wharf; and the cotton in question did pass accordingly to Cotton's wharf, was put on shore at Cotton's wharf on the 7th Feb., and remained in the hands of the wharfingers at Cotton's wharf with a stop put upon it to secure the freight of the shipowner; and on the 4th March the cotton was at Cotton's wharf, subject to that stop, and subject to all the other rights that I have spoken of, by reason of the pledge of the bill of lading: Mr. Abraham had done what is said to be an act of ownership, and had called at Cotton's wharf and intimated that he had a claim to the cotton. He was permitted by the wharfinger to act in some respects as the owner so far as employing Mr. Barber, the deft. Both the plt. and the defts. were of the highest respectability, and the only question is, who is to lose by the fraud of Abraham? Abraham employed Barber the deft. as his broker to sell the cotton for him. He gave Barber the sampling order, which enabled him as broker to act in the way that was required to ascertain the value of the cotton, and between the 7th Feb., when it was landed, and the 4th March, the cotton had remained as I have described, landed, but not delivered according to the bill of lading. The responsibility of the shipowner as a carrier may have been at an end when he put that cotton on the wharf, and if it had been burned it might have been burned at the loss of the real owner; but it was put on the suffrance wharf, and in respect of that suffrance wharf there is an Act of Parliament which says that the goods at the suffrance wharf, with a stop upon them for freight, shall be in the same circumstances in some respects as to the rights of the parties as if the goods were

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still afloat. Abraham might do one of the acts of ownership that I have described, but if he attempted to claim the delivery of those goods, giving a delivery order to the wharfinger, without producing the bill of lading, as I read the evidence in this case, the wharfinger would not obey the delivery order, but the goods would be held until the bill of lading was produced. The goods are held at the sufferance wharf as if they were in the ship for the purpose of freeing the ship, but are not delivered according to the bill of lading, and are subject therefore in many respects to rights derived through the bill of lading. So stood the cotton on the 4th March, with the bill of lading pledged to the Chartered Bank of India to secure the payment of the drafts which they had discounted. On the 4th March Abraham went to Meyerstein, and asked for the advance of 2500*l.*, to enable him to take the bill of lading from the Chartered Bank. He got the bill of lading by a colourable cheque, and then obtained the money from Meyerstein to enable him to pay the cheque that he had advanced for that amount. The substance of the transaction, to my mind, is exactly the same as it would have been if the Chartered Bank had trusted Abraham with the bills pledged to them, and said to Abraham, "If you will get 2500*l.* on this bill and pay off our claim upon it, we authorise you to hand that bill over to the party who shall advance that money." Was the bill of lading spent (or whatever is the word the learned counsel may rely upon; defunct is the right one) at that time? It had been deposited in the hands of the Chartered Bank as a pledge when the cargo was afloat. In their hands it had never become in the least degree extinct. The treaty between Meyerstein and Abraham and the Chartered Bank was to get the living bill of lading, paying the sum that was upon it. The bill of lading was deposited with Meyerstein; Meyerstein advanced 2500*l.* upon it, and at the time when it passed from the hands of Abraham to the hands of Meyerstein, it was a living bill of lading. On what principle can it be said that it became an extinct bill of lading the moment it came into Meyerstein's hands? Meyerstein did not know whether the cotton was afloat or had arrived. But I do not found my judgment in the least on that. To my mind that bill of lading was the symbol of the cotton operating to govern the possession of that cotton at the time when Meyerstein received it from the hands of Abraham. That being so, the advance was made, and one contention is, that the pledge of the cotton to secure that 2500*l.* was a valid pledge, and that the possession of the chattel went to the pledgee. In my opinion, from the description I have given, the bill of lading did represent the symbol of the cotton, and the passing of the bill under these circumstances operated just as much as if the cotton had been taken bodily and handed over to the pledgee. The contention on the other side is, that the bill of lading being in three parts, and Abraham passing two of them to Meyerstein by fraud, and passing the third to Barber, it was merely an agreement to pledge cotton of which the actual possession was not given, and therefore it operated nothing; that Barber having come down to the wharf, and having got the goods transferred into his name, and made deliverable to his order on the 11th March, and under that process having obtained possession of the goods, of the two pledgees with an imperfect pledge, he became the one who had perfected his security. I think there is not the least foundation for that argument. The notion that the second mortgagee, by getting the legal estate, can get rid of the first mortgage appears to me to have no analogy and no bearing. I think the pledge to the plt. was valid, and if it was, the plt.'s rights have been violated by the deft.,

and he is answerable in trover, and upon the count for money had and received, for the proceeds of the goods that were sold. The powerful and lucid argument on the part of the defts. was ineffectual to my mind, because, as I say, the whole foundation lies in the fact that this bill of lading on the 4th March was an extinct thing, and would not enable the holder to get possession of the goods; and if the notion be established that a bill of lading (one of the most frequent securities to secure advances) could be extinguished as a security, because the ship had touched land, and put the cargo represented by that bill of lading ashore, and then that the holder of that bill of lading might pass it among the moneyed men of the port, and obtain large advances upon it, and then surprise the party who had made the advance by saying, "that bill of lading is an extinct piece of waste paper, because the cargo has been put on shore before the time I passed it to you," it is impossible to say to what extent such reasoning might not be pushed. But it is obvious that a wider door to enable parties to defraud by the semblance of security was never attempted to be opened. There is no authority for that. There is the most intense ill likely to result if such a claim is established. I have narrowed it to the particular circumstances of this case, because it is sufficient to authorise the plt. to have the judgment. I believe that the same law would apply if there had been no stop put on the goods for freight, if they had been held by the wharfinger deliverable to the holder of that bill of lading according to the custom of trade at the port where the goods were—I believe that would be the law; but, as I said before, I have not the least doubt under the circumstances of this case that the bill of lading was the symbol of the cargo, and, being delivered, operated as a delivery of the cargo would have done, and therefore that the plt. is entitled to keep his verdict.

WILLES, J.—I am of the same opinion, and I should have contented myself with saying that I concur in everything that the Lord Chief Justice has said; but I believe it is his wish that the court should deliver their opinions *seriatim*, as if we had given judgment yesterday upon the conclusion of the argument. Accordingly I will add my reasons to my Lord's, at the expense of rather detracting from the judgment instead of adding to it. The facts of the case have been already stated, and they may for the purposes of the judgment be shortly put thus:—that goods that had been effectually shipped under a bill of lading abroad had arrived at their port of destination, and had been landed and deposited at a warehouse where the master had put on a stop for freight; so that in fact the goods, although delivered under circumstances in which the master would not have been answerable for an accident happening to them, were not capable of being received and taken possession of by the consignee or holder of the bill of lading, without discharging the lien for freight. Therefore by that statement the warehouseman was at the lowest the common agent of the master of the vessel, and of the consignee; the agent for the consignee, on his producing the bill of lading, showing that he was entitled to the goods, and upon his paying the freight, to transfer the goods completely into his name; agent for the master not to transfer the goods into the name of the consignee, so that he should have control over them, and not, except at his peril, to give a warrant for them until the freight had been discharged. At this period, therefore, the bill of lading would not only, according to usage and for the satisfaction of the warehouse-keeper that he was delivering to the right party, be a symbol of possession, and therefore practically the key of the goods, but during that time it retained, so far as

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the master was concerned, its complete operation as a bill of lading, because the delivery of the goods was not complete. To say that the delivery of the goods was complete would be perfectly contradictory, because to say the delivery is complete is to say that the person to whom the delivery was made has the goods; whereas the consignee in a case of this kind has not the goods until he does a new act to discharge the liability that has been incurred for him by the shipper of the goods in respect of payment of freight, which payment, and the liability thereto, as well as the right to the goods, is proved by the bill of lading. That being the state of things, if the consignee, before the delivery, or before any right to delivery, wants to deal with those goods, how is he to deal with them? In what manner is he to obtain money for those goods? With respect to a sale, of course he can very easily do so, because ever since the judgment of my Lord Wensleydale, when Parke, J., in *Dixon v. Yates*, 5 B. & Ad. 313, it has never been doubted that by the law of the land the sale of specific goods does pass the property in those goods, and that notwithstanding the cavil of the late very learned Serjt. Manning in the well-known note in 2 M. & R. p. 566. And with respect to a sale there can be no doubt, if these goods had been sold out and out to Mr. Meyerstein or anybody else on the 4th March, that the fraud Abraham committed as against Mr. Barber would have had the effect of taking in Mr. Barber, and of making him stand to the loss of his advances. I do not say that I am quite satisfied; it would be wrong to say that a pledge stands on the same footing, but I take notice of that in passing for the purpose of showing that all arguments founded upon the notion that this court is to take care and give a judgment which shall protect those who deal with fraudulent people are entirely out of the facts of the present case, and entirely out of the character of transactions of this description. I had better apply my mind to the facts of the case, and see what is their true bearing, and what conclusion I ought to arrive at in respect to the rights of the parties without considering what future cases may arise of persons who, so to speak, do not choose to use due vigilance, or who have the misfortune to be over-reached. This was not a sale; this was a mere pledge to Meyerstein; but one may observe again that if by the alteration of a word or two in the conversation this had been converted into a mortgage whereby the entire property in the goods had been conveyed to Meyerstein, with only an equity of redemption instead of a convertible interest, a subsequent fraud might have been committed. Now, in respect to a pledge, according to the law of this country, a mere contract to pledge even specific goods, and even although the money be advanced upon the faith of the contract, is not sufficient to carry the legal property in the goods; and I am quite satisfied by the argument, if my own opinion had not been so before, that such a transaction amounts to an authority only to take possession of the goods, and the other consequences so ably pointed out by the counsel for the defts. would follow. But in order to complete the pledge it is not necessary that there should be an absolute delivery of the goods pledged. It is decided in the case of *Reeves v. Copper*, 5 Bing. N. C. 136, and the other cases to which reference was made in the course of the argument, that it is sufficient by the law of this country that there should be a constructive delivery. It is not necessary that the goods should have passed actually from the hands of the pledgor to the hands of the pledgee. It is sufficient to pass the property in the goods, even though the goods remain in the hands of the pledgor, provided they do so by a contract between the

pledgor and the pledgee, which makes the custody of the pledgor the custody of the pledgee as between the parties. That was the decision of this court in the case of *Reeves v. Copper*, where the master of a vessel pledged his chronometer, but continued, by an agreement with the person to whom the pledge was made, to have possession of it for the purposes of the voyage he was about to undertake, and having disposed of the chronometer to another person, the person who had advanced money upon it with the agreement that it should remain in the hands of the pledgor as agent for the pledgee was held entitled to recover it. In many cases symbolical delivery is sufficient; a symbolical delivery is equivalent to such a constructive delivery by contract as is sufficient to complete a pledge. If it were necessary that I should lay down as in a code all the series of circumstances in which it might be held that there was a symbolical delivery, I should have desired more time to consider it, and I should have liked to have considered the case of handing over the key of a warehouse, as to whether that was or was not a sufficient symbolical delivery, and whether that could be defeated by subsequently forging or abusing another key that would open the warehouse for the purpose of deceiving a second lender of money into advancing upon the supposed security. If that case were considered, it would be a case apart from the peculiar property that the law imparts for mercantile convenience to a bill of lading, which case stands to my mind on the footing of the present, because the lowest at which the plt.'s case can be stated here is, that he got that which, if he had produced it at the wharf, would have procured for him the goods which were mentioned therein. He had the bill of lading which, according to the evidence, including that of the defts., would, upon being produced at the docks, have induced the warehouse keeper to hold the goods for the behoof of the person who held that bill of lading. But I do not desire to consider that question at present; it may be worth considering when the facts raise it. There was another sort of delivery, to which the law has from very early times imparted a peculiar effect. There was a delivery by handing to Mr. Meyerstein the bill of lading representing the goods. Now, as my Lord did, I pass over the proposition, which is obvious, that the pledge of a bill of lading under ordinary circumstances does as completely vest the property of the pledgor in the depository of the bill of lading as if the goods had been put in his warehouse under his control. I refer in passing to the case in 5 B. & A. as being the very case in which the question was considered and discussed, where it was held that a stoppage *in transitu* was defeated by such a transaction, subject to the pledgee of the bill of lading being bound to render an account to the vendor: (see *Re Westzinthus and others*, 5 B. & A. 817.) The question, therefore, is whether at the time the advance was made by Meyerstein on the 4th March, he did make an advance on a bill of lading? On the part of the defts., it is said that the paper on which he made the advance, although appearing to be a bill of lading, was in reality only a piece of waste-paper, which had been a bill of lading, and which, though extinct, bore still the semblance of what it was in its lifetime; and the question is whether that can be maintained. Putting it in plain English, it is whether the bill of lading ceases to have any operation after the goods are landed, even although they remain on the wharf on which they have been placed by the master as a security for the freight? Now I am of opinion that that is not the effect of such a transaction. On the contrary, I think that the bill of lading is in force, at least, so long as complete delivery has not taken place to any person claiming thereunder. I believe that that will be found to be

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not only law, but also in accordance with the practice and the convenience of merchants. Now I will consider it as it was before the Act of 1862, or the Acts of which that is the modern representative, and at a period at which there was no Act allowing the master to warehouse at the risk of the consignee of the goods, or the holder of the bills of lading. What would have been the state of things if the master of the *Acastus* had arrived in the river, and had found nobody prepared to tender the freight for the goods? The condition of the master would have been, according to the law of this country, the same as that of any other carrier who arrives and finds there is no person to take delivery of the goods, which of course means to take delivery, paying freight against such delivery. What is his duty? His duty is to deal with the goods in a reasonable manner, and to deal with them in a reasonable manner involves the consideration of his own lien, which he may not be willing to give up, and according to our law he may keep the goods in the vessel, and upon demurrage, so long as he does not exceed a reasonable time. By the common law he might keep the goods in his vessel waiting for somebody to produce the bill of lading, and to tender him the freight for those goods. He might use his ship as a warehouse until he was applied to by the proper person to receive, and was asked to give them in a proper manner, namely, with a tender of the freight. Of course that was exceedingly inconvenient, and led often to disputes between shipowners and consignees. But the master had another course to pursue. Having obtained a new employment for his vessel, he would be unwilling that she should be used as a mere warehouse, and especially as the damages recovered for delay might be no sufficient compensation for the loss of the use of the vessel, which might be in an expensive port. The law gave him the alternative, if he thought fit, to land the goods and put them in a warehouse, giving notice to the consignee that he might take them if he thought proper upon paying the freight. That was a great inconvenience; as, although the liability of carriers would be got rid of, still the liability of warehousemen would remain; and it was inconvenient and unjust that the master should be obliged to abandon his lien upon the goods or to retain it with the chance of litigation belonging to his new capacity of warehouse-keeper by himself or his agent. Then we find that a series of Acts of Parliament have been passed for relieving the master from that difficulty; and the local Act that was referred to no doubt was handed up for the purpose of showing the progressive steps by which the Legislature arrived at the conclusion which is set forth in the section of the Act of the 25 & 26 Vict. In the first place, if an owner chooses to enter the goods at the Customhouse, and selects the wharf, the master puts them on that wharf, retaining only his lien for the freight, having his hands upon the goods through the agency of the law, and of the right which he would have against the wharfinger if he parted with them without getting the freight. In the event of no person entering the goods, what was to be done? The master was then allowed to enter the goods himself, and to land them, but in that case, by the section of the local Act, the goods were to be considered as in all respects in the same custody as if they remained on board the ship, for the master got rid of the cumber on board his ship, but he still might be exposed to the litigation that might follow him in his character of warehouseman. Lastly came the Act of 1862, the Act of the 25 & 26 Vict., which Act it is necessary to recite. It gives very large powers, and there are the same powers—powers similar, though not precisely in the same terms as those that are given to the master by a variety of foreign codes. The master then shall deliver the

goods to the holder of the bill of lading. If there are a number of bills of lading the master must protect himself by interpleader, and the person who holds the first bill of lading for value is entitled to have the goods eventually, and in that case, as here, on the single holder of a bill of lading presenting himself, and not paying the freight, the master is entitled to secure himself by putting the goods into a warehouse, and then, if there is any dispute as to the freight, it is to be settled in the manner pointed out by the Act. If there is any delay in paying the freight, after a certain time, it is also to be settled in the manner pointed out by the Act, but so long as the freight is not paid, the master distinctly holds the goods for all purposes contemplated by the bill of lading. Now, to consider this question properly, you must first take the case of the master landing goods without the assistance of any Act of Parliament; landing the goods as at common law in the hands of the warehouseman, who is his warehouseman as in the case pointed out in the first section of the local Act, and who retains the goods for him as his agent until the freight is paid, and then delivers on production of the bill of lading. As to that case no question could arise. The bill of lading is in full life for all its purposes until it is produced and delivery made by the person who so is agent for the master. That person, for any benefit the master had, was not agent except for the mere purpose of securing him his freight. If that is so, let us come to the Act of Parliament. What was the object of the Act of Parliament? The Act of Parliament was dealing with the case of the shipowners and shippers and receivers of goods. It was not dealing with the effect of mercantile instruments. That subject had been under the consideration of the Legislature very recently in a former Act (18 & 19 Vict. c. 111), by which rights of action as well as property may be transferred in bills of lading. The Legislature seem to desire rather to extend the effect of a bill of lading than to cut it down. Are we to suppose that by this Act of Parliament, without any express provision for the case, or any necessary indication that it was the intent of the Act, the Legislature meant to destroy the operation of the rights of the holders of bills of lading, or to make bills of lading not capable of being dealt with or not operative at a period when they would have been before? That would be to read the Act of Parliament backwards. I entertain no doubt that the Act does not make any alteration in the rights of the parties, and I say it appears to me to be clear that the bill of lading is an operative instrument with the specific qualities of a bill of lading until there is a complete delivery thereunder, and there had not been a complete delivery thereunder in the present case. So far with respect to the law of this country. I feel almost ashamed of travelling out of the road, but Mr. Brown having mentioned yesterday on the authority of a very learned writer, Story, J., that the foreign law had been careful to guard against cases of this description, against cases of supposed danger which would follow from allowing persons to make pledges without an actual delivery of the goods, I thought it right to search a little in the direction which his argument indicated. If you turn to the passage in Story on Bailments (section 299), you will find he was not dealing with the present case, or anything like it, but after giving the text from one of the writers, he states to this effect, that where a person pledges goods by the Roman law the pledgee may thereupon deliver back the goods to the pledgor to be held as his servant as it were, because a man may be tenant of goods, and that does not destroy the right of the pledgee, but he says, in continental countries, provisions have been made to avoid the danger that might follow

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from this. I need hardly say the text by which those provisions have been made is, according to *Reeves v. Copper*, the text of our own law, and I need hardly say the observations of Story, J., taken with the text to which he refers, are not at all applicable to the present case. I have looked also to the French code. It appears to me to be very meagre on this subject. It says simply a bill of lading may make the goods deliverable to a third person, or to order, recognising the validity of a bill of lading, but containing no absolute provision on the subject: (Code de Commerce, liv. 2, tit. 7, s. 281.) The Spanish code, in section 802, contains an express provision besides the statement of what the bill of lading is to contain, that a bill of lading may be indorsed, and the indorsement may carry all rights with it. It seems to allow an indorsement of rights of action, as since the Act of the Queen, and I observe the great Spanish commercial lawyer, Don Gomez de la Serna, whose edition of the code I referred to, says that in this respect bills of lading are very much upon the same footing as bills of exchange. There is no provision there that a bill of lading shall cease to be operative at a given time, and there is a provision in both those codes for the master putting goods, as the French code calls it, *en mains tierces*, when the freight is not paid, to be kept for the security of the master. In the codes adopted by Prussia and other German States of the Zollverein, there are similar provisions, which code, as is well known, is very much more elaborate than the previous code, and exceeding care is taken there for the purpose of protecting both the master and the person who receives the goods, and I observe the right of the master is considered to stand on the same footing, whether the goods are kept back by the master for the freight, or deposited in other hands for the purpose of being kept, and I think, in article 651, there is an express provision for the case that has occurred here, for several persons getting several parts of a bill of lading, and the person who is first in time in getting the part of the bill of lading being also first in law; I observe that article 649 puts the case of the delivery of a bill of lading on the same footing precisely as the delivery of goods stated by my Lord. In every one of these codes, there is a provision for several, in the German for four, parts of a bill of lading being given to the master. In the absence of any fraud, it being admitted that Meyerstein advanced his money upon the security of a bill of lading, and that he was induced to take a bill of lading as being a valid and operative bill of lading at the time; that he had no notice of any circumstances to invalidate that bill of lading, and that its force was not spent, but it still retained its specific properties, which are imparted to a bill of lading by the law, I have no doubt he is entitled to succeed. I will add but one sentence to this judgment, because it contains that which is the motive in my mind for arriving at it. The bill of lading was allowed this peculiar effect in consequence of the difficulty of an actual delivery of goods which were the subject of a maritime adventure. By usage and by law, the delivery of a bill of lading came to be taken for the delivery of the goods, because of the difficulty of the delivery of the goods themselves. So long as that difficulty exists by reason of the incidents of the adventure, so long does the reason apply. In this case the goods could not have been transferred by actual transfer during the voyage, and the freight not having been paid, there could have been no actual transfer of them by Abraham. The goods were in precisely the same state, so far as the reason for holding the bill of lading for the goods is concerned, while they were under the stop for freight as while they were

on the vessel and during the voyage. I think, therefore, certainly, having thought over this case with the interest and anxiety that one ought to apply to a transaction affecting so many others of a similar kind, I cannot accede to such a doctrine, which to me I own is novel, as the doctrine advanced for the defendants. Therefore, I concur that the judgment should be for the plaintiff.

KEATING, J.—I am entirely of the same opinion; and after the judgment pronounced by my Lord and my brother Willes, it is unnecessary that I should do more than state in a very few words the way in which the case strikes my mind. Mr. Brett, in his very able argument, made the foundation of his proposition that the object of the bill of lading being to accomplish the delivery of the goods, when the object had been accomplished, the bill of lading ceased to exist as a bill of lading; and then he contended that in the present case, the goods having been removed from the ship to the sufferance wharf, and their being held by the wharfinger as deliverable on payment of freight, that was the accomplishment of the bill of lading, and the bill of lading then ceased to be a bill of lading. I did not understand him to deny all the operations of the bill of lading, but he contended that it ceased to be a bill of lading, and in truth became nothing more than a mere delivery order, and, being such a delivery order, it was transferred to the plaintiff. Meyerstein as a deposit for the advance made by him to Abraham, and that it could have no effect whatever as a transfer of the property, but at the most could only place in his hands a document which if used might obtain for him the delivery of the goods. Now, it is obvious that the whole force of that argument rests on the supposition that upon the 4th March, when Meyerstein advanced his money, the bill of lading which was deposited in his hands had ceased to operate as a bill of lading, and that because the goods had been completely delivered. Now I entirely agree with my Lord and my brother Willes, and for the reasons which they have stated, and I do not intend to repeat their reasons for the opinion that on the 4th March there had been no complete delivery of these goods, and I adopt the way in which my brother Willes has put it, as a safe guide to what may be considered a complete delivery, such as was insisted on by Mr. Brett. There can be no complete delivery of the goods until they have been delivered to a person having a right under the bill of lading to obtain those goods. Now here it is admitted, and it is clear, that on the 4th March those goods were held by the wharfinger subject to the stop for freight. They never had been delivered under that bill of lading to any person whatever, consequently there never had been any complete delivery. That being so, the foundation of the argument, and the very able argument, used on the part of the defendants, fails, and the plaintiff is entitled to retain his verdict.

In answer to *Honyman*, Q. C.,

WILLES, J. stated that interest would be allowed from the time the money was received to the present time.

Rule discharged.

Attorneys for the plaintiff, *Thomas and Hollans*.

Attorney for the defendant, *W. M. Crump*.

[Ex.]

LEWIS AND OTHERS v. MCKEE.

[Ex.]

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUXLEY, Esqrs., Barristers-at-Law.

Wednesday, Nov. 14, 1866.

LEWIS AND OTHERS v. MCKEE.

Bill of lading—Indorsement of to third party by original consignee while goods are in transitu—Indorsement accepted and acted upon by shipowner—Transfer of liability for freight thereby—18 & 19 Vict. c. 111—Action for freight—Pleading—Demurrer.

In an action for freight by the shipowners against deft., the original consignee of goods under a bill of lading, a plea, which stated that before the ship arrived at the port of call, the deft. indorsed the said bill of lading to W. and K. in the following terms: "Deliver to W. and K., or order, looking to them for all freight, dead freight, and demurrage without recourse to us," and that plts. accepted the said indorsement and delivered the goods in pursuance thereof to W. and K. as the persons entitled to the said goods, and not to the deft., was

Held, on demurrer, to be a good plea and to constitute a defence to the action.

If the consignee under a bill of lading, while the goods are yet in transitu, indorses the bill and gives notice thereof to the party entitled to the freight, and upon the indorsement he states in express terms that the owner of the freight, the party who may be ultimately entitled thereto, is to look to other persons for payment of it, and that indorsement is accepted and acted upon without objection or qualification on the part of the owner of the freight, that of itself, in point of law, constitutes a transfer of the liability, and a defence to any subsequent action.

Declaration.—First count :

That after 14th Aug. 1865, one Jas. Brown delivered to plts. certain goods, to wit, &c., to be by plts. carried and conveyed in a certain ship of plts., then in the port of L., from L. to O. or F., in the United Kingdom, for orders under a certain bill of lading, signed for the same by the master of the said ship, as agent for plts., and to be delivered as ordered (the act of God, &c., excepted) unto deft., or to his assigns, on his or their paying freight for the said goods as per charter-party, with primage and average accustomed; and that thereupon and by reason thereof, the property in the said goods passed to deft.; and that by the charter-party referred to in the first bill of lading, freight is made payable in cash at certain rates therein specified, and that all conditions, &c., necessary to entitle plts. to have the freight, primage, and average paid by deft. according to the terms of the said bill of lading and charter-party, and to sue deft. for nonpayment thereof, yet deft. made default in payment; and although he paid plts. a portion of the said freight, primage, and average, yet he made default in paying plts. the residue of the said freight, &c., amounting to 67*l*. 13*s*. 6*d*., whereby (allegation of loss to plts.)

Second count :

That on 24th Nov. 1865, plts. being owners of a certain ship, &c., then at L. and bound for C. or F., in the United Kingdom, certain goods, to wit, &c., were shipped in good order, &c., by one J. B., as agent for S. and Co., in and upon the said ship, whereof J. B. was master, to be delivered in like good order, &c., at the aforesaid port as ordered (the act of God, &c., excepted), unto deft. or to his assigns, on his or their paying freight for the said goods in cash at the rate, &c., with primage and average accustomed. And that, in consideration that plts., at request of deft., would deliver to deft. as such assignee, and would suffer him to take the said goods without the said plts. being first paid the said freight, primage, and average, deft. promised plts. that he would, within a reasonable time after delivery to him of the said goods, pay to plts. freight for the carriage of the said goods after the rate aforesaid, with primage and average accustomed, less a certain sum, to wit, 28*l*. 10*s*. 3*d*., to be deducted therefrom on account of advances, assurances, and stamps. And plts. did deliver to deft. as such consignee, and did suffer him to take the said goods without the said plts. being first paid the said freight, &c.

Averment of performance of all conditions, &c., necessary to entitle plts. to a performance of deft.'s promise, and to maintain this action for breach thereof; yet deft. made default in payment of the said freight, primage, and average, and although he

*paid plts. a portion thereof, yet he made default in paying plts. the residue of the said freight, &c., amounting to (to wit) 67*l*. 10*s*. 3*d*.*

Third count: for money payable for freight, &c., for conveyance by plts., at deft.'s request, of goods in ships, and for care and attendance of plts. and their servants in and about the loading and unloading and delivery of the said goods, and on accounts stated.

Plea 3, to the first count :

That by the said charter-party it was provided that plts. should deliver the goods on being paid freight by the receivers of the cargo, and that before the said ship arrived at the port of call the deft. indorsed the said bill of lading to certain persons carrying on their business under the firm and style of "Messrs. Watney and Keane," and the said indorsement was in the words following, that is to say, "Deliver to Messrs. Watney and Keane, or order, looking to them for all freight, dead freight, and demurrage, without recourse to us." (Signed) "George B. McKee and Co.;" and plts. accepted the said indorsement, and delivered the goods in pursuance thereof to the said Messrs. W. and K., as the persons entitled to the said goods, and not to deft.

Demurrer and joinder in demurrer to the said plea.

There were other pleas, and issue was taken and joined on all of them.

Plts.' points:—1. That plea 3 does not expressly aver that the plts. exonerated deft. from his liability, or that there was a substituted liability of Messrs. Watney and Keane, and does not set forth facts operating as such exoneration or substitution of liability. 2. That the plea only answers part of the claim in the first count and contains no defence to that part of the claim which is for primage and average.

Deft.'s points:—1. That the plea sets forth facts operating as an exoneration or substitution of the liability of Messrs. Watney and Keane for that of deft. 2. That the answer contained in the plea to each part of the claim in the first count which applies to freight, is a defence also to that part of the action which is for primage and average. 3. That the case is governed by the case of *Smurthwaite v. Wilkins*, 31 L. J. 214, C. P.; 5 L. T. Rep. N. S. 842; 7 Ib. 65.

Karslake, Q. C. (with him C. P. Butt) for the plt. in support of the demurrer.—The first count is framed on sect. 1 of the Bills of Lading Act (18 & 19 Vict. c. 111), which followed the case of *Thompson and another v. Dominy*, 14 L. J. N. S., 320, Ex.; 14 M. & W.; in which it was held that a bill of lading was not negotiable like a bill of exchange. The declaration alleges that the property passed to the deft., and that allegation is admitted by the plea. The plea admits a right and true delivery of the cargo, and therefore *prima facie* shows a liability on deft. of which he cannot discharge himself without an express agreement between him and the plts., founded on good consideration. But the plea shows no such discharge, and carefully avoids saying that by the indorsement to Watney and Keane the property passed to any one at all. Deft. will rely on the case of *Smurthwaite v. Wilkins* in the C. P., 5 L. T. Rep. N. S. 842; 7 Ib. 65; 31 L. J. 214, C. P., as governing the present case, but the plea there differs from the present plea. Admitting that the property passed to Watney and Keane, still the plea is no answer to the declaration. It shows no satisfaction and discharge after breach, but simply the indorsement and acceptance. This limited indorsement, with an allegation that the plts. were parties to it, and agreed to take the onus of it, does not, so far as plts. are concerned, amount to a discharge of the deft.: (*Abbott on Shipping*, edit. of 1847, p. 416.) If a bill of lading be indorsed to a third person, he paying freight for the same, the shipper has still a claim for freight on the original consignee. The allegation is, that deft. being liable for freight indorsed to Watney and Keane; but if plts. choose

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to deliver without agreeing to discharge deft., his original liability remains. Watney and Keane are mere receivers, mere agents of deft. The master cannot be involved by the holder of the bill in disputes between the latter and the consignee. The object of the Bills of Lading Act, 18 & 19 Vict. c. 111, was to give the shipowner the double liability of the person with whom he contracted and the person in whom the property vested. *Wegner v. Smith*, 15 C. B. 285, 24 L. J. 25, C. P., gives the proper form for raising the question of liability. The plea is objectionable as stating facts which may or may not be a defence, but which are not put on the record in the form of a defence. A discharge from all liability might easily have been pleaded. He cited also

Shepard v. De Bernales, 13 East, 565;
Penrose v. Wilkes (not reported), cited in Abbott on Shipping; and
Domett v. Beckford, 5 B. & Ad. 521.

Watkin Williams, for the deft. contra, in support of the plea.—[He asked leave to amend the plea by adding a clause averring express exoneration of deft.'s liability by the plts., and excepting primage and average accustomed. (a)] It may be there is some awkwardness in raising the point in the way proposed by the present plea; but nevertheless the plea does, though it be somewhat informally, raise the question of the liability of a transferee of a bill of lading. The deft.'s liability is founded solely on the Bills of Lading Act. There is a fallacy in saying that the plea admits the deft.'s liability without showing any discharge. The deft. may dispose of the bill of lading; he may, in fact, never become liable at all. The plts. accepted the substituted liability of the transferees for the imperfect liability of the consignee, and chose to give up the goods on the special indorsement. The position of the intermediate consignee is the same as that of the indorsee in *Smurthwaite v. Wilkins* (*ubi sup.*). The plea is good as a denial of a condition precedent.

Karslake in reply.

KELLY, C. B.—This case has been very ably and concisely argued by counsel on both sides, but I am of opinion that it presents no question of real doubt for the consideration of the court. The action is brought against the original consignee of certain goods consigned to a port in Great Britain, under a bill of lading, and there can be no doubt that upon the facts stated in the declaration the deft. was originally, not at any time absolutely, but contingently, liable to the plts. for the freight of those goods; I say only contingently, because, as pointed out by Mr. Williams, many circumstances may have arisen which would have precluded the plts. from making any claim whatever against him in respect of such freight. But such being the state of the case, after the original consignment of the goods and during the voyage, the deft., the then consignee, indorsed the bill of lading to certain persons trading under the names of Watney and Keane, and notice of that indorsement was given to the plts. The plea then alleges what took place between the parties in these terms; this was the indorsement: "Deliver to Messrs. Watney and Keane, or order, looking to them for all freight, dead freight, and demurrage, without recourse to us.—G. B. McKee and Co." This was signed by the deft., and then there is an allegation that the plts. accepted the said indorsement, and delivered the goods in pursuance of their order to the said Messrs. Watney and Keane, as the persons entitled to the said goods, and not the defts. Now, I quite agree that as a statement only of certain facts which would have raised a ques-

tion for the consideration of a jury, and upon which the judge would have been bound to take the verdict of the jury, the plea would have been insufficient; the plea must not be argumentative, it must not rest upon a state of facts upon which the jury may infer an agreement which, being made, would constitute a defence to the action. It is necessary that the defence should be stated in positive terms. But I am of opinion that, if the consignee of the goods under the bill of lading, while the goods are yet *in transitu*, indorses the bill and gives notice of that indorsement to the owner of the ship, or the party, whoever he may be, entitled to the freight, and upon that indorsement he states in express terms that the owner of the freight, or the party who may be ultimately entitled to the freight, is to look to other persons for the payment of freight, and that indorsement is accepted and acted upon without objection and without any qualification on the part of the owner of the freight, that that of itself, in point of law, constitutes a transfer of the liability and a defence to any subsequent action. Under these circumstances, in my opinion, the plea contains a statement of facts which are themselves an answer to the action, and not merely evidence of that which would be an answer to the action if so found by a jury. I think, therefore, that the plea is good; that the demurrer to it cannot be sustained; and that the deft. is entitled to judgment.

BRAMWELL, B.—I am of the same opinion, and I must say that I do not think any the worse of the plea because it states the actual facts rather than stating some conclusion of law which involves, first of all, proof of the existence of certain facts before a jury, and then the difficult question whether the conclusion of law has been correctly stated from them. It seems to me that these facts, as stated, furnish an answer to the action upon the grounds put by the Lord Chief Baron, and I will merely add this, that what has taken place is to my mind equivalent to the deft. having said, "Deliver to these persons upon these terms, or do not deliver to them at all." If that were so, the owners of the freight should have said, "We will not deliver at all; we do not choose to take their responsibility to your exclusion—that is to say, the responsibility of Messrs. Watney and Co. to the exclusion of you the deft." Then he would have had a right of action against the deft., as owner of the goods, for not receiving them, which it would have been his duty to do. It appears to me that, unless that reasoning were well founded, it would be a very mischievous thing, indeed; because, in what way is an owner of goods who desires to trust them to the care of a wharfinger, making him personally responsible for the freight, to do it, unless he adopt some such indorsement as this. It is always in the power of the shipowner to say, "I will not deliver upon those terms;" and the owner of the goods can say, "I will bring an action against you for not delivering the goods, and not allowing the proper person to receive them, you will be liable to demurrage and other consequences." If he choose to take such a nominee for receiving the goods, he must take him upon the terms upon which he is nominated, and those are, in this case, no further responsibility to the deft. I think the deft. is entitled to our judgment.

CHANNELL, B.—I am also of opinion that the deft. is entitled to our judgment. The question is, not whether the plea might not have been pleaded differently, but whether the facts stated on the plea afford a sufficient answer to the plts.' claim for freight. It would not, perhaps, be sufficient that the facts should be such as would justify or admit of the opinion that the plts. had renounced their

(a) Leave to amend the plea accordingly was given.

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claim for freight against the deft.; the question is, whether the facts are such as to require that conclusion; and I am of opinion that they are. The plts. might have refused to act upon this order. I do not say what would have been the state of things if they had done so; but if the plea shows that they delivered upon the faith of this special indorsement, I think the case is clear to show that they renounced their claim for freight against the deft. I do not repeat the terms of the indorsement, which my Lord Chief Baron has read from the pleadings; but the plea goes on to say, that the plts. accepted the said indorsement, and delivered the goods, in pursuance of their order, to the said Messrs. Watney and Keane, as the persons entitled to the said goods, and not the deft.; therefore the plea excludes, in point of language, any notion that there was a delivery to persons simply as agents of the deft.

PIGOTT, B.—I am of the same opinion. If the facts might not be evidence of a substituted liability, I should quite agree that the plea would be bad; but it seems to me, in point of fact, that they show a good substituted liability.

Judgment for the deft.

Attorneys for the plts., *Pritchard and Son*, 18, Great Knight-riding-street, Doctors'-commons.

Attorneys for the deft., *Cotterill and Sons*, 32, Throgmorton-street, City.

EXCHEQUER CHAMBER.

Reported by W. GRAHAM and JOHN THOMPSON, Esqrs.,
Barristers-at-Law.

ERROR FROM THE COMMON PLEAS.

June 17 and Nov. 29, 1866.

FARNWORTH v. HYDE.

Marine insurance—Total or partial loss—Sale of cargo.

In an action against the underwriters of a policy on a cargo of timber from Quebec to Liverpool, it was proved that the ship was frozen up in the St. Lawrence at the beginning of winter, and in the spring was, under the advice of competent surveyors, sold, it being considered that her expense of repairs and forwarding would be greater than the value when repaired. No notice of abandonment was given, and the news of the loss and the sale arrived at the same time.

In reckoning these expenses the freight from Quebec to Liverpool was included.

The jury found the sale justifiable, and a verdict was entered for the plts. as for a total loss.

The Court of C. P., on a rule to enter a nonsuit, held (Byles, J. dissentiente), that there was evidence to show that the probable loss during the operation of saving and forwarding would have absorbed the surplus profit, and that the verdict for a total loss ought to stand even without notice of abandonment.

*In estimating the value of the cargo if it had arrived at its destination, Liverpool, the original bill of lading freight, 1556*l.*, was deducted, and if this deduction had not been made, there would have been a margin of 1700*l.* profit.*

This point was not brought to the attention of the court below, but was suggested by Blackburn, J. in the Ex. Ch.:

*Held, by the Court of Error, that the original bill of lading freight ought not to have been deducted in considering the value of the cargo if it had arrived at its destination; and that the plts., to establish a total loss, must have proved a probable loss of cargo to the amount of the bill of lading freight, 1556*l.*,*

besides the expenses in saving and forwarding; and that, consequently, the rule to set aside the verdict as for a total loss must be made absolute.

The Court affirmed the doctrine of Rosetto v. Gurney, 11 C. B. 176, but left the question of the necessity of notice of abandonment untouched.

The action was tried at Liverpool before Pigott, B., and a verdict was found for the plts. for a total loss, with leave to defts. to move.

The defts. obtained a rule which was discharged. Against this rule they appealed.

The case was argued in the Court of Ex. Ch., at the sittings in June last, by

Mellish, Q. C. (Brett, Q. C. and C. Russell with him) for the plts.; and by

T. Jones (E. James, Q. C. with him) for the defts.

The following judgment was delivered on Nov. 29:

CHANNELL, B.—This case was argued in error after last Trinity Term before Pollock, C. B., my brother Blackburn, my brother Mellor, my brother Pigott, my brother Shee, and myself, and I am now to deliver the judgment of all the judges who heard the argument, except that of Pollock, C. B.:—This was an action on a marine policy of insurance on goods from Quebec to Liverpool. The declaration claimed a total loss. The defts. paid into court as for a partial loss of 23 per cent., and the plts. claimed damages *ultra*. From the statement in this case it appears that the vessel, with the insured cargo of deals on board, was wrecked in the autumn in the St. Lawrence; that she lay there all the winter; and in the spring was sold by auction, when the hull was bought for 450*l.* and the cargo for 750*l.*, by the same purchaser. The purchaser succeeded, without much difficulty or expense, in getting them off together, and bringing them safely together to Quebec, where the cargo was sold by him for more than double the price given for it. The purchase of the hull, however, taken by itself, was a losing speculation. There was evidence that the cargo could not have been saved in this manner unless the hull had been purchased also; and that there were some unexpected accidents of weather and tide, which facilitated the getting off of the ship, and saving of the cargo by the purchaser; and it was contended on the part of the plts. that the owners of the goods were not bound to purchase the hull, and that the jury should look at the state of the matters as the hull and cargo lay when they were sold, and that the sale was justifiable if, as matters then stood, it would not have been practicable to save the cargo and send it on to its destination without purchasing the hull. In order to support this view of the case, they gave evidence that the value of the cargo, if it had been sent on, and arrived in Liverpool, would have been 4300*l.*, which, deducting the bill of lading freight, of 1556*l.*, would leave a net value of 2744*l.* They also gave in evidence a calculation that, in order to send it on from the place where it lay in peril in the wrecked vessel, it would be necessary to land it, then raft it to a vessel brought down for the purpose and reload as weather permitted: and they made out an estimate of these expenses as follows:—The cost of landing it, 350*l.*; to raft it to another vessel and reload it, 700*l.*; increased freight of 1556*l.*, freight having risen between the date of the original shipment and of the opening of the navigation, to a river where another vessel would have been chartered, 296*l.*, additional freight, which would have been charged for lying off to take the cargo from where it was stored, instead of loading it at Quebec, 700*l.*; total, 2046*l.*; and evidence was given that

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besides all these expenses there would probably have been a loss by depreciation, which was erroneously estimated by the witnesses—the highest estimate being 12 per cent. on the Liverpool value, or 515*l.*, which, if added to the 2046*l.*, would bring up the expenditure to 2561*l.* They also gave evidence that in the ordinary state of the weather there would be risk of loss of some portion of the cargo during the operations of landing, rafting, and reshipping it, and that if the weather was unfavourable that risk would be greater. No notice of abandonment was given. On this state of the evidence, the judge asked the jury two questions: first, whether the sale of the ship was justifiable, which the jury answered in the affirmative, and on which finding no question is now raised; and secondly, whether it was right to sell the cargo, directing them that whether it was right to sell the cargo or not, would depend on whether the cargo could have been practically carried to its destination. And he meant the word practically to be understood in a mercantile sense, and that whether the cargo could be practically carried to its destination would depend, under all the circumstances, on whether the cost of bringing the cargo, added to the amount of the depreciation, would have left any appreciable margin of profit. The jury answered this question in the affirmative, and the verdict was entered for a total loss, giving leave to the defendants, as stated in paragraph 43, to move to enter a verdict for the defendants, or a nonsuit, on the ground that there was no evidence of a total loss, and no evidence of a partial loss exceeding the sum paid into court, or to reduce the damages to the sum actually due as and for a partial loss. And it was at the same time agreed, if the court should be of opinion that the loss was not total, that the amount of the partial or average loss should, if necessary, be corrected by the court, or by an arbitrator to be agreed upon. A rule was obtained accordingly, which was, after argument, discharged by the majority of the Court of C. P., my brother Byles dissenting, from which decision this is an appeal. The first question to be determined therefore is, whether there was evidence on which the jury might reasonably find that the cargo could not be practically carried on to its destination. It is to be observed that, assuming the jury to have believed that the expenses would have been the maximum amount of which there was any evidence, namely, 2561*l.*, yet on the plaintiffs' own figures there would have been a very considerable margin of profit. The plaintiffs' counsel assumed that this margin of profit was the difference between the Liverpool value of the cargo after deducting the original freight, that is, on their own figures, 213*l.*, and they agreed that the jury might reasonably estimate that probable loss of cargo during the operations of landing, rafting, and reshipping, at an amount that would more than absorb this margin. By some oversight not explained to us, the defendants' counsel never called the attention of the Court of C. P., or of the Court of Ex. Ch., to the cardinal postulate of the plaintiffs' counsel, that the original bill of lading freight, 1556*l.*, was to be deducted. The case was argued in the court below on the assumption that the only question was whether there was evidence to justify the jury in finding that the probable loss might have been so high as to absorb the 213*l.*, and the judges not having their attention called to the matter, which the counsel took for granted, considered it in that way only. The majority of the court taking it for granted that this was the proper question, thought that there was evidence on which the jury might find for the plaintiffs, to that extent. My brother Byles thought there was not. In this court the argument had proceeded a great way in the sittings after Easter Term, before it occurred to a member of the Court of Error, as

then constituted, that we were not considering the real question, for that unless the Court of C. P. in *Rosetto v. Gurney* had laid down a wrong rule, the question was whether there was evidence that would justify the jury in finding a loss that would account for the difference between the Liverpool value, without deducting the original bill of lading freight of 1556*l.*, and consequently that the plaintiffs ought to show that there was evidence to justify their finding a probable loss of cargo to the extent of more than 1769*l.* Mr. Mellish had the opportunity of preparing himself to meet this view of the case, and in the sittings after Trinity Term he was heard at length on this point before the Lord Chief Baron, my brother Blackburn, my brother Mellor, my brother Pigott, my brother Shee and myself, and we are all of opinion that where goods are, in consequence of a peril insured against, lying at a place different from their destination, damaged, but in such a state that they can at some cost be carried to their destination, the jury are to determine whether it is practically possible to carry them on. That is, according to the well-known exposition in *Moss v. Smith*, whether to do so will cost more than it is worth—and that in determining this the jury should take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and reshipping the goods; but that they ought not to take into account the fact that if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight originally contracted to be paid, that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not; and we also agree that *Rosetto v. Gurney* correctly decided that where the original bottom is disabled by the perils of the sea, so that the shipowner is not bound to carry the goods on, and he does not choose to do so, the jury are not to take into account the hull and the cost of transit from the place of distress to the place of destination, which must be incurred by the goods owner, if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened. To hold otherwise would be to enable the assured owner of goods to bring into account the whole of the freight whenever the cost of obtaining a substituted bottom exceeded the original cost, however small the excess may be. For in such a case the shipowner would never carry on the goods for the purpose of earning his original freight, though he might perhaps do so as agent of the shipowner, while no part of the freight could ever be charged when the cost fell short of the original freight, in which case the shipowner would forward them. This would be a very unsatisfactory state of the law, and we are of opinion that the case of *Rosetto v. Gurney*, which prevents that result, was correctly decided. Then, applying this to the facts of the present case, it becomes obvious that while it is doubtful whether there was evidence justifying the verdict if the jury had to deal with a margin of a little more than 5 per cent. of the value of the goods, there is clearly none justifying it when they had to deal with a margin of above 40 per cent. Mr. Mellish indeed said that there are cases in which a thing in extreme and imminent danger of immediate destruction may be justifiably sold, although in the event it turns out that it survives the peril to the great benefit of the purchaser; but there is not in this case any evidence of such a state of imminent and immediate peril as could justify a verdict for a total loss on this ground. We think, therefore, that the rule to set aside the verdict for a total loss must be made absolute. This renders it unnecessary to consider the question principally argued in the court below, as to the necessity of a notice of

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abandonment. On that point we leave the authority of the decision of the court below untouched, neither confirmed nor weakened by anything that has taken place in this court. On the remaining question, whether the partial loss does or does not exceed the amount paid into court, we are absolutely without materials for forming a judgment; the only course that seems practicable is that on which the parties seem to have agreed at *Nisi Prius*, namely, that an arbitrator should find the figures, and raise and state for the Court of C. P. any question of principle involved arising on his finding.

Judgment reversed.

ERROR FROM THE QUEEN'S BENCH.

Tuesday, Nov. 27, 1866.

(Before KELLY, C. B., WILLES, J., CHANNELL, B., BYLES, J., and PIGOTT, B.)

THE TYNE IMPROVEMENT COMMISSIONERS v. THE GENERAL STEAM NAVIGATION COMPANY.

Ship—Pilot—Negligence—Liability of owner of vessel—Navigation of the Tyne—41 Geo. 3, c. lxxvii.—6 Geo. 4, c. 125, ss. 58, 89.

By a local Act relating to Newcastle-on-Tyne, the owners and masters of foreign ships coming into or departing from the Tyne are compelled to employ pilots, but British vessels are not so compelled. And by the general Act, 6 Geo. 4, c. 125, s. 58, a penalty is imposed on the masters of vessels piloted by other than duly licensed pilots within the limits in which such vessels should be required to be piloted by law; but sect. 89 provides that nothing in the Act shall alter or repeal any provision in any Act relating to pilots of any port or district in relation to which particular provision shall have been made by any Act:

Held, that the provision in the local Act is still in force, and that it is not compulsory to employ pilots for British ships navigating the Tyne.

Dodds v. Embleton, 9 Dow. & Ry. 27, confirmed.

This was an appeal from the judgment of the Court of Q. B., discharging a rule *nisi* to enter the verdict for the defts.

Declaration for damage sustained by the plts. by reason of a vessel of the plts.' having been run down and injured by a vessel of the defts.

The defts. pleaded, first, not guilty; secondly, that the damage complained of was occasioned by the fault or incapacity of a qualified pilot then acting in charge of the defts.' vessel under and in pursuance of the provisions of the Merchant Shipping Act 1854, within a district where the employment of such pilot was compulsory by law.

The plts. took issue upon both pleas, and to the second plea also replied that the defts.' vessel at the time of the grievances was a vessel as to which the employment of a pilot was not compulsory by law.

The facts of the case were stated by Willes, J., before whom the case was tried, and made use of by the parties in the court below, and also for the purpose of the appeal.

The following is a copy of such case:—

This case was tried before me without a jury.

It was an action by the Tyne Commissioners against the owners of a screw steamer for running into one of the commissioner's dredging boats.

There were two questions: one of fact, whether the accident happened by the actionable negligence of the defts.' servants. This I decided in favour of the plts.

The other question was upon a plea of the Merchant Shipping Act, whether the defts. were

exempt from liability because of what was done having been done under the orders of a qualified pilot. This I reserved.

It depends, as I understand it, upon whether the vessel was of such character as to have been bound (in the sense put upon that word by the authorities) to take a pilot.

I therefore only furnish so much of the evidence appearing upon my notes as touches that matter, viz.:

The defts.' steamer was a British sea-going vessel usually trading between London and Tonn- ing. She went upon the occasion in question in ballast to the Tyne with a view to get a cargo thence to London.

As she was going up the river, and before she had arrived at her berth, she cast anchor, swung up with the tide, which was flowing, and in doing so struck the bow of the dredger, which was going down the river at the time.

The casting anchor in order to swing round was not improper in itself, but it was wrong when done, because of the dredger so unwieldy being so near that striking her in swinging was practically inevitable.

The steamer was in charge of a qualified pilot duly licensed by the Trinity-house of Newcastle, and what was done was done by his orders and under his control.

The master and crew were not to blame, but the pilot, if anybody, for giving the orders.

I found for the plt. damages 588*l*.

This verdict is subject to the opinion of the court upon the question of exemption by reason of having a pilot on board under the statutes.

The following are the material provisions of the Acts of Parliament applicable to the case.

By the 6 Geo. 4, c. 125, s. 55, the owner of any vessel is exempt from liability for any loss or damage caused to any person by the negligence of any licensed pilot acting in charge of such vessel under the provisions of the Act where and so long as such pilot shall be duly qualified to have charge of such vessel.

By sect. 58, masters of vessels allowing them to be piloted by any other than a licensed pilot, qualified to act within the limits in which the vessel is, are made liable to certain penalties.

By sect. 89:

Nothing in this Act contained shall extend to the taking away, abridging, defeating, impeaching, or interrupting of any grants, liberties, franchises, or privileges heretofore granted by any charters or Acts of Parliament to the pilots of (*inter alios*) the Trinity-house of Newcastle-upon-Tyne, or to give any authority to the corporation of Deptford Strand, within any ports or districts having separate jurisdictions in matters of pilotage under any Act of Parliament, or charter, or to alter or repeal any provisions contained in any Act or Acts of Parliament relating to pilots of any ports, or districts in relation to which particular provision shall have been made in any Acts as to the pilots or pilotage within the limits prescribed by any Act or Acts of Parliament relating to pilotage for such ports, or to the burthen of vessels navigating to or from such ports.

The 6 Geo. 4, c. 125, is repealed by the 17 & 18 Vict. c. 120, but by sect. 353 of 17 & 18 Vict. c. 104 (the Merchant Shipping Act 1854), subject to any alteration to be made by any pilotage authority in pursuance of the power thereinbefore given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation, and all exemptions from compulsory pilotage then existing within such districts shall also continue in force, and masters of unexempted vessels navigating within such districts without duly qualified pilots are subjected to certain penalties.

By sect. 6 of 6 Geo. 4, c. 86 (a local and personal Act relating to the duties of the Trinity-house, of Newcastle-upon-Tyne):

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BATES v. HEWITT.

[NISI PRIUS.]

The owners or masters of any foreign ship or vessel resorting to, or coming into, or departing from the said port of Newcastle, or of any of the creeks or members belonging thereto, shall, and they are hereby obliged and required respectively to receive, take on board, and employ in the pilotage and conducting such their ships or vessels, such pilots to be licensed as aforesaid, and in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally nevertheless answer and pay to the said master, pilots, and seamen the aforesaid pilotage duties, and the same shall be recoverable in the same manner as if such pilots had been actually received and employed: provided always that nothing in this Act contained shall extend or shall be construed to extend to oblige or compel the masters or master of any British ship or other vessel to employ or make use of any pilot or pilots in piloting or conducting such ships or vessels if they shall not respectively be minded or desirous so to do.

A rule nisi having been obtained pursuant to the leave reserved to set aside the verdict for the pilots, and to enter a verdict for the defts., the Court of Q. B. discharged the rule without argument, on the authority of *Dodds v. Embleton*, 9 Dow. & Ry. 27, and thereupon this appeal was brought.

S. Temple, Q. C. (T. Jones with him) for the defts.—The question is, whether the employment of the pilot whose negligence caused the collision was obligatory on the part of the defts. In the court below the judgment proceeded upon the authority of the case of *Dodds v. Embleton*, 9 Dow. & Ry. 27, and this appeal is brought to question that authority. In that case a pilot licensed by the Trinity-house of Newcastle-on-Tyne, under the 41 Geo. 3, c. lxxxvi. s. 6, was taken on board a ship by the master, and it was held that the master was not within the protection of the 6 Geo. 4, c. 125, s. 58, exempting them from liability for damage caused by incompetent pilots. It is now submitted that that case was wrongly decided. Sect. 58 of the 6 Geo. 4, c. 125 imposes a penalty upon any master of a ship for acting himself as a pilot, or employing any other person so to act than a pilot qualified to act as such within the limits where the employment is required. That is a provision of a general nature, and applicable here. The Merchant Shipping Act (17 & 18 Vict. c. 104) s. 353, enacts that the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before that Act came into operation; and sect. 388 provides that no master or owner of any ship shall be liable for loss or damage occasioned by the fault or incapacity of any pilot where the employment of such pilot is compulsory by law. Such being the present state of the law, the employment of pilots in the Tyne is compulsory under the general provision in sect. 58 of the 6 Geo. 4, c. 125. There is nothing in the local Act, 41 Geo. 3, to prevent the application of that section. It is a significant fact that the case of *Dodds v. Embleton* is not noticed in *Abbott on Shipping*, and cannot be considered as one of much authority. Cases cited:

The Killarney, 1 Lush. Adm. Rep. 327;
Carruthers v. Sydebottom, 4 M. & S. 77;
Maude & Pol. on Ship. 206, note v. (edit. 3).

E. James, Q. C. (Liddell, Q. C. and G. Bruce with him) was not called upon.

KELLY, C. B.—I am of opinion that the judgment of the court below must be affirmed. The question to be decided is, whether the master of the defts.' vessel was bound, under the 6 Geo. 4, c. 125, s. 58, to employ a duly licensed pilot under the circumstances stated in the case. The first Act which it is necessary to refer to is the local Act, 41 Geo. 3, c. lxxxvi., by which the Trinity-house of Newcastle-on-Tyne were empowered to appoint pilots to pilot vessels up and down the river Tyne, and into and out of the port of Newcastle-on-Tyne; and by sect. 6 of that Act it is expressly provided that vessels are to be navigated by those pilots, and that masters and owners of vessels are bound to employ those

pilots. By the first part of that section the owners or masters of any foreign vessel coming into or departing from the Tyne are bound to employ those pilots. And then follows a proviso which, though negative in terms, operates affirmatively to exempt the owners or masters of British ships from the obligation of employing those pilots. That is a distinct provision that foreign vessels only are bound to employ such pilots. Then comes the general Act, the 6 Geo. 4, c. 125. It was contended that, by sect. 58 of that Act, it is compulsory on the owners and masters of all vessels, British and foreign, to employ licensed pilots within the limits for which pilots may be licensed to act. But sect. 89 of that Act enacts that nothing in that Act shall extend, or be construed to extend, to the taking away, abridging, defeating, impeaching, or interrupting of any grants, liberties, franchises, or privileges theretofore granted by any charters or Acts of Parliament to the pilots of (*inter alios*) the Trinity-house of Newcastle-on-Tyne. The question arises, therefore, whether the present case is within sect. 89 or not? This is not the first time the question has arisen. It came before the Court of Q. B. in 1826, when Lord Tenterden presided over that court. He was eminently conversant with this subject. And that Court decided that the case did not come within sect. 89, and that that section did not compel the owners and masters of British ships to employ pilots in the Tyne. It may be contended that sect. 58 of 6 Geo. 4, does not abridge or impeach the privileges of the pilots of Newcastle-upon-Tyne; but then the words in sect. 89, "or to alter or repeal any provisions in any Act of Parliament relating to facts for which particular provision has been made," seem to admit of no other construction but that put on them by the Court of Q. B. It would be impossible to hold it is compulsory upon British vessels to employ pilots in the Tyne without altering or repealing the provisions of a local Act, which expressly provides that such pilotage shall not be compulsory. The cases cited in the course of the argument have no direct application, and independently of the case of *Dodds v. Embleton* we have no difficulty in deciding that sect. 58 of the 6 Geo. 4, c. 125, the effect of which is preserved by the 17 & 18 Vict. c. 104, s. 353, does not make it compulsory on the owners or masters of British vessels to employ pilots while navigating the river Tyne. The judgment of the court below will therefore be affirmed.

NISI PRIUS.

Reported by JOHN KINGHOEN and JOHN SHORTT, Esqrs.,
Barristers-at-Law.

SITTINGS AT GUILDEHALL.

Monday, Dec. 17, 1866.

(Before COCKBURN, C. J. and a Special Jury.)

BATES v. HEWITT.

Marine insurance—Concealment of a material fact.

Knowledge on the part of an underwriter must not always be assumed because of the notoriety of a fact.

The identity of a vessel is very material with reference to liability to capture.

The Georgia was the famous Confederate cruiser, and much talked of in Parliament and the press. An action brought on a policy on the ship for 10,000L. was met by a plea of concealment of the identity of the vessel insured with the cruiser in question. On the facts the jury held that the deft. did not know the fact, but that he might have known and had the means of knowledge. The point of law was reserved, whether this means of knowledge was equivalent to actual knowledge.

[NISI PRIUS.]

BATES v. HEWITT.

[NISI PRIUS.]

This was an action on a marine policy of insurance; and the defence set up was a concealment from the underwriter of a material fact which increased the risk.

For the plt., *Mellish, Q. C. and Potter.*

For the deft., *James, Q. C., Jones, Q. C., and Honniman, Q. C.*

The plt. is a merchant at Liverpool, and the deft. is an underwriter at Lloyd's, and had underwritten the plt.'s screw steamer, formerly the Confederate war cruiser the *Georgia*, for 100L. The vessel had been purchased by plt. on the 8th Aug., and was insured for 22,000L, of which 10,000L was underwritten in London. The vessel on putting to sea a few days after the purchase of her by plt. was captured on a voyage to Lisbon by a Federal man-of-war, and plt. claimed the insurance for an entire loss. The case had been tried at the Liverpool assizes, when the jury returned a verdict for the plt.; but subsequently a rule was obtained and made absolute for a new trial.

Plt. deposed that before purchasing the *Georgia* he applied to the collector of customs, and from the information he received, he purchased her and registered her as a British ship. He afterwards chartered her to carry the Portuguese mails from Lisbon and the Portuguese settlements on the West Coast of Africa. As she was the only *Georgia* screw steamer in the world, he did not think there could have been any mistake about her, and he gave all the information required as to her builder and condition, and the service she was to be employed in.

The evidence of the deft. was to the effect that he never for a moment suspected that the *Georgia* was the Confederate cruiser; but that he most probably considered her to be one of Messrs. Bradford's (plt.'s agents) regular line of steamers going up the Mediterranean. He however was not aware whether the Mediterranean boats touched at the Portuguese and Spanish ports or not; and he insured these boats for twelve months, whereas the insurance on the *Georgia* was only for six months at the rate of three guineas and a half per cent. He did not refer to Lloyd's register, but if he had, he should not have found the *Georgia* screw steamer there.

For the plt. it was contended that the present case was widely different from ordinary cases of concealment, the history of the *Georgia* being notorious to everybody, and all the circumstances connected with her having been discussed in Parliament, in the public prints, and in mercantile circles; the deft. ought to have known, and was bound to know, that the *Georgia* had been the Confederate war steamer. It was well known that she was built in the Clyde, and was originally called the *Japan*; that she had put into Liverpool, and was taken down to Birkenhead and dismantled, and then sold to an English merchant. Seeing that all these facts were so notorious, how could it be said that there had been concealed from the underwriters a material fact? If the deft. had carefully attended to the ship, he would have seen that he was insuring the *Georgia* free from seizure and capture, and that she was built in the Clyde. If he had referred to Lloyd's register, he would have learned that there was no such vessel as the *Georgia*, and this would have led him to know what she really was. If deft. had read the "slip" so carelessly as not to inform himself of its contents, he should not now be permitted to take advantage of his own negligence.

For the deft. it was urged that as a matter of fact he was ignorant that the vessel insured was the Confederate *Georgia*; that he considered her to be one of a number of vessels going to the Mediter-

anean whose names ended in "a;" and that it was the duty of the plt. to have made known to deft. the history of the vessel, and that having kept back this material information he had now no right to recover.

COCKBURN, C. J. told the jury that nothing was more important than the maintenance of that perfect good faith which was of the essence of insurance; and, no doubt, it was the duty of the assured to communicate every material fact as to the vessel to be insured, so as to enable the insurer to exercise his judgment as to whether he would accept the risk; and if so, at what rate of insurance. At the same time it was equally plain that the rule could not apply where the matter was within the common knowledge of both parties. It was admitted that the fact of the identity of the vessel was material with reference to her insurance; for, although if the ownership had been changed it might be that the capture by a belligerent would not be valid, still, on the other hand, as questions of international law were in a great degree unsettled, there could be no doubt that the identity of the vessel was very material with reference to the liability to capture. And there was no doubt that the identity of the vessel was not stated to the underwriters, though the name was mentioned. But it was said, in effect, that taking the "slip" communicating the name of the vessel, along with notorious facts, they either must have known or might have known if they had chosen to know, what the vessel was. The first question would be whether the deft. did, in fact, know it. He had positively sworn that it did not occur to him, and this was not lightly to be disbelieved. Still, it was insisted that, considering the notoriety which the name of the vessel had acquired through debates in Parliament and comments in the press, it was impossible but that he must have known it at the time, though he might since have forgotten it. Taking all the circumstances, it was for the jury to say whether they were satisfied that he did know it at the time of the insurance. But even if not satisfied of that, the plt. further contended that, supposing that he might have known it if he had exercised common care, that was sufficient. He would leave that question to the jury in order to enable him to reserve it for the court upon their finding, as one of law, although his own opinion was rather adverse to this view of the case, for he thought that it would be highly dangerous to allow the insured to speculate upon the degree of knowledge the underwriter might possibly acquire, and upon such speculation to dispense himself from the duty of giving full information of everything material as to the vessel. Still, he would leave to the jury whether, by reasonable care, the underwriter might have known the fact. The two questions, then, for the jury were, first, did the deft. know the fact; next, might he have known it by the exercise of common care? In other words, did he know it; or, if not, was it his own fault that he did not know it? In the former view they would certainly find for the plt., and upon the other view they would state their finding, in order that the question of law might be reserved for the court.

The Jury, after some time, said they were not satisfied that the deft. was aware of the fact that the *Georgia* was the Confederate steamer, but that he had sufficient means of identifying the ship at the time of the insurance.

His LORDSHIP then directed the verdict to be entered for the deft. with leave to plt. to move the court above.

ADM.]

THE HANNA.

[ADM.]

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister-at-Law.

Tuesday, Dec. 4, 1866.

(Before the Right Hon. Dr. LUSHINGTON.)

THE HANNA.

Compulsory pilotage—Norwegian and Swedish vessels exempt from, when coming through the North Channel and not carrying passengers.

A person to whom the master, without the owner's consent, gives a passage gratuitously, and who messes with him, but who, having had some experience at sea, undertakes in return to help in the working of the ship, is neither a passenger nor a seaman.

This barque had come into collision with the *Britannia* steam-tug off the Nore Sand on the 15th Sept. 1865. She was a Norwegian vessel on her way from Sundswald, in Sweden, to London. The cause was tried on the 16th Nov., when it appeared from the evidence that she had taken on board a duly licensed pilot to conduct her from Lowestoft to the port of London, and that she also had on board, besides the crew, a sort of nondescript person, who, though not a regular sailor, had occasionally been at sea, and who on the present occasion got a free passage from the master as an act of friendship without the owner's knowledge, but undertook in return to give whatever assistance he could on board the ship. He messed with the master.

The Court decided that the pilot of the *Hanna* was solely to blame.

It was then contended, on the part of the *Britannia*, that the employment of a pilot was not compulsory at the time and under the circumstances. This question was argued on the 23rd Nov.

Brett, Q. C. (Clarkson with him) for the defts.—The pilotage in this case was compulsory; the *Hanna* was a Norwegian vessel, not having a British register, coming from a northern port in the Baltic through the north passage, and having on board a passenger. The employment of a pilot, therefore, taken on board to navigate her into an English port was compulsory under sect. 376 of the Merchant Shipping Act, 17 & 18 Vict. c. 104, and the vessel could not come under the exemptions contained in sect. 379 of the same Act by reason of her carrying a passenger on board. Though in that section the word is used in the plural "passengers," still that must be construed to include the singular, under 13 & 14 Vict. c. 21, s. 4.

Dr. Deane, Q. C. (Vernon Lushington with him) contra.—The pilotage was not compulsory. There are two questions for the court. First, assuming that there was a passenger on board, did that fact make the employment of a pilot under the circumstances compulsory? Secondly, did this person on board the *Hanna* satisfy the meaning of the word passenger? First, the exemptions contained in the old Pilot Act, 6 Geo. 4, c. 125, s. 59, were continued by sect. 353 of the Merchant Shipping Act, 17 & 18 Vict. c. 104: (*The Earl of Auckland*, Lush. 177.) These exemptions were further extended by the Order in Council of Feb. 1854 (cited in *Earl of Auckland*), and within these exemptions the *Hanna* came, though carrying a passenger. There was, however, another ground on which exemption was claimed. About the time of the Act of Geo. 4, exempting traders to Norway, the *Cattégat*, Baltic, &c., there was a commercial treaty made between this country and Sweden, which was signed in London on the 18th March 1826 (*Hertslet's Commercial Treaties*, vol. 3, 434),

the second and third paragraphs of which are as follows:

2nd Art.—British vessels entering or departing from the ports of the kingdoms of Sweden and Norway, and Swedish or Norwegian vessels entering or departing from the ports of the United Kingdom of Great Britain and Ireland, shall not be subject to any other or higher ship duties or charges than are or shall be levied on national vessels entering or departing from such ports respectively.

3rd Art.—All goods, wares, and merchandise, whether the productions of the kingdoms of Sweden and Norway, or of any other country, which may be legally imported from any ports of the said Kingdoms into the United Kingdom of Great Britain and Ireland, in British vessels, shall in like manner be permitted to be so imported directly in Swedish or Norwegian vessels, and all goods, wares, and merchandise, whether the production of any of the dominions of Her Britannic Majesty, or of any other country, which may be legally exported from the ports of the United Kingdom in British vessels, shall in like manner be permitted to be exported from the said ports in Swedish or Norwegian vessels. An exact reciprocity shall be observed in the ports of Sweden and Norway, so that all goods, wares, and merchandise, whether the production of the United Kingdom or of any other country, which may be legally imported from the ports of the United Kingdom into the ports of Sweden and Norway in Swedish and Norwegian vessels, shall in like manner be permitted to be so imported from the ports of the United Kingdom in British vessels, and all goods, wares, and merchandise, whether the production of any of the dominions of Her Britannic Majesty or of any other country, which may be legally exported from the ports of Sweden or Norway in Swedish or Norwegian vessels, shall in like manner be permitted to be exported from the said ports in British vessels.

Now compulsory pilotage was a charge from which Norway and Baltic traders with British registers were exempt under 6 Geo. 4, c. 125, s. 59. These two paragraphs of the treaty, therefore, brought Norwegian and Swedish vessels within the exemptions contained in that section, and those exemptions being continued by the Merchant Shipping Act, the *Hanna* was exempt. As to the second question, the definition of a passenger given in sect. 303 of the Merchant Shipping Act, as to passengers in steamships, applies here *mutatis mutandis*. This man must be considered as one of the crew; to be a passenger too he should be on board with consent of the owner; but in this case the master took him on board out of kindness, and he in return gave his services during the voyage.

Brett, Q. C. in reply.—The object of this Act is the preservation of life; the owners' consent is not necessary to invest a person with the character of a passenger. If the captain takes on board a person without this consent, is his life not to be cared for? By the Act the owner has his remedy against the captain. This man is said to be a seaman: did the sections of the Merchant Shipping Act, relative to seamen, apply to him? Could the captain punish him? This man must be held to be a passenger, and then, even had the captain or mate particular knowledge, the employment of a pilot was compulsory. Then, as to the exemptions under the statute, the obligation was imposed by sect. 376 of the Merchant Shipping Act, and was not removed by sect. 379. Sect. 353 did not apply at all; this case arose in the Trinity-house district, to which that section does not apply. Suppose, however, it did, still the *Hanna* was not exempt, either within the 6 Geo. 4, c. 125, s. 59, for that section only contemplated masters of British vessels having a particular knowledge; or under the Order in Council, because he was not coming up the South Channel. But a final exemption is stated to exist under a treaty, and this treaty was a convention of commerce between Great Britain and Sweden, providing that British vessels entering or departing from the ports of Sweden and Norway, and Swedish and Norwegian vessels entering or departing from the ports of the United Kingdom, shall not be liable to heavier charges than national vessels entering or leaving such ports. Suppose the case of a Norwegian vessel passing, but not entering; the treaty would not apply. This

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refers simply to port dues, and not to the payment of a pilot for services rendered. That which makes the pilotage compulsory is a penalty for not taking a pilot; that is entirely different from a due. Such a treaty cannot override an Act for the preservation of life, at the time, and under the circumstances, the employment of a pilot was compulsory or not.

The COURT now gave judgment.—The owners of the *Hanna* are liable for the damage done, unless under the circumstances the pilotage of the *Hanna* was by law compulsory. The question then before the court at present is, was the pilotage compulsory? The burden of proof lies upon the defts., the owners of the *Hanna*. They rely upon the positive enactment of the 376th section of the Merchant Shipping Act, which is as follows:—"Subject to any alteration to be made by the Trinity-house, and to the exceptions hereinafter contained, the pilotage districts of the Trinity-house within which the employment of pilots is compulsory, are the London district and the Trinity-house outport districts as hereinafter defined;" this includes the district where the collision between the *Hanna* and the *Britannia* took place. "And the master of every ship navigating within any part of such districts, who after a qualified pilot has offered to take charge of such ships, either himself pilots such ships without possessing a certificate enabling him so to do, or employs an unqualified person to pilot her, shall for every such offence incur a penalty." From the effect however of this enactment, the plts. contend that the *Hanna* was exempted, and they specify two classes of exemptions, either of which they allege is sufficient; the one class of exemptions subsisting before the passing of the Merchant Shipping Act, and retained by that Act, the other created for the first time by the Merchant Shipping Act. To take the former class first, the 353rd section of the Merchant Shipping Act (passed when compulsory pilotage was general) provides that all exemptions from compulsory pilotage existing at the time when the Merchant Shipping Act came into operation should continue in force, and by the 59th section of 6 Geo. 4, c. 125, it was enacted that, "the master of any vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea on their inward or outward voyages, or of any constant trader inwards between Boulogne inclusive and the Baltic (all such ships and vessels having British registers and coming up by the North Channel, but not otherwise), might lawfully, without being subject to any of the penalties by this Act imposed, pilot his own vessel so long as he should pilot the same without the aid of an unlicensed pilot. Now that the exemptions contained in the above section of 6 Geo. 4, c. 125 were retained by the 353rd section of the Merchant Shipping Act is a point which has been decided by the Court of Q. B. in *Reg. v. Stanton*, 8 El. & Bl., and by the Judicial Committee of the Privy Council in the case of the *Earl of Auckland*, 1 Lush. These authorities I am bound to obey. The question then is, whether the exemption of the 59th section of 6 Geo. 4, c. 125, applies to the *Hanna*, and looking within the four corners of the section I am satisfied that the section does not apply, because the exemption is subject to the condition that the vessel should have a British register. But the plts. would escape from this difficulty by invoking a convention of commerce or navigation between this country and Sweden in March 1826, that is to say, a few months before the passing of 6 Geo. 4, c. 125. The plts. contended that compulsory pilotage was a charge within the meaning of the 2nd section of the convention, and consequently that notwithstanding anything in the 59th section of 6 Geo. 4, c. 125, Norwegian vessels could not be subject to compulsory pilotage where

British vessels were exempt. This view seems to be untenable; the theory of the Legislature, whether right or wrong, must be taken to be that compulsory pilotage is not a charge upon vessels, but rather a regulation instituted for their benefit. Moreover, if the construction of the plts. were correct, the condition annexed in the 59th section of 6 Geo. 4, c. 125, that vessels to be exempted should have a British register, would be null and void, not only in the case of Norwegian vessels, but also in the case of vessels of the numerous countries with which Great Britain has a similar convention of navigation and commerce. I need not refer to the third section of the same treaty with Sweden; it simply prescribes free reciprocity of navigation in respect of exports and imports; it has, in my opinion, no bearing on the present case. The plts. then called the attention of the court to the extension which the 59th section of 6 Geo. 4, c. 125, received from the Order in Council of 18th Feb. 1854, a few months before the passing of the Merchant Shipping Act, and pointed out that in that order the condition that vessels to be exempted should have a British register is wanting; that order is in the following terms: "The masters of the undermentioned ships and vessels shall, subject to the provision contained in the 59th section of 6 Geo. 4, c. 125, in respect of the employment of unlicensed persons, be exempted from compulsory pilotage, viz., of ships or vessels trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the North Sea, when coming up by the South Channel; of ships and vessels trading to Boulogne (inclusive) and the Baltic on their outward passages and when coming up the south passage." Now, this Order in Council (the exemptions contained in which are, by virtue of the 353rd section of the Merchant Shipping Act as interpreted by the decision in the *Earl of Auckland*, equally in force with the exemptions contained in the 59th section of 6 Geo. 4, c. 125) does not directly apply to the *Hanna*, for the *Hanna* at the time of the collision was upon her inward passage and coming up the North Channel; but it was argued that the Order in Council having exempted vessels coming up from the Baltic by the South Channel, without rendering it necessary for them to have a British register, it would be an anomaly to hold that by virtue of the statute the same vessels, when coming up by the North Channel, should not be exempt, because they had no British register. To this argument I cannot accede. It would be easier for the court to acquiesce in such an anomaly, or to hold that the condition of a British register, as expressed in the statute, was understood in the Order in Council extending the exemption of that statute, than to hold that an express proviso of a statute had thus been tacitly repealed by implication in an Order in Council made in pursuance of the statute. It was also argued that any distinction in the matter of exemptions from compulsory pilotage between British and foreign vessels, is an irrational distinction, neither class being necessarily more or less in need of a pilot than the other from the more or less familiarity of the master with the waters within which the pilotage is compulsory, and a distinction which has been superseded by the sensible distinction adopted in the Merchant Shipping Act between vessels navigating in the waters of the port to which they belong, and vessels navigating in other waters. I admit the force of this argument, but it cannot weigh against the express words of the statute, 6 Geo. 4, c. 125, s. 59, requiring a British register. Any anomalies that may thus arise are due to the Merchant Shipping Act retaining, or having been interpreted to retain, exemptions previously existing under another system. I come then to the conclusion that the *Hanna* was not exempted from compulsory pilotage by the

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59th section of 6 Geo. 4, c. 125, either taken alone or in connection with the convention with Sweden of 1826, or of the Order in Council of 18th Feb. 1854. I now pass to the other class of exemptions on which the plts. relied, viz., those constituted by the 379th section of the Merchant Shipping Act itself which provides (*inter cetera*) that ships trading to any place in Europe north of Boulogne, when not carrying passengers, shall be exempt from compulsory pilotage in the London districts and in the Trinity-house outport districts. This exemption duly applies to the *Hanna*, provided she was not carrying passengers. The question then is reduced to this, whether she was carrying passengers. There was only one person on board on whom that character is attempted to be fixed. I will assume that to satisfy the statute it is not necessary that there should be more than one passenger. By the 4th section of the 13 & 14 Vict. c. 21 (the Act for shortening the language used in Acts of Parliament) the plural is to be deemed to include the singular unless the contrary is expressly provided, and in this statute there is no express provision to the contrary; but the question is, whether the person on board alleged to be a passenger is in the eye of the law a passenger. It appears that the man did not pay for his passage; that the master, being acquainted with his friends in Sweden, agreed to give him a passage to London gratuitously, on the understanding that the man, who had been to sea before, should do what he could to assist in the work of the ship. He messed in the cabin with the master. Now, the term "passenger" is not defined in the Merchant Shipping Act, except in the 303rd section, where the definition is given only for specified purposes, viz., for the purpose in the provisions of the Act with respect to stowage and certificate of passenger steamships. As so defined, the term includes any person carried in a steamship other than the crew, the master, his family and servants. The word "seaman" is defined by the interpretation clause of the Merchant Shipping Act, and includes "every person (except masters, pilots, and apprentices duly registered) employed or engaged in any capacity on board any ship." Upon the whole I am satisfied that the person in question was not a passenger; in fact, he was a non-descript. In one respect he was a seaman, because, as he helped to work his passage, he might be said to have been employed or engaged in some capacity on board ship; on the other hand, as being a friend and messing with the captain without making any payment, he might seem to belong to the category of the family or servants of the master; but in any case he was not a passenger within the meaning of the statute. The result then is, that in my opinion the *Hanna* was, under the 379th section of the Merchant Shipping Act, exempted from compulsory pilotage, and consequently her owners are responsible for the damage she occasioned by her collision with the *Britannia*. I shall refer it to the registrar and merchants to estimate the damage in the usual manner; and I condemn the owners of the *Hanna* in the amount, together with the costs of the suit.

Tuesday, Dec. 11, 1866.

(Before the Right Hon. Dr. LUSHINGTON.)

THE SOBLONSTEIN.

Pro ratâ freight—Inference of consent—Master's authority—Master's possessory lien.

Where a ship and cargo were salvaged, and, the ship being rendered valueless, the cargo was sold by order of the court on petition of the salvors, the owner of the ship is entitled to *pro ratâ freight* on a new inferential

contract arising from the voluntary acceptance of the cargo at a port short of its destination.

If the owner of the cargo, though having notice, puts in no bail, and does not interfere till the proceeds are in the registry, there is inference of his consent to receive the cargo at a port short of its destination.

The master has authority to appoint an agent, both for ship and cargo, when there is no representative of the owner of the cargo.

The master has a possessory lien on the cargo for its share of general average expenses, but a ship agent has no such lien upon ship, freight, or cargo, nor a right of action in rem against any of them.

In June 1865 the *Soblonstein* had been chartered from her owners by Messrs. Bergman and Co., of Neder Calix, in Sweden, to take a cargo of deals to Bordeaux, sold by them to the Messrs. Verger, of that place. The deals were duly shipped in August, the freight per tale being payable on delivery. Bills of lading were given to Messrs. Bergman, and by them indorsed for value to Messrs. Verger, who it is not disputed were the owners of the cargo.

On the 2nd Oct. the vessel in the course of her voyage to Bordeaux struck on the Ower Sand in the North Sea, and was towed up by three English fishing-smacks into the pool of Great Grimsby in a disabled condition. On the 7th Oct. a salvage suit was instituted by the plts. against the *Soblonstein*, and the freight and cargo, and the vessel and cargo were arrested under the order of this court. The master at Great Grimsby employed Messrs. Donner, Stewini, and Co., shipbrokers, of that port, to act as agents for the owner of the vessel, and to transact all that was necessary under the circumstances for the vessel and cargo. He also summoned from Yarmouth Mr. Butcher, agent in this kingdom for the Norwegian Lloyd's Assurance Association; and Mr. Butcher, for the benefit of all concerned, instructed Messrs. Deacon and Co., the proctors, to enter an appearance in this case on the part of the owners of the ship, and also on behalf of the owners of the cargo. Shortly afterwards, after having made a survey of the vessel, Mr. Butcher instructed Messrs. Deacon and Co. to write to Messrs. Verger, the owners of the cargo, to inform them of the condition of both the ship and cargo, and to obtain their instructions with regard to the cargo. Meantime the cargo was discharged at Great Grimsby, the *Soblonstein* was put into a graving-dock and surveyed on behalf of the owners and underwriters, and the result was that she was not found worth repairing. Accordingly on the 24th Oct. the master and crew abandoned her, and the master gave notice of such abandonment to the proprietors of the graving-dock. On the 14th Nov. the court, on the application of the plaintiffs, directed both vessel and cargo to be sold, but at the instance of Messrs. Deacon and Co., suspended the issue of the commission for three days. This delay was asked for in order that the owners of the cargo or their agents might be communicated with. It appears that though Messrs. Donner and Co. had written several times to the Norwegian consul at Bordeaux to procure instructions from the owners of the cargo, no instructions had been received; Messrs. Donner and Co. then telegraphed to the Norwegian consul at Bordeaux, informing him that the ship and cargo would be sold by the court unless bail were given, and begging him to telegraph instructions; no instructions, however, appeared to have arrived, and Donner and Co. declined on their own responsibility to find bail for the cargo. The cargo was accordingly sold on the 16th Dec. The vessel was also put up for sale, but found no purchaser, and thereupon the salvors abandoned her to the proprietors of the graving-dock, the dock dues not having

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been paid. On the 6th March in the present year the case came on for hearing, and the Court awarded to the salvors 300*l.* for their services, and directed that sum, together with the costs, to be paid out of the proceeds of the sale of the cargo. This was done. The defts., the late owners of the cargo, subsequently claimed to have paid to them the balance remaining in the registry. Other claims, however, were made on the same balance, by the owners of the *Soblostein*, for *pro ratâ* freight, by Messrs. Donner and Co. for disbursements, and by Messrs. Deacon and Co. for their costs. These several claims were made by motion, and argued on Dec. 4.

Lushington for shipowners.—The ship was abandoned and the cargo taken out by the master, and was in his hands when arrested by warrant of this court. This did not deprive him, nor did he part with his lien for freight, or his lien to earn freight. The value of the deals was vastly increased by their transport to England; there was a solid gain to the cargo, and is the ship to receive no return? We do not demand the full freight, though perhaps we are entitled to it, but limit our claim to about two-thirds. Freight *pro ratâ* goes on a measurement of distance. The Admiralty warrant was notice in law to the owner of the cargo to come in, and he does not deny in his affidavit notice in fact. So, as he did not come in, the cargo must be taken to be sold with his consent:

Cargo ex Galam, 2 Moo. P. C. Rep. N. S.;
Bleasoe v. Fletcher, 14 C. B., N. S., 147, 178;
Baily v. Wood, Abbott on Shipping (9th edit.), 363.

Clarkson for owner of cargo.—*Pro ratâ* freight arises on a fresh contract to be drawn by inference: (MacLachlan, 406.) No inference can be drawn from Verger's affidavit that he consented to pay *pro ratâ* freight. The master abandoned his voyage, the owners of the cargo left it in the hands of the court. The balance has been paid in, and can it be said that by asking for their money they have consented to the delivery of the cargo at a place short of its destination—there has been no delivery of the goods at all? *Cargo ex Galam* is here inapplicable; in that case parties who may be said to have been claiming under the owners of the cargo prevented it going on to its destination. Here it was the act of strangers.

Lushington in reply.—If the master abandons the voyage he loses all right to freight, but the abandonment of the ship does not preclude his right: (MacLachlan, 406.) There must be a distinct abandonment of the voyage. There is no evidence in this case that the master abandoned the voyage when the cargo went into the hands of the court. The master had a perfect right to wait: (*Cargo ex Galam*). His work might go for nothing unless he waited to see what the court would do. The salvor here in a sense may be said to claim under the owner of the cargo, in much the same manner as in the *Cargo ex Galam*, referred to by Mr. Clarkson, the holder of a bottomry bond was said so to claim. When the owner accepts the cargo short of its destination there is an inference of consent; if he accept the proceeds there is the same inference. Before the Bills of Lading Act it was the universal rule of law that where a cargo was received under a bill of lading, that, though not necessarily raising a contract in law, is evidence from which a jury may infer a contract to pay freight in consideration of the captain giving up his lien on the goods.

Cohen for the Messrs. Deacon.—The master had a right to appoint proctor for both ships and cargo; so laid down by Lord Stowell in the *Gratitude*, 3 Rob. Adm. Rep. 259, and referred to in *Vlierboom v. Chapman*,

13 M. & W. 230-239. The salvees had no power to change proctors without permission of the court and having first paid their costs:

23 & 24 Vict. c. 27, s. 128;
Chitty's Practice, p. 91.

Lushington for Messrs. Donner.—These charges are for the landing of the cargo and other expenses, and though the Messrs. Donner have no lien on the cargo, yet I appeal to the equitable jurisdiction of this court to order payment out of the fund in court, for the master has a possessory lien (*Ex Galam*; *Scaife v. Tobin*, 3 B. & A. 523), and my client a right of personal action against him. This application is brought to save all this circuitous action.

Clarkson contra.—This application is not by the master but by shipbrokers; their remedy is in another court.

The Court now gave judgment.—The claim of the owners of the *Soblostein* is a motion for the payment of *pro ratâ* freight for the carriage of the cargo as far as Great Grimsby. The defts., Messrs. Verger and Co., deny that any freight has been earned. It has not been argued that in this respect the Norwegian law differs from the British law, whereby it is settled, first, that if the vessel becomes disabled at an intermediate port, the master is allowed a reasonable time within which to reshipe or tranship, so as to earn his freight; secondly, that the whole freight is payable if, by the default of the owner of the cargo, the master is prevented from forwarding the cargo from the intermediate port to its destination. I apprehend these propositions are elucidated by the case of the *Galam*. Again, that no freight is payable if the owner of the cargo against his will is compelled to take the cargo at an intermediate port; fourthly, that to justify a claim for *pro ratâ* freight there must be a voluntary acceptance of the goods by the owner at an intermediate port in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with. This proposition is mentioned in the case of *Vlierboom v. Chapman*, 13 M. & W. 238. I must hold that Verger and Co. had notice that their cargo would be sold if not bailed; that they suffered it to be sold and must bear the consequences of their own laches. I think the conduct of the owners of the cargo amounts to a waiver by them to have their cargo carried from Great Grimsby to Bordeaux, and does raise an implied promise that they would pay *pro ratâ* freight when they took the cargo. In ascertaining this *pro ratâ* freight, the freight which the owners of the vessel had already received by way of advances from Messrs. Bergman at Neder Calix must be remembered, and there must also be a deduction on account of the salvage and the costs of the suit previous to this motion, which are a charge upon the freight as well as upon the cargo, and which on the present occasion have been defrayed entirely out of the cargo; the freight now allowed must contribute its proportionate share, which must be recouped to the cargo. The other claimants against the fund are Messrs. Deacon and Co. for their costs, and Messrs. Donner for their disbursements. The owners of the cargo repudiate both Messrs. Deacon and Messrs. Donner, and deny they ever employed them or authorised them to be employed. In my opinion, according to Lord Stowell's judgment in the *Gratitude*, the master was justified in appointing Messrs. Donner to act as agents for the cargo as well as for the ship. I think the owners of the cargo cannot be heard to say that Messrs. Deacon and Messrs. Donner were not justified in acting for the cargo. I think Messrs. Deacon and Co. are entitled to their costs as the first

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charge on the fund in court. Respecting so much of the claim of the Messrs. Donner and Co. as relates to necessities, I consider the court would be justified in directing it to be satisfied out of the sum awarded to the owners of the vessel as *pro rata* freight. With regard to the part of the claim of Messrs. Donner and Co. which refers to general average expenses, those expenses are attributable to ship, freight, and cargo in proportion; and, according to the authority of the *Galam*, I must hold that the master has a possessory lien upon the cargo to satisfy the proportion of general average expenses due from the cargo. The ship agent, by whom, in the first instance, these expenses may have been incurred, has no lien upon the ship's freight or cargo for these expenses, nor has he even a right of action *in rem* against any of them. The court therefore cannot direct, no matter how just such a course might be, that any portion of the proceeds now in court either the portion to be assigned to the owners of the vessels as *pro rata* freight, or the portion, if any, to which the owners of the cargo are entitled, should be paid over to Messrs. Donner and Co. in discharge of such of their disbursements as are in the nature of general average expenses. The court has no authority to order them to be paid to Messrs. Donner and Co. I must refer this matter to the registrar and merchants to ascertain the amount of *pro rata* freight in the manner before mentioned, to ascertain what portion of Messrs. Donner's charges may be considered as charges for necessities supplied to the ship. Messrs. Deacon must have their costs; Messrs. Donner their charges for necessities; the owners of the vessel their *pro rata* freight, less the claim of Messrs. Donner for necessities—that is to say, the necessities must come out of the freight and not out of the proceeds of the cargo. The residue will belong to the owners of the cargo, subject to the lien of the owners of the vessel for the share of general average expenses due from the cargo, which lien the court, according to the *Galam*, is bound to regard. Each party must bear his own costs except Messrs. Deacon, who have a right to add their costs to the amount of their claim.

Proctors: Coote, Deacon, Son, and Rogers; and Clarkson, Son, and Cooper.

UNITED STATES DISTRICT COURT— ADMIRALTY COURT.

Reported by R. D. BENEDICT, Proctor and Advocate.

EASTERN DISTRICT OF NEW YORK.

(Before BENEDICT, J.)

THE JOSEPH C. GRIGGS.

Salvage—Steamboat—Costs.

Where a sloop, with her cargo of iron ore on deck, having got on a rock in a dangerous strait, was left by her crew, who went to the shore near by, and while they were there the vessel, by the action of the tide, came off the rock and drifted in the tide towards another dangerous rock, and while drifting was seen by those on a passenger steamer then landing a short distance away, which hastened out, and taking hold of her towed her to a place of safety, her crew reaching her just after the steamboat took hold of her:

Held, that this was clearly a case of salvage.

Considerations which affect the amount of salvage awarded.

300 dollars salvage, and costs allowed on a valuation of 3500 dollars.

This was a libel filed by Holmes, the master of the steamboat Sylvan Grove, in behalf of all parties interested, to recover salvage. The facts of the case

sufficiently appear in the opinion of the court. It was claimed in behalf of the schooner that it was not a case of salvage, inasmuch as her crew could have unassisted towed her into a place of safety. The value of the schooner and her cargo was about 3500 dollars.

Benedict, Tracy, and Benedict for libellant.

Haskett for resp.

BENEDICT, J.—The evidence in this case shows that on the morning of the 15th March last the sloop *Joseph C. Griggs*, laden to the extent of her capacity with iron ore on deck, in passing through Hell Gate, was driven upon Negro Head Rock. Her large anchor had been let go, in an effort to avoid the rock, but had failed to bring her to, and she grounded upon a falling tide. Her master and crew, anticipating, as the evidence clearly shows, that the sloop might keel over as the tide fell, removed their clothes, provisions, bedding, &c., to the boat, and in it betook themselves to the shore, intending, however, to watch the vessel, and attempt to save her in case she should come off under the action of the strong ebb tide. While thus abandoned for the time a strain came upon the chain of the large anchor, which tore up the windlass and freed the vessel from the anchor, and about the same time the current swept her off the rock. She began at once to drift down stream in the eddies which make rapidly from Negro Head Rock to the Bread and Cheese, a dangerous reef at the upper point of Blackwell's Island. While the sloop was on the rock her position had been observed by the persons on board the *Sylvan Grove*, a fast passenger steamboat engaged in making hourly trips between Peck-slip and Harlem, and her movement being seen while the steamboat was landing at Astoria, the landing was hastened and an extra man taken on board, and the steamboat started to rescue her. She was reached before she struck the Bread and Cheese, was at once boarded by some of the hands of the steamboat, and, lines being got, was towed out of danger and taken to Harlem Flats. The movement of the sloop from the rock had also been noticed by her crew, who, with the exception of her master—then absent in search of his owner—at once started out in their boat, but failed to reach the sloop until just as she began to move in tow of the steamboat. They then boarded her, and with her were taken to Harlem. The sloop sustained little or no injury while on the rock, and on being released from custody in this action proceeded on her voyage without repairs. These facts, which are not seriously questioned, present a clear case of salvage. The sloop when taken hold of by the steamboat had no one on board, and was drifting towards a dangerous shoal, where, if she had struck, the total loss of her cargo would have been almost certain and the vessel herself seriously injured if not destroyed. The testimony of the crew and others, greatly relied on by the claimant, to the effect that, in their opinion, the vessel would have been saved by her crew if the steamboat had not gone to her aid, although to be taken into account in fixing the amount of compensation as indicating the extent of the risk, does not take the case out of the rules applicable to cases of salvage. "A situation of actual apprehension, though not of actual danger, makes a case for salvage compensation." (*The Raikes*, 1 Hag. 247; *The New Holland*.) "Salvors," says Story, J., "are not to be driven out of court on the suggestion that if they had not touched a derelict ship, the latter might in some possible way have been saved from all calamity, and therefore the salvors have little or no merit." (*The Henry Eurbank*, 1 Sumn. 401.) The case being, then, in my opinion, one for a salvage award, it remains to fix the amount. In

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ning this I bear in mind that the whole doctrine of salvage rests upon considerations of public

I also take into consideration, on the one hand, that the service in question was rendered timely; that it was performed by a steam-vessel; that the steam-vessel was a passenger boat, at the time engaged in making a regular trip; that the vessel was one beset with dangers for sailing-vessels, steamboats of this class can often render valuable and much-needed aid. On the other side, that the steamboat was not detained so as to interfere with her next trip; that the service cost little labour or skill and no risk; that the vessel was near at hand, with a chance of being able without assistance to get their way into the true tide, and so to tow her to the boat to the adjacent shore. How conditions like these have affected the decisions of Courts of Admiralty in awarding salvage, the cases, unnecessary to be cited here, will

As somewhat analogous to the present case, however, refer to the case of the *Margaret* (Gazette 1857), where a brig had touched Spit of the Dutchman Bank, but shortly afterwards came off with loss of anchor, and then let go her anchor and hoisted a signal, and where the Court in awarding 250*l.* to a tug which went to her aid held that, "not only the present but the previous state of danger of the vessel rescued was considered." I also refer to the case of the *Ocean*, a schooner of 136 tons, which was towed off the sands in the Thames, where the Court awarded "in order to encourage steamers to assist vessels when ashore in the Thames:" (*Shipping Gazette*, Feb. 1853.) After duly weighing, then, the considerations which the present case seems to present, my conclusion is that 300*l.* is the proper sum to be awarded to these salvors, and I shall also award them their costs, although, in view of the evidence tending to show that either under haste or apprehension on the part of the master of the boat, he caused the claim to be put in suit, it was in a fair way to be settled without suit, I might, were it not a case of salvage, be disposed to withhold them. But I find, on looking at the cases, that the considerations of public policy, which so largely affect every award of salvage, have been overlooked in disposing of the question of

Thus Dr. Lushington, in the case of the *And*, 2 Mar. Law Cases, 220, when he dismissed the libel on the ground that no salvage had been performed, gave the libellants their costs "in order to recognise the meritoriousness of their intentions;" and in the case of the *Countess of Melville*, 1 Mar. L. C. 154, the same learned Judge, when pronouncing in favour of a tender made by the salvors, declared the salvors to be entitled to costs. So, too, in the case of the *Innocenza*, a libel for salvage was dismissed without costs against the salvors, he cites, with approval, the opinion of Lord Stowell, that "if, as a general rule, accompanied by a decree (adverse to salvors) with which it would discourage other salvors, a class of men, not very able to comprehend these matters, would therefore be likely to injure public interest." See also Coote's Pr. p. 63. A decree must accordingly be entered in favour of the salvors for the sum of 300*l.*, and their costs to be taxed.

COURT OF COMMON PLEAS. (IRELAND.)

Reported by J. FIELD JOHNSTON, Esq., Barrister-at-Law.

May 19, 20, 24, and 28, 1866.

(Before MONAHAN, C. J., and KEOGH, J.)

SCHMIDT v. BOYD.(a)

Condition precedent.

To an action brought for the non-acceptance of a cargo of sugar, the defendant pleaded that his undertaking and promise were made and given subject to a proviso (which had not been complied with) that the sugars should be shipped in a first-class vessel:

Held, upon demurrer, that this was a condition precedent, the nonperformance of which entitled the plaintiff to repudiate the contract.

The first count of the summons and plaint complained,

That heretofore in consideration that the plaintiff, at the request of the defendant, would purchase for the defendant, in parts beyond the seas, to wit, in Cuba, in the West Indies, certain goods, to wit, sugars, within certain limits as to quantity and price, and of a certain quality then specified by the defendant, and would ship the said goods for the defendant to a port of call, and for discharge in the United Kingdom, the defendant undertook and promised the plaintiff to accept the said goods on the arrival thereof in the United Kingdom, and to pay the freight for the carriage thereof from Cuba aforesaid, and to pay to the plaintiff all such moneys as the plaintiff should pay for the purchase of the said goods within the limits as to price so agreed on as aforesaid, together with the plaintiff's commission for and the usual and proper expenses to be incurred by them in and about the purchase and shipment of the said goods in manner aforesaid. And the plaintiff averred that pursuant to the defendant's said request, and relying on his said undertaking and promise, they did accordingly purchase for the defendant in Cuba aforesaid, certain sugar within the limits as to quantity and price, and of the quality so specified by the defendant as aforesaid. And the plaintiff then paid for the said sugars the price or sum of money at or for which they so purchased the same, and duly shipped the same for the defendant in a certain ship or vessel called *B. F. Shaw*, to a port of call and for discharge in the United Kingdom; and also incurred and paid divers usual and proper expenses in and about the purchasing and shipment of the said sugars. And the said sugars afterwards duly arrived in the United Kingdom ready to be delivered to the defendant, of all which said premises the defendant had due notice; and the plaintiff were ready and willing and then offered to deliver the said sugars to the defendant; and all conditions were performed and fulfilled, and all things were done and happened, and all times elapsed necessary to entitle the plaintiff to have the said sugars accepted by the defendant, and to be paid by the defendant the moneys so paid by the plaintiff for the purchase of the said sugars, together with the plaintiff's commission for and the usual and proper expenses incurred and paid by them in and about the purchasing and shipment of the said sugars as aforesaid. Yet the defendant, though he was thereunto frequently requested, did not nor would accept the said sugars or any part thereof, nor pay the freight for the carriage thereof from Cuba aforesaid, but wholly refused so to do, and did not or would pay to the plaintiff any part of the moneys paid by them for the purchase of the said sugars, or the plaintiff's commission for, or the said expenses incurred and paid by them in and about the purchasing and shipment of the said sugars as aforesaid, but wholly refused so to do, whereby the plaintiff sustained great loss, and were obliged to sell and did sell the said sugars at a much lower price or sum of money than the price at which they had so purchased the same as aforesaid; and were also obliged to pay and did pay the said freight and divers sums of money for insurance and expenses properly incurred in and about keeping the said sugars until such sale, and in and about such sale and incidental thereto, and in forwarding the said sugars to the purchasers thereof upon such sale; and by reason of the premises, the plaintiff were and are otherwise greatly injured, and they claim damages to the amount of 2000*l.*

The second count complained,

That the defendant heretofore retained and employed the plaintiff as the agents of the defendant to purchase and ship for the defendant, to wit, at Cuba, in the West Indies, in one or two bottoms, under neutral flag, 400 to 500 tons of sugar, say 200 to 250 tons cloyed, No. 12 Dutch standard, at 3/4 per cwt. of 112*lbs.*, English cost and freight, other numbers 11 and 13 inclusive, at proportionate rates, and 200 to 250 tons good refining Muscovado at 2 1/2 per cwt. of 112*lbs.* English cost and freight, to a port of call and for discharge in the United Kingdom, by first-class vessel or vessels with continental range of ports &c

(a) From the Irish Jurist, by permission.

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practicable, at proportionate rates, upon the terms that the deft. should accept the said sugars on the arrival thereof in the United Kingdom, and pay to the pita all such moneys as the pita should pay for the purchase of the said sugars within the limits aforesaid, and the usual and proper expenses to be incurred by them in and about the purchasing and shipment thereof in manner aforesaid, together with the pita's commission for purchasing the same. And the pita aver that, as agents for the deft., they accordingly did purchase for the deft. in Cuba aforesaid certain sugars in the quantities, of the qualities, and within the prices hereinbefore mentioned and as required by the deft. as aforesaid. And the pita then paid for the said sugars the prices or sums of money for which they so purchased the same, and duly shipped the same in two bottoms under neutral flag; that is to say, a portion of the said sugars in a first-class ship or vessel called the *R. F. Shaw*, and the remainder of the said sugars in a certain first-class ship or vessel called the *Hebe*, to a port of call and for discharge in the United Kingdom, with continental range of ports, at proportionate rates. And the pita also incurred and paid divers usual and proper expenses in and about the purchasing and shipment of the said sugars in manner aforesaid. And the said sugars afterwards duly arrived in good order and condition in the said vessel respectively in a port in the United Kingdom, ready to be delivered to the deft., of all which said premises the deft. had due notice. And the pita were ready and willing, and then offered, to deliver the said sugars to the deft., and all conditions were performed and fulfilled, and all things were done and happened, and all times elapsed necessary to entitle the pita to have the said sugars accepted by the deft., and to be paid by the deft. the moneys so paid by the pita for the purchase of the said sugars, and the usual and proper expenses incurred and paid by the pita, in and about the purchasing and shipment of the said sugars in manner aforesaid, together with the pita's commission for purchasing the same. And the pita say that the deft. accepted and paid for that portion of said sugars which was shipped by the said vessel called the *Hebe*; but although thereunto frequently requested, the deft. did not nor would accept that portion of the said sugars which was so shipped in the said vessel called the *R. F. Shaw* as aforesaid, or any part thereof, and did nor would to the pita any part of the moneys paid by them for the purchase of the same portion of the said sugars, or the pita's commission for the said expenses incurred and paid by them in and about the purchasing and shipment thereof as aforesaid, but wholly refused so to do, whereby the pita sustained great loss, and were obliged to sell, and did sell, the same portions of the said sugars at a much lower price or sum of money than the price at which they had so purchased the same as aforesaid; and were also obliged to pay, and did pay, the freight thereof and divers sums of money for insurance and expenses properly incurred in and about keeping the same portion of the said sugars until such sale, and in and about such sale and incidental thereto, and in forwarding the same portion of said sugars to the purchasers thereof upon such sale, and by reason of the premises the pita were and are otherwise greatly injured, and they claim damages to the amount of 2000*l*.

The third defence to the first count was as follows:

That the undertaking and promise of the deft in said count mentioned were made and given under and subject to an express proviso and condition that the pita should and would ship the sugars in the said count mentioned by a first-class vessel or by first-class vessels, and save as aforesaid the deft. did not undertake or promise as alleged; and the deft. avers that in breach of the aforesaid proviso and condition the pita did not ship the aforesaid sugars, or any part thereof, in a first-class vessel, or in first-class vessels, but on the contrary shipped the same and every part thereof in a certain vessel called the *R. F. Shaw* in the said count mentioned, which said vessel was not at the time of the said shipment by the pita a first-class vessel, by reason whereof the deft., within a reasonable time in that behalf, refused to accept the said sugars or pay for the same, or for the freight, commission, or expenses in said count mentioned, as for the reasons aforesaid he lawfully might, which are the non-acceptance and nonpayment in the said count complained of.

The fourth defence to the first count was as follows:

And by way of a fourth defence to the said first count the deft., by like leave, says that the sugars in the said count mentioned and purchased and shipped by the pita were not within the limits as to quantity specified by the deft. as therein alleged; for the deft. says that the quantity so specified by the deft. as aforesaid, and so to be purchased and shipped by the pita, was a certain small quantity, to wit, a quantity of the sugars which were purchased and shipped by the pita, as in the said count mentioned, was a certain very large and excessive quantity, much exceeding 250 tons, to wit, 310 tons, by reason whereof the deft. refused to accept or pay for the said sugars, or to pay for the freight, commission, or expenses in the said count mentioned, as for the reasons aforesaid he lawfully might, which are the non-acceptance and nonpayment in the said count complained of.

To the second count the deft. pleaded, with others, the following defences:

2. And by way of a second defence to the said second count of the summons and plaint, the deft., by leave of the court, says that the pita, in breach of their duty in that behalf, did not ship the sugars in said count mentioned by first-class vessel or vessels, for the deft. says that the pita shipped a large portion of the said sugars, to wit, the Muscovado sugars in said count mentioned, in a certain vessel called the *R. F. Shaw*, which was not then a first-class ship or vessel, and the deft. says that by reason of the aforesaid misconduct and breach of duty of the pita, the deft. within a reasonable time in that behalf refused to accept the said sugars so shipped as aforesaid from the pita, or to pay for the same, or to pay for the commission or expenses in the said count mentioned, which are the non-acceptance and nonpayment therein complained of; and the deft. says that afterwards and before the acceptance of, or payment for, the portion of the said sugars which was shipped by the vessel called the *Hebe*, as in the said count mentioned, it was agreed by and between the pita and the deft., in consideration of the deft. agreeing to accept and pay for the same portion of the said sugars, notwithstanding the aforesaid misconduct and breach of duty of the pita, that the said sugars so shipped as aforesaid by the pita should be treated by the pita, and the deft. independently of the other portions of the said sugars shipped as aforesaid by the said *R. F. Shaw*, and the same were so treated accordingly, and were accepted and paid for by the deft. with the consent of the pita, as an independent transaction, and without prejudice to the deft.'s right (if any) to refuse to accept the portion of the said sugars shipped as aforesaid by the said *R. F. Shaw*. 3. And by way of a third defence to the said second count the deft., by like leave says that the sugars which were shipped by the pita in the vessel called the *R. F. Shaw* in the said count mentioned consisted wholly of Muscovado sugars, of which the deft. had retained and employed the pita, as in the said count mentioned, to purchase only a certain small quantity, to wit, 200 to 250 tons thereof (as in the said count mentioned), and save as aforesaid the deft. did not retain or employ the pita, as alleged to purchase Muscovado sugars, and the deft. says that in breach of the said retainer and employment the pita purchased a certain large and excessive quantity of Muscovado sugars much exceeding 250 tons, to wit, 310 tons, and shipped the same to the deft. by the said vessel called the *R. F. Shaw*, by reason whereof the deft. refused to accept the said Muscovado sugars so shipped in the *R. F. Shaw*, as aforesaid, or to pay to the pita the moneys paid by the pita for the same, or any commission or expenses connected therewith, as for the reasons aforesaid he lawfully might, which are the non-acceptance and nonpayment in the said count complained of; and the deft. says that afterwards and before the acceptance of or payment for the portion of the said sugars which was shipped in the vessel called the *Hebe* as in the said count mentioned, it was agreed by and between the pita and deft., in consideration of the deft. agreeing to accept and pay for the same portions of the said sugars, notwithstanding the premises, that the said sugars so as aforesaid shipped by the *Hebe* should be treated by the pita, and the deft. independently of the other portion of the said sugars so shipped as aforesaid by the said *R. F. Shaw* and the same were so treated accordingly and were accepted and paid for by the deft. with the consent of the pita, as an independent transaction, and without prejudice to the deft.'s right (if any) to refuse to accept the portions of the said sugars as shipped as aforesaid by the said *R. F. Shaw*. 4. And by way of a fourth defence to the said second count the deft., by the like leave, says that after the retainer and employment of the pita by the deft. in the said count mentioned, and before any breach thereof, it was mutually agreed by and between the pita, and the deft. that the clayed sugars and the Muscovado sugars in the said count mentioned should respectively be separately purchased and shipped by the pita for the deft., and should be separately paid for by the deft. to the pita, and that the respective purchases and shipments thereof should be treated as separate, distinct, and independent transactions, and the deft. says that thereafter the pita, in breach of their said retainer and employment, did not ship the Muscovado sugars aforesaid, being the sugars of which the non-acceptance by the deft. is complained of in the said count, to the deft. in a first-class ship or vessel, but shipped the same in a vessel called the *R. F. Shaw*, which said *R. F. Shaw* was not then a first-class vessel, by reason whereof the deft. within a reasonable time in that behalf refused to accept the said Muscovado sugars so shipped in the *R. F. Shaw* as aforesaid, or pay for the same, or for commission or expenses connected therewith, as he lawfully might, which are the non-acceptance and nonpayment in the said count complained of. 5. And by way of a fifth defence to the said second count the deft., by the like leave, says that after the retainer and employment of the pita by the deft. as in the said count mentioned, and before any breach thereof, it was mutually agreed by and between the pita, and the deft. in manner and form as in the last preceding defence is averred, and the deft. says that although he had retained and employed the pita to purchase and ship a certain small quantity, to wit, 200 to 250 tons, and no more, of Muscovado sugar, as in the said count mentioned, yet the pita, in breach of their said retainer and employment, purchased and shipped to the deft., to wit, in a vessel called the *R. F. Shaw*, a certain large and excessive

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quantity of the said Muscovado sugars, much exceeding 250 tons, to wit, 310 tons thereof, by reason whereof the deft. refused to accept the said Muscovado sugars so shipped as aforesaid, or to make any payments in respect thereof, which are the non-acceptance and nonpayment in the said second count complained of. 6. And by way of a sixth defence to the said second count the deft., by the like leave, says that the sugars which the deft. refused to accept or make any payment in respect thereof were certain Muscovado sugars which purported to be shipped by the plts. in compliance with the deft.'s order to the plts. in said second count mentioned to ship from 200 to 250 tons good refining Muscovado sugars at 27s. per cwt., and the deft. says that the sugars which were accepted by the deft. as in said second count mentioned were certain clayed sugars which were shipped by the plts. in compliance with the deft.'s order to the plts. to ship from 200 to 250 tons clayed sugars, and which clayed sugars were all shipped on board the vessel called the *Hebe* in said second count mentioned; and the deft. says that the said Muscovado sugars were all shipped on board the said vessel called the *B. F. Shaw* in said second count mentioned, and no portion thereof was shipped on board the *Hebe*; and the deft. says that the said vessel called the *B. F. Shaw* in said count mentioned was not a first-class vessel as therein alleged, and the deft. for the said reason, within a reasonable time in that behalf, refused to accept the said sugars shipped therein by the plts. or make any payments on account thereof, which are the non-acceptance and nonpayment in the said second count complained of.

The plts. obtained leave to reply and demur. The replications severally denied that the pleas demurred to were true in substance and fact. The plts. demurred to the third defence to the first count on the ground that what in the said defence was alleged to be an express proviso and condition was not a condition precedent, and because, having regard to the agreement between the plts. and the deft. in the said first count mentioned, it was immaterial for the purposes of this action whether the vessel called the *B. F. Shaw* in the said first count mentioned was a first-class vessel or not, and because the alleged breach did not go to the whole consideration for the deft.'s promise and undertaking, and was, if anything, a cause of action for the deft. against the plts., and not an answer to the cause of action in the said first count. To the fourth defence to the first count the plts. demurred, on the ground that it was not shown by the said defence that any substantial difficulty, or any expense, trouble, or risk was or would have been imposed on the deft. by the alleged circumstance that the quantity of sugars purchased and shipped by the plts. exceeded the quantity alleged to have been specified by the deft., and because the said alleged excess did not authorise the deft. to refuse the whole of the cargo, and refuse to make any payment to the plts., and because it was consistent with the said defence that the plts. were ready and willing and offered to deliver to the deft. the actual quantity alleged to have been specified by him, and that the deft. could have accepted that quantity without difficulty, expense, trouble, or risk. The plts. demurred to the other defences on similar grounds respectively, alleging in their demurrer to the second defence to the second count that the agreement in the said second count mentioned contained no condition precedent that the vessel in which the said sugars were to be so shipped should be a first-class vessel.

Andrews (with him *Law*, Q. C.) in support of the demurrer. First, that these sugars should be shipped in a first-class vessel was not a condition precedent. Secondly, the difference in the quantity does not excuse the deft. from accepting. Thirdly, the plts. did tender the deft. the very quantity of sugar contracted for. It is a long-established rule that where the nonperformance of an agreement on one side does not go to the whole of the other, then the remedy must be by cross-action in the nature of an action for damages: (*Franklin v. Miller*, 4 A. & E. 599.) It has been held that the court will look at a question of this kind in a common-sense view. A first-class vessel either means a vessel rated A 1 at Lloyd's, or it means a first-rate vessel in the sense in

which we should speak of a first-rate horse. If the latter, a merchant in Havannah might think a vessel first-class which a merchant at home might not consider to be such. If it means a vessel classed as A 1 at Lloyd's, it might be that one morning, and the next morning it might be unclassified: (*Stavers v. Curling*, 3 Bing. N. C. 355.) It is not alleged here that any damage or what must occasion damage occurred. [MONAHAN, C.J.—Those are cases in which the party had received certain advantages which he could keep. Here the deft., by repudiating the contract, has received no benefit whatever.] There is a detriment to the one party here while the other goes entirely free. In the event of the market falling the deft. does get a benefit by having repudiated the contract. As to the defence of a different quantity of sugar, it amounts to this: that because the sugar came in company with sixty other tons of sugar, therefore the deft. refuses it. It is consistent with that defence that we offered the deft. the 250 tons. The deft. might as well say the sugar came along with rice or coffee. He should go on to show that some expense, some risk, or trouble was occasioned. [MONAHAN, C.J.—Where the party has accepted and retains the goods, he must show some damage or loss.] *Rylands v. Whitney*, 19 C. B. N. S., 351; *Levy v. Green*, 8 Ell. & Bl. 575, and 1 El. & E. 969, is distinguishable from the present case. It is a different thing if less than the quantity contracted for be sent: (*Shannon v. Barlow*, 15 Ir. C. L. R. 478.) As agent is not to act for his principal as a machine, but as a man having discretion: (*Story on Agency*.)

Macdonogh, Q. C. and *Porter*, for the deft., cited *Behn v. Burness*, 3 B. & S. 755; *Ollive v. Booker*, 1 Ex. 424.

The warranty is a warranty that the vessel be A 1 at the time, not that she should continue to be so; and the meaning lies in this—that the rates of insurance are in the inverse ratio. The present case is stronger, as being not one of vendor and vendee, but one of principal and agent.

Law, Q. C., in reply, cited *Hord v. Grace*, 5 L. T. Rep. N. S. 360. The dictum in *Behn v. Burness* is confined to a particular class of cases.

The case was adjourned in order to admit of certain suggested amendments of the pleadings being made. The parties having failed to agree as to the amendments, the Court gave judgment on the demurrer.

May 28.—MONAHAN, C. J. said that both himself and Keogh, J. were clearly of opinion that this was a condition precedent, and that the other defences were good, and therefore there must be judgment for the deft.

Judgment for the deft.

NISI PRIUS.

Reported by JOHN KINGHORN and JOHN SHORTT, Esqrs.,
Barristers-at-Law.

COURT OF EXCHEQUER.

Monday, Jan. 28, 1867.

(Before BRAMWELL, B. and a Common Jury.)

CURRAN v. WOOD AND ANOTHER.

Liability of owners of ship for goods ordered by the master.

Where clothes have been supplied to a ship's crew on the orders of the master of the ship, in a port within a day's post of the residence of the owners of the vessel.

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[ABN.]

and an undertaking to pay given by the master, the value of the goods could be recovered from the owners of the ship.

Action for goods sold and delivered.
Plea, never indebted.

This action was brought to recover the value of certain clothes which plt. had supplied to the crew of a ship called the *Edward Herbert*, the property of the defts.

It appeared that the *Edward Herbert* had been out at sea for rather more than nine months, and that during the voyage the crew's stock of clothes had become very much exhausted. They had to call at Queenstown on the way home to receive orders as to their ultimate destination; and while they were there the plt. came on board. As the men were so badly off for clothes, the master of the ship gave orders to plt. to supply them to the crew (consisting of thirteen seamen), and told him that either he himself or the owners would remit the money as soon as they got to Liverpool, where the owners resided; and it appeared that at the same time the master had given a stamped written undertaking in his own name for the price of the clothes supplied. Plt. supplied the crew with clothes to the amount of 64l. 9s.; and he now sought to recover that sum from the owners of the *Edward Herbert*.

The master of the ship was called and gave evidence in support of the above. He also said that after they got to Liverpool he saw Mr. Coghill (who was the same as the defts.); that he showed him the seamen's wages book, in which there were entries about the clothes, and told him that the men had been supplied with the clothes that appeared against their names in the book. When the accounts were made out deductions were made for the clothes, and the seamen were paid their wages, less these deductions, and signed the receipts for them in full, in accordance with the provisions of the Merchant Shipping Act. He afterwards sent in an account of his own disbursements.

In cross-examination he stated that he never mentioned plt.'s name to Coghill before the men were paid off; that in the account of disbursements he had taken credit for the sums against the men's names for the clothes; and that he had given a note of hand or undertaking to the plt. for the amount of the clothes.

In re-examination he said, "I cannot say that I ever mentioned the name of the man who supplied the clothes to the men before they were paid off."

The undertaking of the master was called for and put in. It bore a penny stamp, and some doubt was expressed by the associate as to its being admissible as evidence without being stamped as a bill of exchange. His Lordship, after referring to the Acts, held that the penny stamp was sufficient to admit it as a promissory note.

This being the whole of plt.'s evidence,

C. Russell, for the defts., submitted that there was no case.

Aspinall, Q. C. (with him R. G. Williams) for the plt. submitted that there was some evidence to go to the jury on the count for goods sold and delivered. While the vessel was lying in Queenstown the master must be taken to be there as the captain, and as such he could do what the owners might afterwards ratify and make their own act, and so become themselves liable for it. The case was just the same as if, while in some foreign port, the crew had asked for wages and the master had advanced money to the men, in which case the owners would be liable to refund it to him. If the master makes a purchase for the crew and the owners take the benefit of that purchase, they are liable for it.

BRAMWELL, B.—I am of opinion that there is no evidence to go to the jury. The case seems to me to be very plain. The captain may be liable to the plt. for these goods, but I see no evidence to connect the defts. with them. The effect of these accounts seems to me to be this: "I have advanced so much money to the men, and I charge you with it." From these the defts. were well warranted in thinking that the captain was responsible to the plt., and were he to recover against them they would be paying for the clothes twice over. I am prepared either to nonsuit the plt. or to direct a verdict for defts.

Plt. elected to be nonsuited.

Attorneys for plt., *Nethersole and Speechly*.

Attorneys for defts., *Field, Roscoe, and Co.*

ADMIRALTY COURT.

Reported by HENRY F. PURCELL, Esq., Barrister-at-Law

Tuesday, May 1, 1866.

(Before the Right Hon. STEPHEN LUSHINGTON, D.C.L.)

THE PHANTOM.

Salvage appeal—Inequitable agreement.

The court will set aside an agreement by salvors who about to perform a salvage service, if it be inequitable.

An agreement to pay 8s. 6d. for salvage services when there is real danger is futile.

This was an appeal from the decision of two justices at Lowestoft. The *Phantom*, a small vessel, worth about 700l., had taken refuge in the harbour of Lowestoft, from a gale from the N.N.E. To escape the danger of collision with other vessels rushing in, the master of the *Phantom* hired the services of the apps., seven beachmen of Lowestoft, to tow her from the south to the north side of the harbour; while effecting this a brig came into collision with the *Phantom*, and the apps. encountered considerable danger from the falling masts and spars.

It was asserted on the part of the resp., but denied by the apps., that there was an agreement to perform the service for 8s. 6d.

The magistrates held, "That it was not a case of salvage at all, and had no ingredient of salvage in it—there was no danger, no great risk; it was true that there was a collision, but that had nothing to do with danger." They dismissed the case with costs against the applicants. From their decision the salvors now appealed.

Vernon Lushington for apps.

Clarkson for resp.

Dr. LUSHINGTON gave judgment as follows:—I have nothing to do with the constitution of the tribunal before which the case was originally brought. The Legislature, in their wisdom, thought fit to establish it, and to give jurisdiction to magistrates on salvage, and I presume always they do their best to discharge their duty; and I must go further, and say that it must never be the disposition of this court to reverse the judgment of the court below unless satisfied it is erroneous; but, at the same time, if satisfied it is erroneous, it should never scruple for one single moment to discharge its own duty. Let us look at the facts of the case. I will speak of the alleged agreement presently. It is admitted on all hands there was a gale of wind at the time; and it is admitted that a great many vessels endeavoured to enter the narrow harbour of Lowestoft in a state of safety; that they were coming in, to use an ordinary expression, *pull-mill*,

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to save the inclemency of the weather, and were in a state of considerable danger. The *Phantom* came in not only in consequence of the state of the weather, but also, as mentioned by her master, because she had broken her boom. In she came, and she was not in that part of the harbour in which it was considered consistent with safety to remain, and for this obvious reason, she was at the entrance of the harbour, on the south side, and if she had remained there she was exposed to the chance of coming in contact with the other vessels which were rushing in. Under these circumstances her master was desirous that she should be removed to another and safer berth; and the question is, whether the assistance which was rendered by the apps. partakes of the nature of salvage, and whether they are entitled to any reward, or whether they are estopped by the agreement of 8s. 6d. As far as I make out from the evidence, in the first instance they took a small rope, which was not sufficient for the purpose; but they afterwards took a larger rope, which I think is described as being a three-inch warp, for the purpose of effecting the object of removing the vessel to the place desired. At or about that time—the evidence is not specific—a collision happens, which has been commented upon, and it has been said for the resp. that, with reference to that collision, the boatmen had nothing to do with it; that it did not increase their labours or augment the difficulty they had to encounter; but I am of opinion that it is a very powerful reason to show the risk to which the vessel was exposed. The original reason why the vessel was moved—which was the danger from vessels entering the harbour, not anticipated danger, but that which took place—shows it was a matter of importance that the vessel should be moved from the place where she was to a place of greater safety. It appears to me that is perfectly clear. After the collision what occurred? They were employed by the master to cut away the bowsprit, which was damaged, and that being done, they completed their task. I believe that to be a fair statement of what actually was done, and all the occurrences of the case. I am of opinion that it is not necessary there should be absolute danger in order to constitute a salvage service; it is sufficient if there is a state of difficulty and reasonable apprehension. There might be danger of further difficulty occurring, and I think it is proved in this case, from the facts to which I have adverted, that it was a matter of importance for the vessel to be moved; that she was, while she lay where she did, in reasonable apprehension of danger, and that reasonable apprehension was fulfilled by the accident that occurred. Certainly it is not a service of any importance, but I cannot bring my mind to the conclusion that it is a service to be ignored altogether, more especially if it is consistent with truth; and I do not find it denied that other vessels there were in collision, and that masts and spars were falling on all sides, and that there was risk to the asserted salvors in the service performed. I think there was a risk of that description. Now, seeing the state of the facts, let us see what the judgment is, and whether I can adhere to it. The magistrates say, "We think this is not a case of salvage at all; there is not one single ingredient of salvage in it." I must take the liberty of differing from those gentlemen, for I think there was, and I think the removing of a vessel from apprehended danger and real danger does partake of the character of salvage service. They say, "The smack was not in a state of danger. She was in collision with another vessel it is true, but that has nothing to do with danger, nothing whatever." Well, we are in the habit of considering collisions, but it is the first case, in my apprehension, that has ever occurred since I have sat here in which a

collision can be said to have nothing to do with danger. Whatever else happens it appears to me that, more or less, there is a certain degree of risk from collision. Then they say further, "There was no great risk in what you did." I do not know that it is necessary to constitute a salvage service that there should be great risk, but if persons perform a duty of this description and incur any risk at all, certainly that circumstance ought to be considered, and there ought to be remuneration. "Therefore we dismiss the case altogether," and they make the applicants pay the costs. Now, unless there was a valid agreement binding upon the parties, I certainly think it would be the duty of the court to overrule this judgment for the reasons I have shortly specified. Is it a valid agreement? It is this, that when the vessel first came in, and when the salvors came and offered their assistance, they inquired whether there was anything they could do, and the master answered, according to his own account, that though he was not very particular, still, says he, "I will take you and give you 8s. 6d." No doubt he swears that the agreement was for 8s. 6d. I will assume what he swears about the agreement is true. There is another matter in all agreements when salvors are going to perform a duty—whether the agreement is just and equitable; because, if it is not, however much it has been agreed upon by both parties, the court is in the habit of overruling such an agreement if it is unjust and inequitable. Looking at the storm, seeing the vessel came in in consequence of it, and was moved by reason of danger apprehended which proved to be real, I think the amount of 8s. 6d. utterly futile, and for these reasons I shall overrule the judgment. I think it is a service that requires a small sum of money, and I shall give 10*l*. and costs.

Proctors for the apps., *Shephard and Skipwith.*

Proctors for the resp., *Clarkson, Son, and Cooper.*

Tuesday, June 12, 1866.

(Before the Right Hon. Dr. LUSHINGTON.)

THE JAMES SEDDON.

Wages and disbursements—Legal expenses and penalties.

Held, in a suit for wages and disbursements on an appeal from the registrar and merchants that the owners must pay the legal expenses incurred by the master in defending himself from a false charge brought as a consequence of the discharge of his duty.

And that when a master forfeits his recognisances to prosecute on a charge of perjury, for the interest of his owners, they are liable for the amount.

This was a motion in the nature of an appeal on the part of the owner of the *James Seddon* from the report of the registrar and merchants, in a suit for wages and disbursements brought by R. C. Jeffares, late master of that ship. It appeared that while at Bombay, he had refused their discharges to two of his men. He found it necessary to log one or both of them in consequence of bad conduct, whereupon they vowed vengeance. He ultimately discharged that at Coconato they then brought a charge of murder against him, accusing him of intentionally causing the death of a man who had fallen in and been drowned when working on a stage on the ship's side. After a full trial he was acquitted, and bound over under a penalty of 10*l*. to prosecute the men for perjury. However, before the trial, the vessel had her cargo on board, which was very valuable, and was ready to sail, and the agents out there urged the master to sail and forfeit his recognisances, which he did.

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The registrar and merchants had allowed the master's expenses in defending himself from the charge, also the 10*l*. forfeit. To this decision the deft. now objected.

Brett, Q. C. (*Butt* with him) argued that these expenses were not on account of or for the benefit of the principal, and were not losses which directly and naturally followed from the execution of the agency.

Milward, Q. C. (*Waddy* with him), for the plt., contended that it was the master's duty to stick to the ship, and it was the owner's interest that he be enabled to do so. The master, in defending himself, executed a duty to his owners; he was necessary to bring the ship back. The claim for 10*l*. was made by the agents, who paid it. They had also paid the law expenses.

Dr. LUSHINGTON.—The sole question before the court is as to two items in the report of the registrar and merchants, and those items are substantially objected to on the ground that they were expenses incurred beyond the province of the master, and beyond the right which he could exercise as agent of the owners. With regard to the extent of the agency of a master in the employ of his owners, it would be next to impossible to come to anything like a definition; indeed, I believe absolutely impossible. There are certain broad limits within which we are all well acquainted, within which the owners would never be responsible for the acts of the master; acts done by the master in cases where he has not a shadow of authority to interfere; and cases also of misconduct, where it is abundantly clear, though grievous damage is done to others, yet the owners are not responsible. I remember a case which occurred in the Mersey, where the master of a tug, having been disappointed by a refusal of employment, absolutely went straight at the vessel in question and ran her down purposely. That case came before me, the owner of the vessel, which was an American, having sued in this court on account of the damage done. I was under the necessity of refusing to entertain the suit, because that which was done was an outrage committed, not in the performance of any duty whatever, but an act of vengeance in consequence of a disappointment. I apprehend that is the principle acted upon not only here, but in other courts, exactly on the same grounds. In the *Gratitude*, which was a question of agency, Lord Stowell said the master is not the agent of the cargo, but circumstances may occur which necessarily impose upon him the duty of fulfilling the part of agent of the owner of the cargo. That I apprehend to be good sound law, good common sense, and generally for the benefit of the mercantile interests of the country. No one doubts it is a settled question of law that it is the duty of the master to enforce discipline, or that that is for the convenience and advantage of owners, and is for the protection of the mercantile interests of the country. Let us look at the facts. There had been some disputes on board this vessel, and there were two men whom the master had refused to discharge, and who manifestly entertained a spite against him, and took advantage, in consequence of that spite, of an accidental occurrence, where a man unfortunately lost his life overboard, to bring a charge of murder against the master. In the first instance, I apprehend that the causing these men to be censured and chastised for their insubordination was part of the bounden duty of the master; having fulfilled this duty, out of the performance of it comes manufactured a false charge. I differ entirely from the argument of Mr. Brett, that this is a remote and not a direct cause. The very cause which originated the charge against the

master was the performance of his own duty in correcting these very men for their misconduct, and the false charge emanated instantly from it, and there were no intervening circumstances whatsoever which could cause it to be considered remote. Then the charge was made against him, and it takes the shape of a prosecution, as I understand it, for murder, and large expenses are incurred by the captain in defending himself against this false charge. What is that but defending himself against the consequences of the performance of his own duty, and which if he had not performed he would have been greatly to blame? For he would have been to blame if he had allowed any dereliction of duty from fear of the consequences to himself should any false charge be preferred against him. In the state of the commerce of this kingdom at present you must not look with too close an eye to what duties are discharged by masters on board vessels. When voyages now, out and home, comprehend sometimes two, three, and four years, and when the cargoes with which those ships are laden are 100,000*l*. or 200,000*l*., you must not fetter your masters too closely; and I say that the expenses now objected to were actually incurred for the benefit and advantage of the owners themselves. For what would have been the consequence? The master must have been incarcerated; he would not have been protected in any way against the false evidence brought against him; and even the temporary absence of the master in those distant countries would have been attended with great disadvantage and serious inconvenience to the owners themselves. I entertain no doubt whatever of this. Far be it from me to say I would encourage a master in assuming to himself an authority the law does not confer upon him; but if I see the necessity of the case, the convenience of the case, and the discharge of duty, are all united in one transaction, it is also my duty to support a master that he may not incur any expenses individually on account of having so acted. I have no doubt whatever about this first item, and I rely upon the grounds I have taken in support of it. Now I come to the petty affair of 10*l*., and I confess I am surprised, in a case like this of a valuable ship and cargo, that the time of the registrar and merchants, which is very valuable, should have been wasted in discussing this question, and at the arguments brought forward about the violation of the law and morality. The master entered into an arrangement for 10*l*. to appear to prosecute these men for perjury when his personal appearance to prosecute would have caused him delay nobody knows how many weeks or days with a cargo of 100,000*l*.. It is really making a molehill into a mountain to say there was any violation of the laws of the country which by possibility could have stood between him and the interests of his owners, and more especially the interests of the owners supported as they were by the agents of those very owners. What has become of it all? The penalty is paid instead of the duty of prosecuting being fulfilled. I have no hesitation in affirming the judgment of the registrar and merchants; and I must add, it is not merely the judgment of the registrar on which I rely, but here are merchants of great skill and practical knowledge, who well know the interests of shipowners in this country, and who have given their flat of approbation to these expenses; and I believe that among the shipowners in this country there will be found very few indeed who would quarrel with the allowance of the expenses in this report. I confirm the report with costs.

Solicitor for plt., *Thomas Martin*.

Solicitors for the deft., *Marshall, Westhead, and Roberts*.

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THE CARGO EX HONOR.

[ADM.]

Tuesday, July 31, 1866.

THE CARGO EX HONOR.

*Alleged salvage service by agents—Tender in time—Costs.**Where it is difficult to draw a distinction between salvage and agency services, the court will under particular circumstances allow the claims for each to be combined.**But where a sum sufficient according to the merits of the case, whether it be salvage or agency, has been tendered before suit, the claims were dismissed with costs.*

This was a cause of salvage instituted by Messrs. Dewdney and Collier, ship agents of Brixham, against the cargo lately of the brigantine *Honor* and the owners of the cargo, for services rendered in landing a cargo of flour from this vessel which had been stranded on the 10th Jan. 1866, in Brixham Bay. The cause was heard on the 10th July. The facts are fully set out in the judgment, given on July 31.

Brett, Q. C. and E. C. Clarkson for plts.

Milward, Q. C. and Vernon Lushington for defts.

Dr. LUSHINGTON.—This is a salvage suit instituted by Messrs. Collier and Dewdney, ship agents at Brixham, against the cargo of the brigantine *Honor*. On the 10th Jan. in the present year, the *Honor* laden with a cargo of flour, was stranded in Brixham Bay, at the back of the breakwater. The crew all got ashore, but it was found impossible to get the vessel off. On the 12th the master went to the office of the plts., for what purpose—whether or not, as stated in the answer, to note his protest there—does not appear, for Mr. Collier, who was present on the occasion, was not placed in the witness-box; but of this there is no doubt, that, being at the office, the master requested the plts. to send down men, taking them off from other work on which they were engaged. Before the cargo could be touched the plts. entered into the usual bond with the Custom-house authorities. In the first instance there was some difficulty, and possibly some risk, in getting on board the vessel by means of a rope connecting the vessel and the shore; subsequently a staging was erected from the breakwater to the *Honor*, and this enabled the men to proceed with the work of unloading the cargo regularly, and I may say with safety. They worked with but little intermission for five consecutive days and nights, and received from the plts. payment at the rate generally of 5s. each per tide. At times the vessel rolled about, and on one occasion two men slipped overboard, but were at once rescued. Eventually the vessel became a wreck. The cargo was abandoned to the insurers, the Thames and Mersey Insurance Company (Limited); and on Monday the 15th Jan., that is, after part of the cargo had been got out, Mr. Touzel, of Liverpool, arrived at Brixham to act on their behalf, and the bills of lading were forwarded to him from the owner of the cargo. Various attempts were made in the first instance to have the cargo sold by private contract by Messrs. Collier and Dewdney, and also by a Mr. Smith, and it appears that a discussion arose between Messrs. Dewdney and Collier on one hand, and Mr. Smith on the other, as to whether Mr. Smith, in case he should effect the sale, should be obliged to give half his commission to Messrs. Dewdney and Collier. In this discussion Mr. Dewdney certainly took an active part on behalf of his firm. Eventually, no private offers having been made which were considered satisfactory, Mr. Touzel placed the cargo in the hands of Mr. Smith to sell

by public auction, upon the condition to which Mr. Smith acceded, that he should give half his commission to Messrs. Collier and Dewdney. I should here mention that Mr. Collier has a separate business of public auctioneer, in which Mr. Dewdney, his partner in the ship agency business, has no share. Mr. Smith accordingly, on the 3rd Feb., conducted the sale, which produced 2200*l.* On the 5th, Messrs. Collier and Dewdney, as agents for the consignees and underwriters of the *Honor's* cargo, wrote to ask him for an account of the sale. On the same day Mr. Smith gave to Collier a cheque for 50*l.*, in favour of Messrs. Collier, Dewdney, and Vittery, and Collier gave him a receipt in full at the bottom of the account, which was furnished to him by Mr. Smith, and which was headed by the words "R. W. Smith having offered to give up one-half of the commission on the sale of flour *ex Honor*, on the Breakwater, Feb. 3, to Messrs. Vittery, Collier, and Dewdney." Mr. Vittery is the banker of the firm of the plts., and a relation to one of them. Why his name was mixed up in the transaction he himself could not explain, but Mr. Smith accounted for it by saying that it was not unusual for auctioneers to give a share of their commission to the persons introducing them to the business, and that, as it was at Mr. Vittery's office where the arrangements for the sale of the cargo had first been made, he inserted Mr. Vittery's name in the account, and in the cheque. Mr. Dewdney, in his examination, deposed that he had not received, and did not expect to receive, any part of this 50*l.*; and that he told Mr. Touzel that he had nothing to do with Mr. Collier's business as a public auctioneer. Mr. Collier himself, who, of course, could furnish a complete account of the transaction, was not called. Under these circumstances, and looking especially to what Mr. Dewdney had previously done respecting the commission from the then anticipated private auction, and to the fact that Mr. Collier had nothing whatever personally to do with conducting the public auction, I must hold that this 50*l.* was caused by Mr. Touzel to be paid as a bonus to the firm of Collier and Dewdney. The sale took place, as I have said, on Saturday, the 3rd Feb. Mr. Touzel had repeatedly asked the plts. for their account, but it was not delivered till the sale was actually going on, and therefore could not be examined at the time. But that it had been intended that the amount should be paid before the sale is clear from one of the conditions, which was, that each lot should be at the risk of the purchaser immediately after the sale, and was to be removed at his expense, and if not paid for and taken charge of before six o'clock in the afternoon of the day of sale, the vendor was to be at liberty to resell the same. Mr. Dewdney himself bid for some of the lots. After the sale was over, Mr. Touzel examined the account of the plts., which was as follows: "The consignees and owners of the cargo of flour of the brigantine *Honor*, debtors to Collier and Dewdney for disbursements and expenses on said cargo. 1866, January, paid labour discharging cargo, 104*l.* 8s. 6*d.*; Baxter, for rent of yard, 6*l.*; survey on cargo, 3*l.* 3s.; harbour dues, 15*l.* 15s. 7½*d.*; commission and expenses attending saving cargo, and advances, correspondences, and postages, 125*l.*; duty, 96*l.* 6s. 7*d.* Total, 350*l.* 13s. 8½*d.* Two of the items in this bill, viz., harbour dues, 15*l.* 15s. 7½*d.*, and duty, 96*l.* 6s. 7*d.*, were, together with an additional 2*l.* 0s. 4*d.* (demanded by the officers of the customs), in the first instance paid by the plts. but at the request of Mr. Touzel they withdrew their cheque, and he paid the money himself. The object of this was to save the commission that would be payable to the plts. for making the disbursement. Mr. Touzel was there, supplied with money for the express purpose of paying what was necessary, and

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therefore there was no need for him to employ another person. Mr. Dewdney, however, swears that his firm withdrew the cheque only upon the express promise of Mr. Touzel that he would pay the rest of their account as delivered. Mr. Touzel refused to pay the item of 125*l.* for commission and expenses attending saving cargo, and advances, correspondence, and postage. This commission was 5 per cent. upon the supposed value of the cargo. Mr. Touzel offered to pay the *plts.* the rest of their bill, and to pay the 125*l.* into the bank of Mr. Vittery, but this offer was refused. On Tuesday, Feb. 6, the *plts.* wrote to Mr. Touzel to say that, unless their demand was satisfied, they would institute proceedings, and forthwith, according to Mr. Dewdney, they telegraph to London to arrest the cargo. On the same day Mr. Touzel went to Plymouth, and took legal advice, and on the following day, Wednesday the 7th, offered 150*l.* in gold. But the offer was refused, Mr. Dewdney saying, "All, or none." And on the same day, Wednesday the 7th, the *plts.* instituted this action for salvage, and they arrested the cargo in no less a sum than 1500*l.* Subsequently they released it upon bail to the amount of 1000*l.* The *defts.* have paid 150*l.* into court. With regard to the claim of the *plts.* to be considered salvors, it is clear that they were not volunteers in the matter, they were engaged by the master; and whether the master in so engaging them was acting for the owners of the cargo is quite immaterial. Nor did the *plts.* incur any personal risk, if, indeed, any serious risk was incurred by anybody. Until they instituted the present suit the *plts.* seem never to have made a claim as salvors. Both in their letter to Mr. Smith, calling upon him for an account of the sale, and in the account which they themselves submitted to the *defts.*, they professed to be acting as agents for the consignees and owners of the cargo. It certainly would open the door to abuse if ship agents were encouraged first to send in charges in their character of ship agents, and then when those charges are disputed to turn round and assert themselves salvors. On the other hand it would be unjust that for extraordinary services the remuneration should be restricted to the ordinary commission allowed to ship agents, 5 per cent. upon disbursements. The truth is, that in cases like the present, where ship agents are employed to discharge a cargo from a vessel wrecked on a beach, it becomes a matter of nicety to draw the line between salvage and agency services. For this reason, the court, on previous occasions, has entertained similar applications to the present: *The Favourite*, 2 W. Rob. 255; *The Purissima Concepcion*, 3 W. Rob. 181. In the case of the *Purissima Concepcion*, the Court went very fully into the question, and I think it not necessary to occupy time in stating it with more particularity, but the result of it was this, that the court would allow a claim as agent and a claim as salvors to be united and combined under particular circumstances. If the court had not done that, and had attempted to draw the line in all cases where agency was claimed, assistance would have been refused, and it would have led to mischievous consequences. I shall not therefore refuse to consider the merits of the case. It turns out that the actual disbursements of the *plts.* were rather greater than they at first supposed, and amounted to 119*l.* 8*s.* 2*d.* The *defts.* have paid through Mr. Smith 50*l.*, and have paid into court 150*l.*, altogether 200*l.*, that is 80*l.* odd in excess of the disbursements of the *plts.* It seems to me that, looking at the character of the services performed and to the fact that the *plts.* incurred no personal risk, 80*l.* is sufficient remuneration to the *plts.*, whether those services are considered to partake more of the character of salvage service or more of the character of agency services. The demand of 125*l.* made by the *plts.* is,

in my opinion, exorbitant. My judgment must therefore be for the *defts.*, and, as they made a legal and sufficient tender in proper time to prevent this litigation, with costs.

Solicitors for *plts.*, Lowless, Nelson, and Goodman.

Solicitors for *defts.*, Gregory and Rowcliffe, agents for Duncans, Squarey, Blackmore, and Co., Liverpool.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,
Barristers-at-Law.

May 24 and Dec. 22, 1866.

SANDEMAN AND OTHERS v. SCURE AND OTHERS.

Shipment of goods—Damage by bad stowage—Liability.

A vessel, the *Village Belle*, went out to Oporto under a charter-party entered into between her master on behalf of the owners and a Mr. H., by which the master contracted at Oporto from the factors of the affreighter a full cargo of wine or other merchandises, and to carry the same to a safe port in the United Kingdom. The cargo was "to be brought to and taken from alongside the vessel at the merchant's risk and expense." The captain was "to sign bills of lading at any rate of freight without prejudice to the charterer." The ship was to be addressed to the charterer's agents at Oporto "on the usual terms." The ship accordingly proceeded to Oporto, consigned to the agents of the charterer. She was by them put up as a general ship, but without its being at all made known that the vessel was under charter. The *plts.* delivered their goods on board without any knowledge that the ship was not entirely at the disposal of the owners. Bills of lading for the goods in question were signed by the master in the usual form. The cargo was stowed by stevedores employed and paid by the charterer's agents, but the amount so paid by the latter was repaid to them by the master. The goods having been damaged by reason of improper stowage, the *plts.* brought their action against the *defts.* as owners of the vessel:

Held, that the *plts.* having delivered their goods to be carried in ignorance of the vessel being chartered, and having dealt with the master as clothed with the authority of a master to receive goods and give bills of lading on behalf of his owners, were entitled to look to the owners as responsible for the safe carriage of the goods.

This case was tried before Cockburn, C.J., at the sittings after Trinity Term 1865, at Guildhall, when a verdict was returned for the *plts.*, with leave to the *defts.* to move to enter it for them. The action was brought against the owners of a vessel called the *Village Belle*, to recover damages for injuries done to goods in their transit to England in consequence of bad stowage.

A rule accordingly having been obtained to enter the verdict for the *defts.*,

Brett, Q. C. and Garth showed cause.

E. James, Q. C. and Dowdeswell in support of the rule.

Our *adv.* *val.*

The facts and arguments sufficiently appear in the following judgment.

COCKBURN, C.J.—This is a case which was argued before my brothers Mellor and Shee and myself. The action is brought against the *defts.*, who are the owners of the ship, the *Village Belle*, for bad stowage and loss occasioned by bad stowage to certain goods shipped in that vessel by the *plts.* The facts upon which the case turns are as follows:—The *Village Belle* went out to Oporto under a

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charter-party entered into between her master on behalf of the owners, and a Mr. Hodgson, by which the master contracted at Oporto from the factors of the affreighter a full cargo of wine, or other merchandise, and to carry the same to a safe port in the United Kingdom. Should the cargo consist of wine, the freight was to be 18s. per tun of 252 gallons. Should other goods than wine be shipped, the freight was to be at the same rate on the quantity of wine the vessel would have carried. The cargo was "to be brought to and taken from alongside the vessel at the merchant's risk and expense." The captain was "to sign bills of lading at any rate of freight, without prejudice to the charterer." The ship was "to be addressed to the charterer's agents at Oporto on the usual terms." The ship accordingly proceeded to Oporto consigned to the agents of the charterer. She was by them put up as a general ship, but without its being at all made known that the vessel was under charter. The plts. delivered their goods on board, without any knowledge that the ship was not entirely at the disposal of the owners; bills of lading for the goods in question were signed by the master in the usual form. The cargo was stowed by stevedores, employed and paid by the charterer's agents, but the amount so paid by the latter was repaid to them by the master. The goods having been damaged by reason of improper stowage, the plts. have brought their action against the defts. as owners of the vessel; and the question is, whether the defts. under the circumstances stated are liable. We are of opinion that they are liable, and that the action against them lies. On the argument it was contended on behalf of the defts. that, as the use of the ship had been made over to the charterer, Hodgson, and the ship had been put up as a general ship by his agents, and the bills of lading had been given by the captain in furtherance of a contract for freight of which the charterer was to have the benefit, the captain must be considered as having given the bills of lading as the agent of the charterer, and the contract as having been made with the latter and not with the defts., the owners of the vessel; and that consequently the charterer was alone responsible for the negligent stowing of the goods in question. It is unnecessary to decide whether the charterer would or would not have been liable if an action had, under these circumstances, been brought against him. Our judgment proceeds on a ground wholly irrespective of the question of the charterer's liability, and not inconsistent with it, namely, that the plts. having delivered their goods to be carried, in ignorance of the vessel being chartered, and having dealt with the master as clothed with the authority of a master to receive goods and give bills of lading on behalf of his owners, are entitled to look to the owners as responsible for the safe carriage of the goods. The result of the authorities from *Parish v. Crawford*, 2 Str. 1241 downwards, *Abbott on Merchant Shipping*, and more especially the case of *Newberry v. Colvin*, in 7 Bing. 190, in which the judgment of the Court of Ex. Ch., reversing the judgment of the Court of Q. B., was affirmed on appeal by the H. of L., established the position that, in construing a charter party with reference to the liability of the owners of the chartered ship, it is necessary to look at the charter-party to see whether it operates as a demise of the ship itself, to which the services of the master and the crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particular vessel, and, as subsidiary thereto, to have the use of the vessel and the services of the master and the crew. In the first case, the charterer becomes for the time the owner of the vessel; the master and crew become to all intents

and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners, and through the master and the crew, who continued to be their servants, the possession of the ship remains also in them. If the master, by the agreement of his owners and the charterer, acquires authority to sign bills of lading on behalf of the latter, he nevertheless remains in all other respects the servant of the owners; in other words, he retains that relation to his owners out of which, by the law merchant, arises the authority to sign bills of lading, by which the owners will be bound. It appears to us clear that the charter-party in the present instance falls under the second of the two classes referred to. There is here no demise of the ship itself, either expressed or implied. It amounts to no more than a grant to the charterer of the right to have his cargo brought home in the ship, while the ship itself continues, through the master and the crew, in the possession of the owners, the master and the crew remaining their servants. It is on this ground that our judgment is sustained. We think that so long as the relation of the owners and master continues, the latter, as regards the parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owners by giving bills of lading. We proceed upon the well-known principle that where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has by law authority to sign bills of lading on behalf of his owners. A person shipping goods on board a vessel, unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and is therefore acting for his owners in signing bills of lading. It may be that, as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterers only, and not of the owners. But, in our judgment, this altered state of the master's authority will not affect the liability of the owners, whose servant the master still remains, clothed with a character to which the authority to bind the owners by signing bills of lading attaches by virtue of his office. We think that, until the fact that his authority has been put an end to is brought to the knowledge of the shipper of goods, the latter has a right to look to the owner as the principal with whom the contract has been made. In *Newberry v. Colvin*, 7 Bing. 190, Tindal C. J., in delivering the judgment of the court, observes that the finding of the jury that the charter-party was not known to the shipper "negatives any inference that would otherwise have arisen that the master, by reason of his command of the vessel, was held out by the defts. as their agent in the conduct and management of the ship, as they knew the real situation and relative rights of the captain and the owners before they put their goods on board to be carried on that voyage." From this language it may be inferred that, had this material circumstance existed in that case, the decision might have differed, even though the Court there held that there had been a demise of the ship. In the case of the *St. Cloud*, in *Browning and Lushington's Reports*, which was recently before the Court of Admiralty, but which was not referred to on the argument before us, Dr. Lushington, a very high authority on such a matter, on a charter-party substantially the same as the present, and where the goods had been shipped

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in ignorance that the vessel was under charter, held the owners liable on bills of lading signed by the master. After referring as to the effect of the charter-party to *Schuster v. McClellan*, 7 El. & Bl. 723, he goes on to say: "But there is an important distinction in this case. The shipper is not proved to have had notice of the charter-party. Until he had such notice he would be justified in supposing that, in dealing with the master for the carriage of the goods, he was dealing with the owners' agent, for *prima facie* the master is the agent of the owners of the ship. I cannot think that it is consistent with justice, or according to the ordinary mercantile practice, that a shipper of goods on board a ship, put up in the usual way, should lose his right to sue the owner for damage on account of a charter of this description, of which he had no notice. I think the burden of proof must fall upon the shipowner claiming exemption from liability; he must show that the shipper had notice of the charter, and was aware that in making the contract the master was agent for the charterer." In this view we entirely concur, and hold the defts. to be liable. We attach no weight to the fact that the stevedores by whom the cargo was loaded were appointed by the charterer's agent. The stowage of goods, in the absence of any special agreement, forms part of the obligation which the carrier takes upon himself. It is a duty to be discharged by the master and crew. By this charter, the intervention of the stevedore is only made necessary in order to ascertain the quantity the ship would carry. There is nothing to release the master and crew from their responsibility in respect of the stowage. The stevedores were probably appointed by the charterer's agent for the convenience of the master, the agent being acquainted with the port, and knowing who were fit persons to be employed. The expense was ultimately defrayed by the master. At all events the plts. were no parties to the employment of the stevedores, and have a right to look to the owners for the proper stowage and safe conveyance of the goods. For these reasons we are of opinion that the rule to enter the verdict for the defts. must be discharged.

Rule discharged.

Plts.' attorneys, Tatham, Curling and Co.

Defts.' attorneys, Mercer and Mercer.

Monday, Jan. 14, 1867.

REIN V. LANE AND OTHERS.

Construction of statute—Stamp—Charter-party.

The 5 & 6 Vict. c. 79, imposed a duty of 5s. on every "charter-party, or any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel and any other person for or relating to the freight or conveyance of any money, goods, or effects on board of such ship or vessel."

Held, that by the words "or any memorandum, letter, or other writing," was meant any such document in the nature of or to the same effect as a charter-party, and therefore that a guarantee for the performance of a charter-party was not within the enactment.

Action by the plts. against the defts. upon the following guarantee:

14th July 1864.

Messrs Clarkson and Co.

In consideration of our having signed a charter-party upon the *Indian*, dated the 13th July 1864, from Rice Ports (account Boys and Co) to the United Kingdom or Cronstadt, as agents of Messrs. Pierre, Langlois, and Co., of Akysb, we hereby guarantee the due fulfilment of the same.

LANE, H and Co.

It appeared that Messrs. Clarkson and Co. were

the brokers for the plts., the owners of the vessel called the *Indian*, and that the defts. were the brokers for the charterers, Messrs. Pierre and Co., and that the guarantee was given because the charterers were foreigners and unknown, and the plts. would not accept the charter without the guarantee of the defts. The original charter was put in evidence duly stamped with the 5s. stamp according to the 5 & 6 Vict. c. 79, the Act then in force. The non-fulfilment of the charter-party by Pierre and Co. was proved, and the guarantee of the defts., a distinct document stamped with the 6d. agreement stamp only, was then tendered in evidence, but objected to on the ground that the stamp was insufficient, and that it should have been stamped with a charter-party stamp. The objection was overruled, and the document was admitted. The verdict then passed for the plt. for 2900*l*, the agreed damages.

A rule nisi having been obtained to enter a nonsuit on the ground that the guarantee was improperly stamped,

Brett, Q. C. and Hannen showed cause.—The question turns upon the 5 & 6 Vict. c. 79, which imposes a duty of 5s. upon any "charter-party, or any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects on board of such ship or vessel." [LUKE, J.—In a case in which I was counsel, the same objection was taken, and Bramwell, B. ruled that the guarantee did not require a charter-party stamp. *E. James*.—The learned baron's decision was final, and his ruling could not be questioned.] The object of the statute was not to require such documents to be stamped with a charter-party stamp, when they are not intended as substitutes for a charter-party. The course of legislation on this subject shows that. The statutes

5 Will. & M. c. 21, s. 8;
9 & 10 Will. 3, c. 25, s. 87;
5 Geo. 3, c. 35, ss. 10, 11;
44 Geo. 3, c. 98, s. 2;
48 Geo. 3, c. 149;
55 Geo. 3, c. 184,

were referred to. Sect. 21 of 5 & 6 Vict. c. 79, also shows that the words in the statute mean any agreement, or contract, or memorandum, or letter, or other writing chargeable with duty as a charter-party. This guarantee is not chargeable with duty as a charter-party.

E. James, Q. C. and *Watkin Williams* in support of the rule.—A charter-party may be by parol, and if the charter-party in this case had been by parol, could it then have been contended that this guarantee was not liable to be stamped with the charter-party stamp? The words of the schedule of 5 & 6 Vict. c. 79, are quite general, and this guarantee relates to the fulfilment of the charter-party, and therefore to the freight. It was, in fact, the substantial contract on which the plts. relied, as they declined to accept the charter-party alone.

COCKBURN, C. J.—I am of opinion that this rule must be discharged. I agree that the terms in the schedule of the Act on which this question arises are ambiguous, and that they might be construed to apply to such an agreement as this, which in fact is not a charter-party, but only a guarantee that the charter-party shall be fulfilled. It is true that in one sense this document would come within the language of the schedule, but I should hesitate before I came to the conclusion that the Legislature ever intended such a consequence as would happen in this case. The intention of the Legislature was

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to prevent an evasion of the statute by the substitution for a charter-party of some document or instrument not within the technical meaning of that term. By mercantile usage an instrument framed in a certain form has come to be known as a charter-party, and it seems as if the Legislature in the schedule had contemplated an evasion of the statute by the substitution for the charter-party of some other kind of instrument or agreement, and therefore they put in additional words to meet such a case in order to render the attempt at substitution abortive. I do not think that after a charter-party has been entered into a subordinate agreement or instrument is subject to a second stamp as a charter-party. This view is confirmed by sect. 21 of 5 & 6 Vict. c. 79, to which our attention was drawn, and which shows that the Legislature meant by the additional words in the schedule any agreement or other instrument which should be of the same effect as a charter-party.

BLACKBURN, J.—I am of the same opinion. A definition of what was meant by a charter-party requiring to be stamped, was first given in the 48 Geo. 3, and that meaning has been carried out through the subsequent statutes. The words of this schedule, taken in their most literal and extended sense, would apply to every letter written by the captain of a ship relating to the freight, but that could not be the meaning of the Legislature. What was intended by the Legislature was, that any letter or agreement in the nature of a charter-party, so as to be equivalent to one, should be stamped with the duty on a charter-party, so that the stamp duty should not be evaded. The present guarantee is a collateral agreement, and not within the intention of the Legislature.

LUSH, J.—I am of the same opinion. The words used in the schedule are words of definition only, and merely meant that on every document which has the effect of a charter-party, in whatever form it may be, whether by letter, memorandum, or agreement, or otherwise, the stamp-duty payable on a charter-party should be imposed. It was never intended to impose such a duty on every document which might happen to relate to a charter-party. If it were, I do not see why, if a person gave a bill of exchange for the freight, and some one else were to guarantee the payment of that bill, such guarantee would not require a charter-party stamp, as it would be in effect a guarantee of the freight. That would be a most improbable intention of the Legislature.

Rule discharged. (a)

Tuesday, Feb. 12, 1867.

WILSON v. THE BANK OF VICTORIA.

Shipping—General average.

An auxiliary screw sailing vessel was damaged and dismantled on a voyage, at a time when her stock of coal was exhausted. She put into port, and it was found that, to repair the sea damage and restore her sailing power, the cargo would have had to be landed and warehoused for some time, and the repairing expenses would have been very heavy, probably beyond the value of the ship, but by some temporary repairs the ship might be enabled to reach home by steam power. The latter course was adopted, and coal shipped at two ports during the remainder of the homeward voyage:

Held, that no part of this expenditure for coal was the subject of general average.

This was an action to recover 189*l.* 4*s.* 11*d.*, for general average from the defts., under the circumstances stated sufficiently in the judgment.

The defts. paid 85*l.* into court, which was admitted to be sufficient if they were liable for particular average only.

At the trial before Mellor, J., at Liverpool, the verdict passed for the plt., with leave reserved to the defts. to enter a verdict for the defts. on a nonsuit.

A rule nisi having been obtained accordingly,

Milward, Q. C. and Baylis showed cause.—The ship having come into collision with an iceberg became dismantled and disabled from being used as a sailing vessel. She had gold to the value of 144,000*l.* on board, of which 30,000*l.* belonged to the defts. The ship put into Rio without coal, and to preserve ship and cargo, and accomplish the voyage to Liverpool, 1472*l.* was expended in coal at Rio and Fayal, of which sum 500*l.* only is charged as the subject of general average. Under these circumstances this must be regarded as an extraordinary expenditure for the preservation of ship and cargo, which the owners are entitled to recover as general average:

Birkley v. Presgrave, 1 East, 220;

Taylor v. Curtis, 2 Mar. 809;

Tudor's Lead. Cas. 74;

2 Arnould on Insurance, 770, 782, 788.

E. James, Q. C. and Mellish, Q. C.—The charge for coal was not an item for general average. It was a charge similar to that which would arise in the case of provisions running short on account of the protracted length of a voyage. The vessel was an auxiliary screw, and the freighters had a right as part of the contract to the use of steam as an auxiliary. There is no authority for such a claim.

Cur. adv. vult.

BLACKBURN, J.—This was an action to recover from the defts. contribution to general average from them as owners of a large quantity of gold, part of the cargo of the ship *Royal Standard*, on her voyage from Melbourne to England. The defts. paid money into court sufficient to cover the plt.'s claim, with the exception of one item, and the question for the court is, whether that item was such as to be properly included in the general average. The facts, as far as material to the present question, appeared at the trial to be as follows:—The *Royal Standard* was a large sailing vessel, furnished also with steam power and a screw. The screw was capable of being shipped on board when the vessel was sailing, and the quantity of coal which the vessel was capable of carrying was very inadequate for a steam voyage from Australia to England, so that it was obviously contemplated that the voyage was to be principally performed by means of the sailing power of the ship, the steam power being only to be used as auxiliary, which is indeed the common phrase in use to describe such vessels as clipper ships with auxiliary screw. She sailed from Melbourne with the deft.'s gold and other cargo on board, and on the voyage came into collision with an iceberg. The effect of this disaster was to dismast her and to injure her upper works on the starboard side, so that she could not when on the port tack bear any sail, and when on the starboard tack had not the means of making any quantity of sail, so that her sailing power might practically be said to be destroyed. By means, however, of her screw and her steam power she reached the port of Rio Janeiro in this state. It appeared that, in order to repair the sea damage so as to restore the sailing power of the vessel, it would have been necessary to land the cargo

(a) The 28 & 29 Vict. c. 96, is the statute which now regulates the stamping of charter-parties, and that has fixed the duty at 6*d.*

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and warehouse it, and to detain the vessel at Rio for many months, and that the expenses of the repairs there would have been very heavy; so much so that it seems probable they would have exceeded the value of the ship when repaired; at all events, they would have cost many thousands of pounds more than if done in England. But it appeared that by making some slight temporary repairs which would not require that the cargo should be unloaded, and which in fact only caused a detention of three days, the vessel might be made fit to come home under steam. The master resolved to adopt this latter course, and there can be no doubt that in so doing he acted properly. In order to bring her home under steam it was necessary to purchase coal first at Rio and afterwards at Fayal. The value of the coal purchased and consumed in bringing her home was between 1400*l.* and 1500*l.*, and the question that arises is whether the whole or any part of that sum can properly be charged as general average, all the other items claimed by the plt. being covered by the money paid into court. When a vessel at a port of refuge requires repairs to prosecute her voyage, and for that purpose the cargo is unloaded, warehoused, and reshipped, the practice is to charge part of these expenses to the ship, part to the goods, part to the freight, part to general average, and part to the owners. Two average adjusters of great experience proved that, if the repairs had in fact been so done at Rio, a large proportion of the expenses would have been such as according to the practice would have been charged to general average; and they made out the adjustment, and the plts. claimed on the following principle: they said the money expended in buying coal was an expenditure to prevent the necessity of unshipping the cargo at Rio, and therefore ought to be charged against the same interests and in the same proportions as the expenditure which it prevented would have been charged. We wish to guard against being supposed to sanction the notion that in a case like this the shipowners could have charged the owners of the cargo with any part of the expenses of unshipping and warehousing the goods at Rio, supposing the master had under these circumstances adopted that course. Inasmuch as the master could by the expenditure of a comparatively small sum in temporary repairs and coals bring the ship and cargo safely home, it was his duty to do so; and though we do not decide a point which does not arise, we are not to be taken as deciding that his owners would not have been liable to the owners of the cargo if he had not taken this course. But, passing this by, we think that the expenses actually incurred must be apportioned according to the facts that actually happened, and that there is no legal principle on which they can be apportioned according to what might have been the facts if a different course had been pursued. No case or authority was cited to support the principle contended for, nor are we aware of any. If in any particular trade it has been found convenient to act on this principle, and that has been done to such an extent as to create a custom tacitly making it part of the contract that this shall be the principle applied, or if the parties to a charter-party stipulate that it shall be so, and by words of reference to the charter-party in the bills of lading and the policies of insurance make it part of the contract affecting every one, the case would be different; but as it is, the principle propounded is not, we think, tenable at law. The counsel for the plts. then argued that at all events the money paid for the coals was an extraordinary expenditure, and, as such, to be contributed for as general average; but we think this is not so. The shipowners, by their contract with the freighters, are bound to give the service of their crew and their ship, and to

make all disbursements necessary for this purpose. In the case of such a vessel as this, which is equipped with an auxiliary screw, their contract includes the use of that screw, and, consequently, the disbursements necessary for fuel for the steam-engine. Now, the disaster which occurred in this case no doubt caused the engine to be used to a much greater extent than would generally occur on such a voyage, and so caused the disbursements for coals to be extraordinarily heavy, but it did not render it an extraordinary disbursement. The case is similar to that of an ordinary sailing vessel, in which, owing to disasters, the voyage is unusually protracted, and, consequently, the owner's disbursements for provisions, and for the wages of his crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump, when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature. We think, therefore, that there is no right to charge this item to general average, and, consequently, that the rule to enter the verdict for the deft. must be made absolute.

Rule absolute.

COURT OF COMMON PLEAS.

Reported by W. GRAHAM and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Jan. 26 and 29, 1867.

PAYNTER AND OTHERS v. JAMES.

Charter-party—Payment of freight—Time of—Freight payable "on" delivery.

By the terms of a charter-party freight was payable "on right delivery of the cargo." In an action by the shipowners for freight, to which the deft. pleaded that the plts. were not ready and willing to deliver:

Held, that the deft. was not entitled to delivery before paying the freight; that the delivery and payment of freight must be simultaneous acts, and that if in point of fact they could not take place simultaneously, it must be shown that each party was ready and willing to perform his part of the contract.

The first count of the declaration was on a charter-party, alleging that it was agreed that freight should be paid as follows: one-third in cash on arrival at Bristol, and the other two-thirds on right delivery of the cargo, by good and approved bills, payable in London at four months, or cash, deducting the usual interest at the option of the charterer; and that the deft. elected to pay the second two-thirds in cash, deducting 2½ per cent. for four months. Breach, that all things were done and happened, and all times elapsed necessary to entitle the plts. to have the deft. pay to them the said two-thirds, yet the deft. did not pay the same, either in cash or bills.

Second count.—That it was agreed between the plts. and deft. that the plts. should deliver to the deft. certain goods on which certain freight was payable, and that the deft. should pay the said freight, one-third in cash, and two-thirds in cash, with 2½ per cent. discount, and all things were done, &c.; yet the deft. did not pay the two-thirds.

Third count.—For money payable for and in respect of the plts.' having delivered to the deft. at his request certain goods whereon the plts. had a lien for freight, and thereby lost the said lien, and for freight of goods carried in the plts.' ship, and on accounts stated.

Fourth count.—That the said ship arrived in Bristol, &c., and all things were done and happened necessary to be done and to happen, and the plts.

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were ready and willing to do all things necessary to be done and to happen to have the deft. pay to them the said freight, and the deft. exercised the said option as to the mode in which the said two-thirds of the said freight should be paid, and elected not to pay the same by such good and approved bills in London as aforesaid, but to pay the same in cash deducting the usual interest, yet the deft. would not pay.

Fifth count.—That the deft. did not nor would exercise the said option, or pay the said two-thirds.

Pleas:—To the first and fourth counts, that the deft. did not exercise the said option as alleged. To the second count, *non assumpti*. To the first, second, fourth, and fifth counts, that the plts. were not ready and willing to deliver the said cargo. To the third count, never indebted.

Replication taking issue.

At the trial before Pigott, B., at the last assizes for Glamorganshire, it appeared that the plts. were owners of the ship *Ninrod*, and the deft. was a merchant at Teignmouth. The action was brought for the balance of freight due under a charter-party for goods carried by the plts.' ship from Quebec to Bristol. By the terms of the charter-party payment of freight was to become due and be made as follows: "One-third to be paid cash on arrival, and the remainder on right delivery of the cargo by good and approved bills payable in London at four months following, or cash, deducting the usual interest, at charterer's option."

The vessel arrived at Bristol on the 17th Oct., the deft. being there at the time. The deft. paid the captain one-third of the freight in accordance with the terms of the charter-party, and agreed to pay the remainder in cash on being allowed interest at the rate of 7½ per cent. per annum. On the 21st Oct. the deft. received an application from the plts.' brokers for 600*l*. on account of freight, stating that a portion of the cargo had been delivered, and that they insisted on a portion of the balance of freight being paid before the whole of the cargo was discharged. To this the deft. replied on the 25th Oct. that he declined most positively to pay any more freight till the captain was in a position to settle it according to the terms of the charter-party. And on the same day he gave the captain notice that he had appointed Messrs. May and Hassell to receive the cargo, and that he should hold him responsible for any damage he might sustain by reason of the non-delivery. After some further correspondence the captain, on the 30th Oct., gave the deft. notice that he was willing and ready to deliver the cargo upon the deft. tendering him payment of freight according to the terms of the charter-party. In answer to this the deft. wrote that the captain was not entitled to any more freight till the cargo was delivered, and that he should decline to pay any more till the cargo was delivered according to the terms of the charter-party. The captain thereupon commenced discharging the cargo alongside the ship, but declined to deliver it till freight was paid, and on the 8th Nov. this action was commenced.

The question never went to the jury, but it was agreed that it should be taken that the jury found that the deft. exercised the option to pay cash, that the plts. were not ready and willing to deliver the cargo without cash, but that they were on being paid cash, and that they unloaded and rafted the timber ready for delivery. The verdict was entered for the plts., leave being reserved to the deft. to move; the court to have power to draw inferences of fact that a jury might draw not inconsistent with the above finding.

Bowen in Michaelmas Term obtained a rule to enter the verdict for the deft., on the ground that the deft. was under no obligation to pay the residue of the freight before the delivery of the cargo to

him, and that the plts. were not ready or willing to deliver the cargo except on prepayment of freight, to which they were not entitled.

Giffard, Q. C. and *Michael* showed cause.—The question arises on the readiness and willingness to deliver, and that is determined by the finding of the jury. The contention on the other side is, that we were bound to give credit, but neither party was bound to trust the other. It is admitted that the plts. were not entitled to prepayment, but they were ready and willing to hand over the whole cargo on the freight being paid. The provision as to the deft.'s option to pay in cash or bills might be struck out of the charter-party, as the jury have found that he exercised his option and elected to pay in cash.

Bowen, G. B. *Hughes*, and *Watkin Williams* in support of the rule.—The plts. were bound to deliver in order that we might have an opportunity of inspecting the cargo and seeing that it was all right before we paid:

Moller v. Young, 25 L. J. 94, Q. B.;

Foster v. Colby, 28 L. J. 82, Ex.

The freight is payable on delivery of the cargo, that is immediately after delivery. Freight is not payable at common law till delivery is made:

MacLachlan on Shipping 365;

Richie v. Atkinson, 10 East, 295.

The deft. could exercise his option to pay in cash or bills at any time till payment was actually made, and he is not concluded by having said that he would pay in cash.

BOVILL, C. J.—We have felt some embarrassment on account of the terms of the rule, and on carefully looking at the findings of the jury, and after hearing Mr. Giffard, I cannot find that the point raised by the rule was made at the trial. We must look at the charter-party and the findings of the jury and place a construction, and a reasonable construction, upon each. No doubt the question intended to be raised was the meaning of the charter-party. The words are, "the freight to be paid one-third in cash on arrival at Bristol." There is no question as to the one-third, and the question as to the remainder arises on the following words: "and the other two-thirds on right delivery of the cargo by good and approved bills payable in London at four months or cash, deducting the usual interest, at the option of the charterer." That must be taken as "two-thirds on right delivery of the cargo, payment to be in cash," as the option had been exercised. Then what is "on right delivery of the cargo?" The contention at the trial was that the plts. were to be paid on delivery. Now the deft. has shifted his ground and contends that he was entitled to delivery before payment, and it is said that "on delivery" means that the delivery is a condition precedent to the payment, but the word "on" has received a construction in the case of *Reg. v. Humphrey*, 10 A. & E. 335, which my brother Willes has referred me to. The question there arose as to whether a declaration to be made "upon admission" to an office was to be made within a reasonable time after the admission, and the Court of Q. B. were of opinion that it was sufficient if the oath was taken after admission, but the case came before the Ex. Ch., and that Court says: "The words of the Act, 'upon his admission,' do not, as it appears to us, mean after the admission has taken place, but upon the occasion of or at the time of his admission . . . The word 'upon,' in different cases, may undoubtedly mean before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require the interpretation with reference to the context and the subject-matter of the enactment." That is a very

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clear statement of the various meanings that may be put upon the word "on;" it may be before, at, or after, and we must look at the intention of the charter-party. Could it be the intention of the plts. that they should lose their lien? Could that be the construction of the charter-party? One would suppose that the two things should be done simultaneously, that the plts. should be paid at the time of delivery. If a man is ready to pay the freight he is entitled to the delivery, and he is not entitled to delivery if he is not ready. There is a case of *Black v. Rose*, 2 Moo. P. C. C., N. S., 277, to which my brother Willes has called my attention. The point there was very similar to the present case, and the Privy Council affirmed the judgment of the court below to the effect that the terms of the charter-party, that the freight should be paid on delivery, entitled the master to demand freight at the time of delivery, irrespective of the custom of the port of delivery. That seems to determine this question if authority were necessary. Neither party is entitled, the one to delivery without payment of freight, or the other to freight without delivery. That being so on the construction of the charter-party, it is said that the finding of the jury is ambiguous, and there is the same ambiguity as to the meaning of the word "on." I understand the finding to be, that the plts. were ready to deliver on being paid cash at the time of delivery. It was the deft. who was not ready to pay, and he insisted on having the cargo before he paid, the effect of which would have been, that the plts. would have lost their lien. The next point, that the plts. were not ready and willing to deliver the cargo except on prepayment of freight, is disposed of by what I have already said, and therefore I think the rule should be discharged.

WILLES, J.—Not having heard all the arguments, I take no part in the decision, but I agree so far as I have heard them.

M. SMITH, J.—I am of the same opinion. The question turns on the words of the charter-party: "One-third in cash on arrival at Bristol, and two-thirds on right delivery of the cargo by good and approved bills payable in London, or cash, at the option of the charterer." It was contended at the trial that the true meaning of this clause was, that the freighter was entitled to have entire delivery of the cargo, and that the shipowner was to part with his lien, making the delivery a condition precedent to the right to freight, and leaving to the shipowner nothing but his right of action. I think that is not the right construction, but that the payment of freight and the delivery were to be concurrent acts. There is no authority in favour of the contention of the deft. The case of *Foster v. Colby*, cited by Mr. Hughes, was a right decision, but it was on quite a different charter-party. The shipowner there had not stipulated that his lien should continue, and freight was to be paid two months after the ship was reported. Then it is said that the plts. were not ready to deliver, and that they demanded freight before they were ready to deliver. But it seems from the evidence and the finding of the jury that they were ready. I understand that there must be a concurrent readiness and willingness to deliver and to pay the freight, and when the case comes to the jury they must be satisfied that the one in default was ready to perform his part of the stipulations if the other was also. Here the plts. were both ready and willing to deliver, but the deft. was neither ready nor willing to pay the freight. Upon the whole, therefore, I think, that the plts. were ready and willing to perform their part of the contract, and that is sufficient to entitle them to maintain this action,

where the deft. was not ready. *Pordage v. Cole*, 1 Wms. Saund. 320, shows that where such acts as this are to be done, which in point of fact cannot be done concurrently, there must be a readiness and willingness on both sides.

Rule discharged.

Attorneys for the plts., *Williamson and Hill*.

Attorneys for the deft., *Cotterill and Sons*.

EXCHEQUER CHAMBER.

Reported by E. LUMLEY, Esq., Barrister-at-Law.

ERRORS FROM THE EXCHEQUER.

Friday, Feb. 8, 1867.

(Before WILLES, BLACKBURN, KEATING, MELLOR, SMITH, and LUSH, JJ.)

WILSON v. JONES.

Marine insurance—Atlantic Telegraph Cable—Subject-matter insured—Perils insured against—Total loss.

The plt. being a shareholder in the Atlantic Telegraph Company, by a policy of insurance the material parts of which were as follows, caused himself to be insured: "Lost or not lost, at and from Ireland to Newfoundland, the risk to commence at and from and including the lading of the cable on board the Great Eastern, and to continue until the said cable be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland and vice versa, the risk on this policy then to cease and determine, upon any kind of goods and merchandises, and also upon the body, &c., of the good ship or vessel called the Great Eastern." . . . The policy then went on: "The said ship, &c., goods, and merchandises, &c., for so much as concerns the assured by agreement between the assured and the assurers in this policy, are and shall be valued at 200l. on the Atlantic Cable value, say, on twenty shares valued at 10l. per share (and it is hereby agreed and understood that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable from and including its lading on board the Great Eastern until 100 words be transmitted from Ireland to Newfoundland, and vice versa, and it is distinctly agreed and declared that the transmission of the said 100 words from Ireland to Newfoundland, and vice versa, shall be an essential condition of this policy). Touching the adventures and perils which we the insurers are contented to bear, and do take upon ourselves in this voyage, they are of the seas, &c., and of all other perils, losses, and misfortunes that have or shall come to the hurt, &c., of the said goods, &c., and ship, &c., or any part thereof, &c."

The Great Eastern had started with about 2300 miles of cable on board, and had laid from 1100 to 1200 miles, when a fault having been discovered, the cable had to be hauled in, and while this was being done, the weather being fair at the time, the strain proving too great, the cable parted and part went to the bottom. The Great Eastern then returned to port with the remainder:

Held (affirming the decision of the Court of Ex.), that the risk by which the loss occurred was a risk insured against by the policy, and that upon the true construction of the policy the insurance being on the expected profits of the adventure, there was a total loss.

This was an action by a shareholder in the Atlantic Telegraph Company, against an underwriter upon a policy of insurance.

The policy, the more material parts of which

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given above, together with the pleadings and the facts of the case, is fully set out in 14 L. T. Rep. N. S. 65. The words inclosed in brackets were written in the margin of the policy, which was in fact an ordinary printed form of marine policy with blanks to be filled up, opposite to the clause "touching the adventures and perils, &c."

A verdict was entered for the plt. for the full amount claimed on the policy, leave being reserved to the deft. to move to enter the verdict for himself on the ground that the loss was not by the perils insured against, or, if any, only an average loss, and there was no evidence to show that it was higher than 8 per cent.

The Court of Ex. discharged a rule obtained accordingly by *Brett, Q. C.*, and against this decision the deft. now appealed.

Brett, Q. C. (with him *Cohen*) for the app.—There are two questions; first, what is the subject-matter of the insurance: secondly, whether the loss was by a peril insured against. If the insurance is on the adventure it is a mere wager. [BLACKBURN, J.—A wager is when the party has no interest in the event.] At any rate apt words must be used in the description of such a subject-matter. The usual form of marine policy is used, and the sort of insurance suggested is not one which an underwriter would contemplate or be likely to enter into. Now here the plt. might very well intend to insure the cable as that upon the safety of which the success of the adventure depended. The cable is a part of the property of the company in which he is a shareholder, and he is therefore interested in it as being part of such property. The insurance is expressed to be "on the Atlantic Cable," and what follows is merely inserted to make the policy a valued instead of an open policy. The words describe the subject-matter, and then the interest which the plt. has in that subject-matter. The clause relating to the transmission of the hundred words simply defines the duration of the risk, and does not alter the subject-matter of insurance. If this be so, there is no total loss. [SMITH, J.—It is difficult to see what would be a total loss according to your contention.] Then has there been a loss by the perils insured against? The words in the margin must be read as following the printed words specifying the risks insured against, and then, according to the well-known rule, they must be construed as extending to risks only *ejusdem generis*. [BLACKBURN, J.—But that would be to give them no further meaning than the general words at the end of the printed clause, and so in fact no sense at all.] They may have a more extended sense than that, but they cannot include the incidents of an ordinary and successful voyage. Nothing here happened to cause the loss, but that which occurs on every ordinary voyage. This is like the case of a ship sinking in a perfectly calm sea: that would be no evidence of a loss by any peril against which the underwriters insured, but only of a loss through some defect in the ship itself. [WILLES, J.—I do not know that it can be said as a matter of law that in such a case the judge ought to direct a verdict for the defts.] The jury would not be justified in such a case in saying that there was a loss by the perils of the sea. But assuming that the loss here was by a peril insured against, how can it be a total loss? Looking at the case in either aspect, as one of insurance on the cable or one of insurance on the adventure, there is not a total loss. In the first case it is clear there was not. In the second case the adventure was not totally lost. Part of the cable remained, and the value of the shares was not totally gone. In fact, by what took place it was shown that the part of the cable that had sunk could be recovered. [BLACKBURN, J.—Is not that like the case of a capture,

where there is a total loss at one time although a *spes recuperandi* remains, and if the ship be recaptured what was once a total becomes only an average loss?] From that instant the ultimate success of the adventure became morally certain. Then it was said that the insurance was on the success of the adventure on that voyage. That is nowhere stated in the policy. Surely it would be a construction leading to strange results. Suppose some trifling accident occurred which prevented the cable from transmitting messages for the time, but that the mischief could easily be remedied after the voyage, then, though the value of the shares would rise greatly, the underwriters would be liable to pay the full amount as though the whole adventure had totally failed. The contract would not then be one of indemnity, but like a mere wager that the cable would be successfully laid in a certain space of time, three months for instance, which would be lost if it was successfully laid within three months and a day. He cited

Paterson v. Harris, 1 B. & S. 336; 5 L. T. Rep. N. S. 58.

Temple, Q. C. (with him *L. Temple*), for the resp., was not called upon.

WILLES, J.—This is an appeal from a decision of the Court of Ex. discharging a rule to enter a verdict for the deft. in an action on a policy of insurance on the ground that the loss which occurred was not a loss by a peril of the sea, or any other peril insured against; and, secondly, that if it was it was not a total loss, and that there was no proof that the average loss was over 8 per cent. In deciding this case almost everything depends upon the construction of the policy, consisting in this case of written words superadded to an ordinary printed form, and this construction we must therefore now consider and decide upon. Now this was a policy of very unusual character, containing provisions for the insurance of an undertaking of a very novel and speculative description; an undertaking by which a joint-stock company sought to establish, for profit to themselves, a telegraph across the Atlantic, for which purpose it became necessary to lay down a cable at the bottom of the ocean for a distance of over 2000 miles. This was a project involving great risk and uncertainty, and until the cable was laid, the shares in the undertaking were, of course, of very questionable value, but it was expected, and no doubt with reasonable probability, seeing the great efforts that were made to carry out the project, that if success were attained, very large profits would be made. In this undertaking the plt. had shares. Now, it is most material to observe the character of his interest and position as the holder of these shares. The proposition, which was very properly assumed in the argument, and might be asserted without the necessity of referring to any authority, but which is the result of what has been decided in the highest tribunal, was this, namely, that the plt., in respect of his shares in this joint-stock company, had no immediate interest in the cable itself. The shareholders have an interest in the profits, but not in the property of the concern itself. Upon this principle is founded the decision that shares in a company are not within the Mortmain Act. So here we have a person who has an interest in the profits to be earned by the cable if laid, but not a direct interest in the cable, insuring the expected profits against perils which are expected to happen. We must read the policy with reference to that state of things and of law, with which men of business must be taken to be familiar. Let us then look at the language used to see what the plt. intended to insure. Was it his interest in the cable or

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in the profits to be made by the cable, if it should survive all contingencies and become successful, as it must be taken between these parties would have been the case if the hundred words were safely transmitted? That is the first question. Then if the language is plain as to the subject-matter insured, that is to say, that it is the interest of the plt., it will be plain that the insurance is upon the interest in the expected share of the profits itself, and not on the shares themselves, or the cable in any other sense than as connected therewith. It was, no doubt, in one sense an insurance on the cable, that is to say, affecting the cable. It is just like the case of an insurance of freight; that is an insurance affecting the ship; the two things are so connected that they cannot be severed except in cases where the freight is affected by the loss of goods. And then again it may be said that the insurance of freight is an insurance of goods; that is connected with goods, because if the goods are lost the insurers will be liable for the freight just as if the ship was lost. Now, except in this sense, when the words here used are looked at, it is plainly an insurance on the plt.'s interest in the profits of the undertaking or adventure. We shall have presently to determine whether that is the adventure as limited to the attempt to lay the cable on this occasion, or as extended to any other attempt. The first part of the description is as follows: "The said ship, &c., and merchandise, &c. for so much as concerns the assured by agreement between the assured and the assurers in this policy, are and shall be valued at 200*l.* on the Atlantic Cable." If that stood alone, that would not be a sufficient description of what we think the plt. intended to insure. Whether the plt. would have had a sufficient interest within the statute in that case, I do not wish to express an opinion, and I only mention the point lest, as it was mentioned, we might be thought to have overlooked it. The policy then goes on, "Value, say twenty shares, valued at 10*l.* per share." Thus, we have language qualifying the previous language, followed by a context plainly showing that the plt.'s interest in the profits to be derived from his shares was what was insured for; then follow, or, to be more strictly accurate, are inserted in the margin, these words in writing: "It is hereby agreed and understood that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable from and including its lading on board the *Great Eastern* steamship until one hundred words be transmitted from Ireland to Newfoundland and vice versa"—words specially excluding an interpretation confined, as suggested in the argument, to perils of the seas, or perils included in the more general words at the end of the printed enumeration of perils insured against, and referring to the peculiar and especial perils and casualties to which this novel subject of insurance would be exposed. Then follow these words: "And it is distinctly agreed and declared that the transmission of the said one hundred words from Ireland to Newfoundland, and vice versa, shall be an essential condition of this policy." On looking to the subject-matter of insurance and those words it is impossible to avoid coming to the same conclusion as Martin, B. came to at the trial, and which was afterwards confirmed by the Court of Ex. Mr. Brett has argued against this conclusion. His argument at one time almost amounted to this: that if the court should put this construction upon the policy the result would be that the parties really entered into what was only a wager. Now, if by that is meant a wager such as would come within the 8 & 9 Vict. c. 109, I have no hesitation in rejecting that suggestion, because that Act certainly does not affect

speculative contracts in which the parties have an interest, but only what are ordinarily known as wagers; that is to say, bets on future events, not indemnities against injury to an interest practically distinguished from wagers. Then it is said that this is an unusual kind of insurance, and the court ought not to come to the conclusion that the underwriters meant to insure profits so speculative and so unusual a subject of insurance. The answer is, that the only proper conclusion to be come to in respect of such considerations is to make quite sure that the language used has the novel effect attributed to it, but not to be deterred from giving effect to it if it has because this is a novel kind of insurance. A similar kind of argument was used in *McSwiney v. The Royal Exchange Insurance Society*, 18 L. J. 198, Q. B.; 14 Q. B. 634. That was a case of insurance of profits on goods. *McSwiney* had bought 6000 bags of rice in India, and sold them at a distant port, and insured the profits upon the rice. When the ship was at Madras ready to receive the 6000 bags, and 1200 had been put on board, she was blown out to sea and injured, so that the rice on board was spoiled, and the remainder had to be sent later in another ship. The plt.'s contract for sale of the rice could not be fulfilled, and the profits of it were lost. The underwriters settled the claim of the plt. so far as the loss of profit on the 1200 bales was concerned, but resisted any claim in respect of the special profits and the quantity not shipped. The argument used was that the profits in question were not sufficiently described in the policy, and also the subsidiary point was taken that the profits were only insured in respect of goods actually loaded. The judgment was for the plt. in the Q. B., and no one ever suggested that the policy was void from the special nature of the thing insured. That judgment was afterwards reversed in the Ex. Ch. on the ground that the language used was not sufficient to constitute an insurance upon the special profit, and against the risk in question. The judgment of Parke, B. ends thus: "If, indeed, it attached to the profit of those on shore, there has been no loss of that profit by perils of the seas, but only a retardation of the voyage for which the defts. are not responsible unless on a policy specially providing for such an event." The policy before us seems to have been drawn up by some skilful person, or in accordance with good advice, with especial reference to the perils peculiar to the matter insured. Now, this being an insurance upon the undertaking or adventure, it is proper to consider what that adventure was, the profits of which were thus insured. The language describing the voyage is as follows: "At and from and including the lading on board the *Great Eastern* steamship, and to continue until the said cable be laid in one continuous length between Ireland and Newfoundland, and until one hundred words shall have been transmitted from Ireland to Newfoundland and vice versa." The last part is considered so important that it is repeated again, and made an essential condition of the policy. The conclusion, then, that it appears reasonable to draw is, either that it was an insurance on the adventure, limited to the endeavour on that occasion to lay the cable, and then failure on that occasion would be a total loss, or that it must at least be imputed to the parties that their view when using the language they have done was, that unless the desired result was brought about on that occasion, it was to be taken that there was an end of the matter. That at least is the construction one would be inclined to put upon the words which say that the transmission of the 100 words shall be an essential condition of this policy. They thought that it was all up with the adventure unless the cable could then be so laid as to transmit the 100 words. I will now proceed to the second question. That was, whether

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the loss was a loss by the perils of the sea; or, to speak more accurately, the perils insured against, or not. If the policy had only contained the ordinary printed language of a policy, we might have had to do what there is very little authority to assist us in doing, namely, to put a construction upon the ordinary general words at the end of the clause enumerating the risks, "all other perils, losses, or misfortunes that shall come to the hurt, detriment, or damage of the said goods, &c." This is not necessary, for the same reasons as have been already referred to. On reading the words inserted in the margin, and those describing the subject-matter of insurance and the duration of the risk, and looking to the words introduced which expressly provide that "this policy, in addition to all the perils and casualties herein specified, shall cover every risk and contingency attending on the conveyance and successful laying of the cable," until the specified number of words have been transmitted, it is quite clear that the parties have decided this very question for themselves, unless it should appear that in fact the peril by which the loss occurred is to be attributed to some inherent vice or other implied exception, if any, to the contract of insurance contained in the policy. It appears that the vessel set sail: the cable was laid down for a considerable length, and then one morning it was discovered that the current did not pass, and a portion of the cable had to be hauled back. While this was being done the cable parted, and the broken end fell into the sea. The weather is described in the ship's log at and about the time of the accident as fair with a light westerly wind. There is no suggestion of any *mala fides*. Attempts were made to recover the cable, but the grappling iron broke, and it was again lost. The adventure was then brought to an end and failed. Now we are not called upon to decide upon the facts; the only question is, whether there was any evidence to go to the jury, and it is impossible on these facts to conclude that there was no evidence upon which the jury might properly say that the loss happened by a contingency attending upon the "successful laying" of the cable. It is not suggested that the cable was itself defective. One may imagine that some kink may have formed in the part being drawn in which caused the cable to part. This suggestion I make only by way of argument, not professing to be practically acquainted with the details of the matter, but still it affords a sound argument enough to show that the learned judge could not have withdrawn the case from the jury. Then we come to the question whether there was a total loss. Now Mr. Brett well said, if the insurance was on the cable there was no total loss; but it is unnecessary to enter into that, because we have come to the conclusion on the construction of the policy that the insurance was not upon the cable, but upon the profits of the adventure, and that being so, there was either a total loss if, as I am inclined to think, the adventure was limited to the voyage, of the profits insured—that is, the profit to be made by laying the cable on that occasion—or there was as much a total loss by reason of the parting of the cable, according to the language of the agreement itself, as when a ship is totally lost by capture, though there are friendly ships of war about in such number as to make it not improbable that it may be recaptured. Whatever subsequent events might happen, the just conclusion, on the principles of insurance law and on the contract, is that the loss was presumably and conventionally total when the accident occurred. To conclude, therefore, the insurance was on the plt.'s interest valued at 200l., on shares in an adventure by which it was sought to obtain profit by laying down a cable so as to transmit messages to and fro on that particular trial,

or on the interest which he had in the adventure not limited to that occasion, but taking it to be assumed that all chance of ever succeeding would be gone if it were impossible to lay it on the occasion to which the insurance referred. Martin, B. appears to have put the entire argument shortly and well when he said that the insurance was on the adventure. We are for these reasons all of opinion that the decision of the court below must be affirmed.

BLACKBURN, J.—I am of the same opinion, and I would only add a few words to what has been already said on the subject. With respect to the proposition that this contract is a wager, I apprehend that this policy is a contract to indemnify against loss of some interest in the case of any of the perils insured against occurring. I do not know a better definition on this subject than that given by Lawrence, J. in the case of *Barclay v. Cousins*, 2 East, 544. Here the plt. was the owner of certain shares in this company; they were about to lay down a cable; if successful he would have been advantaged; but the event did not happen and he was the worse; consequently he was interested in the event, and therefore, if proper words be used to give a right to be indemnified, this is a perfectly good policy. Then have such words been used? If he had said that he insured the cable he would not have properly described his interest; if the ship, it would have been the same; but he has used the words which we now have to consider, and I will only say that, looking at his situation and these words, there seems to me no doubt that he meant to stipulate that if that interest which he had in respect of his shares was frustrated by the ordinary perils of the sea, or the "other perils" usually insured against, or the additional perils especially included in this insurance, he should be indemnified against such loss. The loss that really happened, if not one of the "other" perils, was certainly included by the words "every risk and contingency attending the conveyance and successful laying of the cable." Those words would have absolutely no sense at all unless they cover this risk. As to the second question, this loss is of his interest in having the cable laid on this voyage. That is totally lost. Looking at it in another, though I rather think not the correct way, his interest is in having it laid this or any other time; but though there may remain in this point of view a chance of ultimate success by which the underwriters would be entitled to benefit, I do not think the character of the loss is altered.

KEATING, MELLOR, SMITH, and LUSH, JJ. concurred.

Judgment affirmed.

UNITED STATES DISTRICT COURT— ADMIRALTY COURT.

Reported by R. D. BENEDICT, Proctor and Advocate.

EASTERN DISTRICT OF NEW YORK.

THE STEAMSHIP NEPTUNE.

Bill of lading—Damage to cargo—Perils of the seas—Proper stowage for coasting voyages—Stowage on deck.

Where goods were stowed on the main deck of a steamer, bulwarkeed entirely round and under cover of the upper deck, well stowed, except that they were not stanchioned down from the top and no bulkheads were built behind them, the voyage of the steamer being short, occupying but one night, though part of the way out at sea, and the goods were injured by a violent storm:

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Held by the court, that these goods were stowed in compliance with the rule requiring them to be stowed under deck :

That steam-vessels making such short voyages, on which the speedy transit of goods is an object of moment to shippers as well as to shipowners, are not bound to exercise the same elaborate and dilatory precautions against the vicissitudes of the sea as on longer and more perilous voyages :

That these goods were stowed with reasonable care, skill, and prudence, considering the nature, extent, and usual perils of such a voyage :

That the proximate cause of the damage, therefore, was one of the dangers of the sea, against which the owners were not bound to provide further than they did.

On Nov. 29, 1865, the firm of Mixen, Whitmore, and Co. shipped on board the steamship *Neptune*, at Boston, twenty-nine casks of sperm oil. The vessel was bound to New York, and left Boston in the afternoon. She usually arrives at New York about seven o'clock next morning, going round Cape Cod and then through Long Island Sound. The oil was shipped under a bill of lading, containing the usual exception of the "dangers of the seas." About midnight, before she reached the Sound, she encountered a heavy blow and a violent cross sea, which lasted several hours, during which the oil broke loose and some of the casks were stove.

The shippers filed this libel to recover their damages, in which they alleged that the loss was chargeable to the carelessness of those in charge of the ship in improperly stowing the oil. This was denied by the owners of the ship, who alleged that the damage was occasioned by the dangers of the seas.

Smith for libellants, and

Benedict, Tracy, and Benedict for the steamship.

SHIPMAN, J.—From the facts, which are contradicted, it will be seen at a glance that the main question to be determined is, whether this oil was well stowed so that the damage is chargeable to the danger of the sea. The evidence separates this question into two branches—first, whether the oil was put in the right place on the ship; and, second, whether it was properly secured in stowing. On both these points the testimony is very conflicting. It is familiar doctrine that the master and ship are responsible for the stowage of the cargo under deck, and that, if it is stowed on deck without the consent of the owner, and is lost or damaged in consequence, even by dangers of the seas excepted in the bill of lading, the carrier is responsible: (*The Paragon*, Ware R. 322.) This duty to stow under deck is deemed a condition of every bill of lading, whether expressed or not. Unless the liability is expressly excluded by the terms of the contract, it will always be deemed one of its provisions. This is a general rule of maritime law arising out of the general usage of the commercial world. Sometimes, however, a well-established uniform local custom, or usage of a particular trade, forms an exception to the general rule, and relieves the bill of lading of this implied condition. The doctrines pertaining to this subject were discussed by this court in the case of *John H. Chubb et al. v. 7800 bushels of oats*, June 1864, and it is believed, accurately stated. In the present case, evidence was gone into for the purpose of proving that such a custom existed in this trade between New York and Boston; but I do not think any such custom is involved here. The steamer *Neptune* is a large propeller, belonging to a well-known class of vessels which ply out of this port, with

an upper or hurricane deck upon which no freight is carried—a main deck between decks where a very large part of the freight is stowed, and a hold floored off several feet above the keelson, where her engines, water, boilers, coal and engines and propeller shaft are placed, and where there is room for some freight. Her construction necessarily requires that a large quantity of freight should be carried on this main deck. It is bulwarked entirely round, and wholly under cover of the upper deck. Upon the degree of strength of the bulwarks and upper deck no question properly arises here. They appear to have been tight and sufficient. At all events no damage resulted to this oil from any defects in these parts of her structure. The right to carry freight on this main deck without violating any implied clause of the bill of lading, results, in the judgment of the court, not from a mere usage, but from the necessities of the trade. This vessel, as a freight-boat, for which she is principally designed, would be of little or no value without the use of this deck. This fact is known to all the world as a peculiarity of this and some other classes of steam-vessels, to shippers as well as shipowners; and the former, who seek for the more rapid transit of their goods than sailing vessels furnish, must be deemed to assent to such disposition and arrangement of the cargo as the peculiar construction of these steam-vessels necessarily involves. But further, I am decidedly of the opinion that the stowage of a cargo on this main deck of a vessel so constructed is a compliance with the implied claim of a bill of lading requiring it to be stowed under deck. Any other view involves the doctrine that the owners of such ships are liable to shippers for damages to goods resulting from the dangers of the sea, provided that they are stowed on this deck. These vessels, then, must carry no more cargo than they can stow in that part of their holds not occupied with engines, water, coal, boilers and propeller shaft, or become insurers against all marine perils resulting from the violence of the wind and waves. I should require very strong and cogent reasons to bring me to a conclusion, the effect of which would require these vessels either to run with very light freights, or to assume responsibilities that in the end would involve this carrying trade by steam over this and similar routes in ruin, and probably lead to its extinction. If the doctrine contended for by the libellants is to prevail, a steamer like the *Neptune* might have her whole upper works swept off by a resistless hurricane, and the main part of a full cargo carried overboard, and yet her owners be liable, provided the freight in the hold escaped destruction. By this peculiar construction of these and similar classes of steam-vessels, great capacity for carrying freight is combined with rapid transit, and this enures as well to the benefit of the shipper and the commercial world generally as to the shipowner; for if steamers are to be allowed to carry no more freight than they can stow in their holds, without becoming absolute insurers against all perils of the sea, it is evident that this mode of transportation must be abandoned, or the rates of freight so much enhanced as to render it impracticable. The evidence in the present case shows that it is a common practice, as it must necessarily be, to stow oil and similar articles in this class of vessels on the main decks. This is proved by the claimant's witnesses, and by Capt. Fish, one of the witnesses for the libellants. The latter, who is master of a propeller plying between New Bedford and New York, testifies that he carries oil mostly in casks of all sizes, holding from one to ten barrels, and that he always stows on this deck when he has filled his hold; but, as already intimated, the court does not rest the right of the carrier on these steam-vessels

[ADM.]

THE STEAMSHIP NEPTUNE.

[ADM.]

to stow freight on this main deck on mere usage. It is grounded on the necessities of transportation by this class of vessels, which have to be constructed with reference to this mode of arranging the cargo, and to which shippers must be deemed to have consented. The conclusion is, that the placing of this oil on the deck where it was stowed was, of itself, no breach of duty or violation of any implied stipulation in the bill of lading. There is another feature of the evidence for the libellants, as to the propriety of putting this oil on the main deck, which requires to be noticed. Some of their witnesses say that, in their judgment, it should have been put below to correct the rolling of the ship; and Capt. Arnold, an intelligent shipmaster, testifies that the *Neptune* was not seaworthy, with the freight she had on deck and nothing in the hold. His experience, though very great, I infer from his testimony, has been confined to sailing vessels, and generally to long voyages at sea. Now the captain of the *Neptune* states that, with water, engines, boilers, coals, &c., his ship had 600 tons of ballast below, and that she had not more than 100 or 150 tons of freight on deck. The evidence on this point, as to the effect of putting this oil below, is conflicting, and I am not satisfied that stowing these twenty-nine casks there would have materially prevented or modified the rolling of the ship. The remaining question to be considered is, whether the oil was properly stowed where it was placed. The captain of the *Neptune* states that it was stowed under his superintendence, four casks in a tier, fourteen on one side of the engine-room and fifteen on the other. Lard in casks was placed between the oil and engine-house, on heads. The oil was dunnaged, bilge free, bung up, chime and chime, each cask chocked separately, and where the oil would not fill up, lard was put in and scantling between driven in thoroughly, so that it would not stave the head of the cask or work, and the scantling nailed to the bed and decks at the after tier. He states that he has had experience in stowing, and that this was well done. Upon the question of whether this was good stowage or not a number of experts were called on both sides. Their testimony is very conflicting. Those examined by the libellants do not agree in details as to what the stowage should have been. I think, however, that one of them, Captain Arnold, states accurately and clearly what the stowage was in fact, and what it might have been. He says: "I think that there is no difficulty in stowing a cargo so that it will stand the rolling of the sea, so long as you have the control of your vessel. I think that if this cargo had been properly stowed in port, there would have been no damage. The cargo was very well stowed with the exception that it was not stanchioned down. It should have been floored over the top and stanchioned down. The outer tiers should have been stanchioned from one deck to the other, so as to form a bulkhead. These stanchions should have been cleated down at each end. This should have been done, or the outer tier of chocks should have been spiked down so as to have held the casks." The testimony of this witness is in some particulars confirmed by Captain Story, who was also examined by the claimants, and who says that the dunnage was proper, but that the casks should have been stanchioned down. He says, however, that it is not usual to nail the chocks. As already stated, the libellants' experts do not agree as to all the details necessary to be observed in stowing such material as this oil. But I think that upon the whole evidence, it is clear that this oil was well stowed for any voyage, with the exception of flooring off and stanchioning down the casks from above, and stanchioning between the decks fore and aft of the outer tiers so as to form bulkheads. The first precaution would probably have kept the casks

from being thrown out of their beds by the violent motions of the ship, and the latter would have kept them from rolling. Whether the jumping of the casks in their beds set any of them leaking, independently of their rolling about after they broke loose, does not appear, and therefore it cannot be determined with certainty whether bulkheads alone, of the kind suggested, would have secured them against all injury. The opinion of Captain Arnold (and I think it is the better one) appears to be that both precautions were necessary to prevent injury, under the circumstances. Now it is evident that these precautions are those required on the longest voyages and through the most tempestuous seas, where heavy gales are almost certain to be encountered before the port of destination is reached. They are such as would protect the cargo under any rolling of the ship, however violent, at least until her navigators should lose all control over her. The question here naturally arises, were they such precautions as are required by the exercise of ordinary skill and prudence, over the route on which the *Neptune* was running, and which was traversed in a single night? In other words, must vessels, and especially steam-vessels, on short, even daily trips, where the speedy transit of goods is an object of great moment to shippers as well as ship-owners, and which is eagerly sought to be obtained by both, and where to such celerity of transit prompt loading and unloading are indispensable, be held to the exercise of the same degree of skill and prudence, and the same dilatory and elaborate precautions against the vicissitudes of the sea, as on longer and more perilous voyages? In determining this question it is necessary to see what are understood, in the law, as excusable perils. It is now settled by a decided preponderance of authorities, that, while common carriers by sea, in the absence of a special contract, are subject to the same rigid liabilities as carriers on land, the term "dangers" or "perils of the seas" usually inserted in bills of lading operates as a limitation of these responsibilities to some extent. It is held, or rather assumed, in the case of *Williams v. Grant*, 1 Conn. R. 487, that the phrase "perils of the sea" includes no more than is comprehended by the "act of God." This is not now generally received as sound doctrine. "Perils of the sea" is now understood and held to have a broader scope than the term "act of God," and to include the natural accidents incident to the navigation of seas: (*Johnson v. Friar*, 4 Yerg. 41; *Gordon v. Buchanan*, 5 Yerg. 72, 82; *Williams v. Branstons*, 1 Murphy, 417; *Plaisted v. The Boston and Kennebec Navigation Company*, 27 Maine 182.) Mr. Justice Story declares, in the case of the schooner *Reeside*, 2 Sum. 571, that "The phrase 'dangers of the seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either sense, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence." Now the question immediately suggests itself: What is ordinary skill and prudence? Chancellor Kent, who is always very high authority, in his *Commentaries*, vol. 3, p. 217, says: "It is often a point difficult to determine, whether the disaster happened by a peril of the sea, or by unavoidable accident, or by the fault, negligence, or want of skill of the master. . . . What is an excusable peril depends a good deal upon usage, and the sense and practice of merchants, and it is a question of fact, to be settled by the circumstances peculiar to the case." The very terms "ordinary skill and

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prudence" used by Mr. Justice Story, and often repeated by other jurists, involve the idea that their meaning, when applied to any particular case, must be determined by the circumstances which characterize and surround that case. Skill and prudence, like diligence and negligence, are relative terms. "Diligence," says Chancellor Kent, "is a relative term, and it is evident that what would amount to the requisite at one time, in one situation, and under one set of circumstances, might not amount to it in another." (2 Kent's Com. 56.) "Negligence," says Baron Alderson, in *Blyth v. Water Works*, 36 Eng. L. & Eq. 508, "is either omitting to do something that a reasonable man would do, or the doing something which a reasonable man would not do." In the case already cited from Nott and McCord, it was held that whether a loss was caused by a "peril of the sea" or not, depended upon the fact of the existence or non-existence of negligence. The libel in the present case appears to have been framed upon this view of the law, and charges that the loss in question was owing to careless and improper stowage. Now, upon a careful review of the evidence, I am satisfied that this oil was stowed with reasonable care, skill, and prudence, considering the nature, extent, and usual perils of such a voyage, and therefore, that the proximate cause of the damage complained of in the libel was one of the dangers of the sea, against which the owners of the ship were not bound to provide further than they did. The libel is therefore dismissed, with costs.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Saturday, Jan. 12, 1867.

Re MORTGAGEES OF PRIDE OF WALES AND ANNIE LISLE.

Ship—Mortgage—Freight—Assignment—Notice to charterer—Bankruptcy.

A., a shipowner, mortgaged a ship, then on her road home, to *B.*, and afterwards gave a written authority to *C.*, to whom he was indebted, to receive the ship's freight. *A.* becoming bankrupt, his assignees, under an order in bankruptcy, sold the equity of redemption in the ship, and, after deducting the amount due to them, paid the balance into court under the Trustee Relief Act:

Held, that *C.*'s claim for freight could not be sustained, no notice of the assignment by *A.* having been given to the charterers or their agents:

Held, also, that it was not necessary that the mortgagees should admit the accuracy of the mortgagees' account, in order to entitle them to payment of the fund in court.

This was a petition by the assignees in bankruptcy of the estate and effects of David Jones, a shipowner, of Llanelly, Carmarthenshire, for payment out to them of a sum of £491, 14s. 3d. Consols, paid into court by the Marine Credit Company under the Trustee Relief Act. The main facts relating to this fund were as follows:—

On the 9th Sept. 1865 David Jones, in consideration of advances amounting to 10,000*l.* in all, executed mortgages to the Marine Credit Company of two ships, the *Pride of Wales* and the *Annie Lisle*, of which he was the owner, the *Annie Lisle* being then on her passage home from Montreal. On the 22nd Dec. in the same year, David Jones, being also indebted to one Thomas Saunders in a sum of upwards of 200*l.*, gave Saunders a written authority to receive all freight due to him as owner of the ship *Annie Lisle*, then on her passage home.

The document embodying this authority, which was signed by Jones, was presented by Saunders to Montgomery and Co., shipbrokers, acting for the owner, who acknowledged in writing its validity.

David Jones absconded in Jan. 1866, and on the 31st of the same month was adjudged a bankrupt, and the petitioners, Messrs. Jeremy and Evans, were appointed assignees. The *Pride of Wales* was wrecked in a gale, the mortgagees receiving the insurance money and obtaining the wreck. They obtained an order to sell the equity of redemption of the *Annie Lisle*, which they did. On the general balance of account between the Marine Credit Company and the bankrupt's estate, a balance of 750*l.* 18s. 9d., now represented by the fund in court, was found to be in the hands of the mortgagees, and as Saunders, as assignee of the freight of the *Annie Lisle*, claimed 225*l.* 16s. 5d. as the amount of such freight, and a second mortgagee claimed the surplus, and both claims were disputed by the bankrupt's assignees, the mortgagees paid the sum into court under the Trustee Relief Act. The assignees had obtained an order in bankruptcy to substantiate their claim to the fund in court, and accordingly presented this petition.

De Ger, Q. C. and *Fischer*, for the petitioners, submitted, with respect to the claim of Saunders for freight, that, subject to the right of the mortgagees, the freight was in the order and disposition of the bankrupt at the time of his absconding, which was the foundation of his bankruptcy. The document which, it was alleged, assigned the freight to Saunders, was not a valid assignment. No consideration was stated, nor was any notice given to the charterers. The second mortgage of the ship was not registered, and was void. They would not admit the correctness of the mortgagees' accounts.

Daly, for Saunders, maintained that the charterers were bound by the notice of the claim for freight, which had been given to Montgomery and Co., who were their agents. This petition was not the proper course by which to dispose of these conflicting claims, but a bill should have been filed.

Druce, Q. C., for the Marine Credit Company, the mortgagees, contended that the petitioners were not entitled to payment of the fund out of court, unless they admitted the correctness of the mortgagees' accounts.

De Ger, Q. C. in reply.

Cases cited:

Re Wright's Trusts, 3 K. & J. 419;
Ex parte Sprague, 4 De G. M. & G. 866;
Douglas v. Russell, 4 Sim. 524;
Leslie v. Guthrie, 2 Bing. N. C. 706.

The VICE-CHANCELLOR stated briefly the facts upon which the questions in dispute turned as follows:—David Jones, a shipowner of Llanelly in Carmarthenshire, being indebted to one Thomas Saunders in a considerable sum of money, and being also the owner of a ship the *Annie Lisle*, then on her road homewards from Montreal, assigned to Saunders a document giving an authority to receive all freight due to the owner of the ship, the document being signed by Jones. This document was taken by Saunders to Montgomery and Co., shipbrokers acting as agents for the owner of the *Annie Lisle*, who acknowledged its validity, and indorsed it, and it is contended that this operated as a valid equitable assignment of the freight. The bankrupt's assignees now dispute this assignment, in the first place, on the ground that this was not the purport of the memorandum, which only purported

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to give an authority to receive the freight, and contained no intimation that it was for value, or that it was an equitable assignment. I am of opinion, however, that it is not necessary that it should be expressed to be for value, though one consideration cannot be shown to have been paid when the document states a different consideration; but it was competent to Mr. Saunders to show, and he has shown, that there was consideration, it being the forbearance of a debt. It appears to me also that there was a valid equitable assignment, giving to Saunders the right to receive the whole proceeds of the voyage. So far, therefore, as the first objection goes, that the memorandum was not a mortgage as against Jones, I am of opinion that it was an equitable assignment of the freight, and a valid mortgage. It is then said that it only passed the outward-bound freight, but I think that the intention was to assign the homeward-bound freight also. The first two points, therefore, must be decided in favour of Mr. Saunders. The third question is the most important. It was necessary, in order to make the assignment valid as against the assignees, that notice should have been given to the charterers of the ship. The assignment being only valid as against the assignees if such notice had been given, it was essential that Saunders should show that he did what was necessary to take the freight out of the order and disposition of the bankrupt. There should have been notice to the charterers as to whom they were to pay the freight, and there is a total absence of evidence to show who the charterers were. Notice was given to Montgomery and Co., who were said to have been the agents for the charterers. At first I was in favour of Mr. Saunders on this point, but I have considered the matter, and am bound to conclude that Montgomery and Co. sustained no other character than that of agents for the shipowner, and were to receive the freight. It was important in one view that notice should be given to them, because they might have made advances on the credit of the freight, than which nothing could have been more common. But Saunders intercepted their right to make any advance, and when he went to their office, Montgomery and Co. did not even know that they were to be agents in the matter, and there is nothing to show that they represented the charterers. No communication has been shown to have taken place between them and the charterers; they were agents of David Jones, the shipowner, to receive the freight, and whether they received it or not I am not told. They were not, therefore, agents of the charterers, and it follows that notice was given to the agents of a person not requiring it, as Jones, having himself created the equitable assignment, must have known of it, though it was important to prevent Montgomery and Co. from making advances to Jones. Reluctantly, therefore, because Mr. Saunders has acted very fairly, I must decide that he was bound to give notice to those who had to pay the money, and as he did not, the assignees are entitled, inasmuch as the freight remained in the order and disposition of the bankrupt. Mr. Druce contended that they, the mortgagees, having paid the money into court, the court cannot part with it on petition, unless the correctness of the mortgagees' accounts are admitted, and if the petitioners dispute these, they must establish their claim in a suit before they can take the fund out of court. But Wood, V. C., in *Re Wright's Trusts*, has decided that it is reasonable to hold that, whenever trustees pay money into court, they thereby admit the money to be due, and cannot raise a case against its being paid out. But Mr. Druce says they are not trustees, but are only mortgagees who had a balance in their hands.

But what is the position of a mortgagee having received sufficient to satisfy principal, interest, and costs? He is a trustee of the balance, and is in the same position as any other trustee, and Mr. Druce is therefore precluded from setting up a defence against the payment of the money. The petitioners have established their title to the fund in court. The Marine Credit Company must have their costs.

Solicitors: *Thomas White and Sons; Davis, Son, and Co.*

COURT OF COMMON PLEAS.

Reported by W. GRAHAM and M. W. MCKELLAR, ESQTS.,
Barristers-at-Law.

Wednesday, Feb. 6, 1867.

THORBURN v. BARNES.

Contract for cotton to arrive—Declaration of shipment by seller—Award—Arbitrator—Misconduct—Pleadings.

A contract for the sale of cotton to arrive from India, March or April shipment, was made subject to the rules of the Liverpool Cotton Brokers' Association. By these rules the name of the ship is to be given to the buying broker within two calendar months after the date of the shipment named in the contract; a dispute arising out of the contract is to be referred to two members of the association, each party appointing one, or in default of appointment by one of the parties, the president is to nominate two arbitrators: there is a right of appeal against the award to the committee upon payment of a fee.

Notice of the shipment of the cotton was given to the buyer in the month of June, more than two months after it was actually shipped, but within that time of the end of April, which the seller alleged to be the meaning of the contract. The buyer refused to accept the cotton and appointed an arbitrator, but the seller declined to refer this question, alleging that it was not a dispute arising out of the contract. The president nominated two arbitrators, whose award against the seller was made within two hours of their nomination, no opportunity being given to either party to be heard.

Held, that a replication alleging the award to be void on account of these facts was no answer to a plea of the award in an action by the seller against the buyer for not accepting.

This was an action upon a cotton contract, tried at the Liverpool Winter Assizes, before Blackburn, J. and a special jury. The agreement was on the terms of the printed rules of the Cotton Brokers' Association of Liverpool, of which those material to the case were set out in the pleadings.

The declaration stated,

That it was agreed by and between the said plt. and the deft. that the plt. should sell to the deft., and the deft. should buy of the plt. certain cotton to arrive in Liverpool per ship or ships from Bombay on the terms of the printed rules of the Cotton Brokers' Association of Liverpool, as indorsed on the said agreement, to wit, 250 bales of cotton on the basis of 16 2½d. per lb. fair new merchants Comrawatee, March or April shipment; no allowance to seller; in case of inferiority of quality, the cotton to be taken by the buyer at an allowance to be settled by arbitration in the usual manner. To be taken from the warehouse. And the plt. says that, although before action he did and was ready and willing to do all things and all conditions precedent were performed, &c., yet the deft. broke the said agreement in this, that he did not nor would accept or receive the said cotton or any part thereof pursuant to the said agreement, nor pay for the same according to the terms of the said agreement or otherwise, but therein wholly made default, contrary to and in violation of the said agreement.

The second breach alleged was "that the deft. wholly and absolutely refused to accept or receive the said cotton or any part thereof."

The declaration also contained common counts for

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goods bargained and sold, goods sold and delivered, money paid, interest, and accounts stated.

The following are extracts from the printed rules indorsed on the agreement:

2. In all cases when the terms are by ship or ships, or for shipment before specified date, the name of the ship or ships, if from an East Indian port, must be given to the buying broker within two calendar months, or a month longer in the event of the non-arrival of the expected mail after the date of shipment named in the contract. In default the buyer shall have the option either of declaring the contract cancelled, so far as regards any undeclared number of bales, or of claiming the difference in price from the seller.

4. Where cotton shall arrive by more than one vessel, each shipment shall be considered as constituting a separate contract, and there shall be a separate invoice for each shipment, and a separate arbitration if required.

7. In case of any dispute arising out of any contract, the matter to be referred to two members of the Cotton Brokers' Association for settlement, such referees having power to call in a third member in case they shall deem it necessary. All applications for arbitration on cotton bought to arrive, shall be made within ten days of notice being received that the cotton is ready for delivery.

8. In the event, however, of one of the disputing parties appointing an arbitrator, and the other refusing or neglecting to do so for three days after notice in writing of the appointment, or in case the arbitrators appointed shall not, within seven days after their appointment, agree to an award or appoint a third arbitrator; or after the appointment of such third arbitrator, in case of the death, refusal to act, or incapacity of any such three arbitrators, then upon application of either of the disputing parties, the question in dispute shall stand referred to two arbitrators to be nominated by the chairman of the association for the time being, or in case of his absence, illness, or interest in the matter in dispute, then by the deputy-chairman if not interested, and in case of the absence of the chairman and deputy-chairman, their illness or interest in the matter in dispute, then by the committee; and in case the two arbitrators so appointed, whether by the chairman, the deputy-chairman, or the committee, shall not, within seven days after their appointment, agree to an award or choose a third arbitrator, then the committee shall appoint a third arbitrator, and shall in the case of the death, refusal to act, or incapacity of any of such three arbitrators from time to time substitute a new arbitrator in the place of the arbitrator or arbitrators so dying, refusing, or incapacitated, the arbitrators in all cases to be members of the association.

9. No member of the committee having any interest in the matter of dispute shall vote on the question of the appointment of arbitrators, and no arbitrator having such interest shall be competent to sit on any arbitration, the award of any two arbitrators in writing signed by them (subject only to the right of appeal after mentioned) shall be conclusive and binding upon all disputing parties, both with respect to the matters in dispute, and all expenses of the reference and award.

10. In case either party shall be dissatisfied with the award, a right of appeal shall lie to the committee of the association, provided it be claimed before twelve o'clock on the day next after the day on which the objecting party shall have notice of the award, and provided also the app. do pay to the association the sum of 10*l*. as a fee for the investigation, and an award signed by the chairman, or in his absence by the deputy-chairman, and countersigned by the secretary, shall be deemed to be the award of the committee, and shall in all cases be final. For the purpose of enforcing any award by attachment or otherwise, these rules and any contract referring thereto, and the memorandum of the appointment of the arbitrators may be made a rule of any court of record.

These printed rules were set out in the third plea, and the defts. therein said:

That after the making of the said contract or agreement, the plt. gave to the deft.'s buying broker the name of the ship *Ann Millicent*, from Bombay aforesaid, the same being an East Indian port, as the ship by and on board of which 225 of the 250 bales in the said contract mentioned were coming, and declared the said 225 bales as against and in part performance of the said contract or agreement. And the deft. says that the said 225 bales of cotton so declared as aforesaid were shipped in the month of March, and were a March shipment, and that the plt. did not give the name of the said ship to the deft.'s buying broker within two calendar months next after the month of March, or the shipment of the said bales, although the expected mails did arrive. Wherefore the deft. refused to accept or receive the said 225 bales, and gave notice to the plt. that he would not accept or take the same, and the deft. says that so far as relates to the first count of the declaration the plt. is suing in respect of such refusal by the deft. to accept or take the said 225 bales, and not otherwise.

By the fourth plea the deft. referred to the rules set out in the previous plea, and alleged the matters stated in that plea, but instead of admitting that he refused to accept or receive the 225 bales, he, in this plea, said,

That he contended and alleged that the said declaration was not a proper one, and by reason thereof he claimed to refuse to accept or receive the said bales, and to cancel the said contract, so far as regarded the said 225 bales, and gave notice thereof to the plt., and a dispute thereupon having arisen between the plt. and the deft. out of the said contract, he, the deft., in pursuance of the said terms indorsed on the said contract, appointed an arbitrator, and gave notice to the plt. in writing of the said appointment, and the plt. neglecting to appoint another arbitrator for three days after the said notice, then, upon application of the deft., the said question in dispute stood referred to two arbitrators, who were duly nominated by the chairman of the said association for the time being, according to the said terms; and the said arbitrators having taken upon themselves the said arbitration, afterwards duly, according to the said terms, made and published their award in writing, signed by them, respecting the matters in dispute so referred to them, whereby they awarded and adjudged that the declaration of the said 225 bales so made by the plt. as aforesaid was not a proper one, and that the deft. was entitled to cancel the said contract as far as regarded the 225 bales, which said award remains and is unappealed against, and is full force, and the deft. says that so far as relates to the first count of the declaration, the plt. is suing in respect of the refusal by the deft. to accept or take the said 225 bales, and not otherwise.

After joining issue,

For a further replication to the third plea, the plt. said,

That the said agreement sued on in the first count of the declaration was made subject and was subject to a certain well-known usage and custom of the cotton trade at Liverpool, where the said agreement was made, according to which custom and usage the plt. was, under the circumstances in the said third plea mentioned, bound by the said agreement to give the name of the said ship to the deft.'s buying broker only within two calendar months next after the month of April in the said agreement mentioned, and not before.

And, for a further replication to the fourth plea,

That the award in the said fourth plea mentioned was not an award duly and according to the said terms in the said rules contained made and published, and was not an award within the true intent and meaning of the said agreement and rules, by reason of the said arbitrators not having been duly nominated and appointed according to and within the true intent and meaning of the said rules.

And, for a further replication to the fourth plea,

That the award in the said fourth plea mentioned was not an award duly and according to the said terms in the said rules contained made and published, and was not an award within the true intent and meaning of the said agreement, by reason of the said award having been made before the said arbitrators were nominated according to and within the true intent and meaning of the said rules, and before they had taken upon themselves the said arbitration according to the true intent and meaning of the said rules.

And, for a further replication to the fourth plea, the plt., by way of equitable replication, repeated the facts which are stated in the last preceding replication, and said,

That they are respectively true, and that, in consideration of the premises, and of the plt. agreeing with the deft. not to move to set aside the said award, but to bring the said dispute in the fourth plea mentioned before the members of the Liverpool Cotton Brokers' Association, the deft. agreed with the plt. to throw up and abandon the award, and to remove all benefit under the same; and the plt. says that he did abstain, according to the said agreement, from moving to have the said award set aside as aforesaid, and that the time within which he could move to set aside the said award has now passed, and that the said dispute was brought, according to the said agreement, before the members of the said association; and that the deft. is contrary to the said agreement now pleading the said award, and thereby trying to derive benefit from the same, contrary to and in violation of the said agreement.

The deft. joined issue upon, and demurred to, all these replications.

The facts proved at the trial were as follows:—

The plt. is a cotton broker at Liverpool and a member of the Liverpool Cotton Brokers' Association; the deft. is a spinner who employed as his broker Mr. S. M. Bulley, another member of the association.

On the 19th March 1866 the 225 bales of cotton, which are the subject of dispute, were shipped on board the *Ann Millicent* at Bombay, and on the 27th the ship sailed for Liverpool.

On the 7th April the contract mentioned in the first count of the declaration was made between the parties.

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On the 21st June this letter was received by Mr. Bulley from the plt.; the letter was dated the same day:

We beg to give you notice of the 250 bales cotton sold you to arrive 7th April; 225 bales are coming by the *Ann Millicent*, and we shall give you the ship's name for the other 25 bales in a day or two.

On the 10th July Mr. Bulley wrote to the plt.:

I find that the *Ann Millicent* by which you declare 225 Comrawatties cleared in the month of March, whilst your declaration is dated 21st June. I cannot, therefore, on the part of Mr. Thomas Barnes accept the declaration.

On the 31st July the *Ann Millicent* arrived, and the plt. gave notice of her arrival to Mr. Bulley by letter, and denied the deft.'s right to repudiate the contract and threatened legal proceedings.

On the 1st Aug. Mr. Bulley appointed Mr. J. C. Jones as his arbitrator under the seventh rule.

On the 2nd Aug. at a meeting of the association, a recommendation was unanimously carried to the effect that in contracts for arrival the ships conveying the cotton should be declared within the two months next succeeding the actual shipment or sailing of the cotton from an East Indian port.

On the 11th Aug. the plt. sent notice that the cotton was ready for delivery.

On the 15th Aug. Mr. Bulley gave the plt. notice that if he failed to nominate an arbitrator by the 17th an application would be made to the chairman of the association to appoint arbitrators under the 8th rule.

On the 20th Aug., in accordance with this notice, application was made on behalf of the deft. to the chairman, and all the documents were sent to him.

On the 21st Aug. the chairman informed both parties that he had appointed Mr. J. C. Jones and Mr. W. Durning to settle the matter in dispute.

On the 31st Aug. the chairman wrote another letter to both parties, in which he said that, as the plt. had objected to Mr. J. C. Jones, who had been chosen as arbitrator by the deft., he had nominated Mr. E. Habershon to act instead of him.

On the same day, and within two hours of the receipt of this letter by the plt., the following award was sent to both parties:

Arbitration on contract for 225 (part 250) bales Surat cotton, bought by Mr. Thomas Barnes from Messrs. Thomas Thorburn and Co., on the 7th April 1866.

We, the undersigned cotton brokers, having considered all the circumstances connected with the above case, do hereby decide that the declaration made on the 21st June is not a proper one, and consequently the buyer has the power to cancel this contract.

WM. DURNING.
E. HABERSHON.

Liverpool, 31st Aug. 1866.

On the 5th Sept. the plt. wrote to Mr. Bulley giving notice that he should sell the cotton at deft.'s risk, and Mr. Bulley answered that he should bring the affair before the association.

On the 7th Sept., at a weekly meeting of the Cotton Brokers' Association, it was unanimously resolved that Mr. Thorburn be respectfully and earnestly requested to leave the matter in dispute between him and Mr. Bulley to the decision of the committee.

On the 14th Sept., at the next weekly meeting, it was recommended by a large majority that the whole matter be reopened and left to the decision of two fresh arbitrators, with the understanding that they should call in a third.

On the 28th Sept., at another weekly meeting, it was resolved by a large majority that the whole matter be left to a fresh arbitration, and the final appeal be to the body at large of the association. Mr. Bulley declined to adopt this course.

On the 26th Oct., at another weekly meeting, an unsuccessful attempt was made to pass a resolution to the effect that the decision of the arbitrators was annulled by the vote of the 14th Sept.

On the 26th Oct. the plt. informed Mr. Bulley

that the cotton was sold at a loss of 1022*l.* 16*s.* 8*d.* upon the contract price.

On the 7th Nov. this action was commenced.

The jury found a verdict for the deft., and the judge reserved leave to the plt. to move the court.

Brett, Q. C. obtained a rule nisi on the 14th Jan., calling upon the deft. to show cause why his verdict should not be set aside, and a verdict entered for the plt. for 1022*l.* 16*s.* 8*d.*, pursuant to leave reserved, on the grounds, first, that the declaration of the ship was in sufficient time; secondly, that the award was void, because not on a dispute within the rules, or because there was no power in the president to change the arbitration, or because the plt. had no notice of meeting and no opportunity of being heard; and why judgment should not be entered for the plt. on the fourth plea, notwithstanding the verdict found thereon for the deft.

Quain, Q. C. and *R. G. Williams* showed cause.—The first point taken by the plt. at the trial was that the time in which the ship was required to be declared was within two months of the last day upon which the shipment could be made. By the fourth of the indorsed rules, when cotton shall arrive by more than one vessel, each shipment shall be considered as constituting a separate contract. We must therefore consider the shipment of the 225 bales by itself, and as the seller chose the time of shipment he must be bound by the clear meaning of the words in the rule as to the time of the declaration. If this is not a dispute arising out of the contract, which was the next point taken, no question can be said to so arise. With regard to the power of the president to change the arbitrator, although it was the subject of one of the replications, it was not mentioned at the trial, and cannot therefore be now questioned. In the next place, the plt. denied the validity of the award on the ground that he had no notice of meeting, and no opportunity of being heard. As neither party appeared before the arbitrators, they were both in the same position. Besides a remedy is provided in the rules by means of an appeal to the committee in the case of a void award. Now there can be no doubt there was an award, although the plt. said in his cross-examination that he did not consider there had been. It has been laid down that the misconduct of the arbitrator can be no answer to an action upon an award, and several cases are mentioned as illustrations in note 8 to *Veale v. Warner*, 1 Wms. Saund. 327*a.*; see also *Whitmore v. Smith*, 7 H. & N. 509. The present case is much stronger than *Re Brook*, 33 L. J. 246, C. P., in which, upon a motion to set aside an award on the ground that the parties were not heard, it was decided that the award was bad, notwithstanding proof that it was the mercantile usage. The only way to raise the question of the validity of the award before the court is by motion, and even by that means it could not be upset, unless the parties had availed themselves of the remedy provided in the rules. It was held in *Grzebrook v. Davies*, 5 B. & C. 534, that on an action on a bond for the performance of an award a plea that sufficient time was not allowed to hear the deft.'s witnesses was bad. Here the question raised in the replication is the same, viz., whether sufficient time was allowed.

Brett, Q. C. and *C. Russell* supported the rule.—This contract is for the sale of cotton to arrive; the seller may declare the cotton by any ship, provided the shipment took place in the months of March or April. The words of the second rule are, "the name of the ship must be given to the buying broker within two months after the date of the shipment named in the contract." The only date of ship-

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ment named in the contract is March or April; the declaration, therefore, may take place within two months of the end of April. The minutes of the association were made part of the evidence. By them it appears that, although no subsequent conclusion was arrived at, an appeal from the award was actually made in accordance with the rules. I read the words "in case of any dispute arising out of the contract" as meaning a dispute whether, as a question of fact, the contract was or was not fulfilled, and not a dispute concerning the interpretation of the words of the contract. As the second ground upon which we impeach the award was not mentioned at the trial, we will not refer to it; but on the third ground we submit that there was no award at all. Within two hours of the time when the plt. heard of the appointment of the arbitrators he received their award. This is certainly a question of misconduct, but it was so great as to be a miscarriage of justice; and by analogy with the law in the case of a foreign judgment, discussed in the note to the *Duchess of Kingston's case*, 2 Sm. L. C. 683, if an award or a judgment appears on the face of the proceedings to offend common reason and justice, or even to be grossly defective, it would not be conclusive. In the case of *Buchanan v. Rucker*, 9 East, 192, this rule was extended to a case where the defect did not appear on the face of the proceedings. [WILLES, J.—A judgment on an award without hearing would be unquestionably set aside; the only question is as to the remedy necessary to be adopted.] If the facts be such as to make a judgment void, it must be taken as if it never was made. *Bruce v. Wait*, 1 M. & G. 1, and the terms used by the court in *Re Brook* are very strong on this very defect. If this is a good objection, either in law or equity, according to the terms of the leave reserved, the plt. ought to have judgment, and if necessary an equitable replication can be added. The cases cited on the other side are distinguishable from this one.

WILLES, J.—This was an action for not accepting cotton which was shipped on the 19th March, on board the *Ann Millicent*, pursuant to a contract dated the 7th April 1866, according to the rules of the Liverpool Cotton Brokers' Association. It was agreed in the contract that the cotton should be a March or April shipment, and one of the rules indorsed on the back was to the effect that on sale of cotton to arrive, the ship should be declared within two calendar months of the date of shipment named in the contract. The declaration of the ship was made on the 21st June, which the plt. alleged was within two months after the date of shipment named in the contract; and the deft. alleged that it was more than two months from the date of the actual shipment. This was the original dispute between the parties. Before we recognise any necessity to decide this point, we must consider whether, as the deft. says, this has been decided under the seventh article of the association. The award was made, in fact, in pursuance of the rules on this very point in question, and the conclusion was adverse to the plt. Then the question arises as to whether it was valid. The first objection made was that the award was void, because, the dispute being whether the declaration was made within the time required, was not within the terms of the seventh rule—that is, it was not a dispute arising out of the contract, but rather it was a dispute upon the construction of the contract, and, as it is said, within the four corners of the contract. This seems to me to be a criticism not adapted to the language. I cannot accede to this interpretation of the words "out of;" I cannot distinguish between the contract itself and a breach in matters arising out of the contract. Secondly, it was said there was no power in the president to

change the arbitrator. It was objected that Mr. Jones had been chosen arbitrator by the deft. at the inception of the dispute, and the president thereupon nominated some one else in his stead. It is enough to say that this point was not raised at the trial, and it is not reserved for our decision. Thirdly, it was alleged that there was no opportunity for the plt. to be heard, but within two hours after he had received notice of the appointment of the arbitrators the award was made. The deft.'s attorney had laid the materials for the decision before the president, but neither party was heard by the arbitrators. If this objection were raised in the course of proceedings at which it might be considered, I should probably hold that nothing which could be said would justify such an arbitration; but, in this particular case, I must first investigate the question whether the objection was raised in a form competent to be considered; that question is whether the validity of the award can be disputed by the pleadings, or only by a rule to set it aside. I think the latter is the only plan by which such a matter can be discussed. Doubtless the first principle in arbitrations, as in every judicial decision, is to hear both parties; but it is a sufficient remedy for this breach of the principle that such an award could be set aside by motion. It was argued by Mr. Brett that an analogy exists between an award and a foreign judgment; but there is this difference between the two: the arbitrator is appointed by contract between the parties, and they stipulate to abide by his decision; a judge is appointed by law. It is not unreasonable that a judgment of the former shall stand until it is overruled in the way formally provided for such a case. It cannot be set aside on plea, although it may be on motion. The allegation that the arbitrator has not sufficiently heard the parties is not a good plea to an award, and I can draw no distinction between an insufficient hearing and no opportunity to be heard. Neither reason nor the authorities can establish any other view of the matter. The rule ought therefore to be discharged on these grounds, which makes it unnecessary to express any opinion on the other points, unless the parties demand it.

KEATINGE, J.—I am of the same opinion that the award is binding, considering the time and the manner in which its validity has been impeached. Mr. Brett insisted that its decision was not within the terms of the submission, and he drew a distinction between the fulfilment of the contract and the terms of the contract. In order to give effect to this contention, it would be necessary for the parties first to agree upon the terms of the contract. Here mercantile men agreed to refer their dispute to mercantile men, and to imagine that the words meant to exclude the meaning of the contract cannot hold. The next ground was abandoned by Mr. Brett, and it was then said that the award was void because it was contrary to natural justice, in that the parties were not heard. I was first of opinion that the objection was a good one; but we are not called upon to say whether the plt. was bound by the arbitrator's decision, but whether he has raised the point in the right way. It seems to me that the authorities are against him. In *Braddick v. Thompson*, 8 East, 344, it was held, that partiality and improper conduct in an arbitrator in not hearing one side could not be pleaded in bar to an action on an award. In truth, unless there is misconduct on the part of the arbitrators, the award is good, and if there is misconduct the award can only be set aside by motion. In the judgment of the Ex. Ch., in *Whitmore v. Smith*, 7 H. & N. 519, it was said, "In truth, this objection (to an award on account of arbitrator's misconduct), assuming it to be well founded, is one of a sort which ought to be

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brought forward whilst the matter is fresh, in the manner and within the period prescribed by the statute of Will. 3, in cases which fall within its provisions." If it be necessary for us to express our opinion further, we will consider the matter.

Sumner, J.—The debt is entitled to succeed unless we consider the plt.'s two objections good. The first is, that this is not a matter referred to the arbitrator. How, possibly, can this point be settled unless the matter be referable? I think no persons are more fit to say what was intended to be the meaning of rules than those who made them. I think it would be an unfortunate state of antagonism, if there were no way of settling the terms of the contract. I am of opinion that this dispute is within the limits of the submission. The arbitrator ought certainly to give opportunities of hearing the parties; but, upon the breach of this duty, the parties must take the remedies provided. In *Peck v. Warner*, and *Bradick v. Thompson*, the Courts have laid down the rule that the misconduct of an arbitrator cannot be pleaded in bar to an action on an award; the plea in this case is good. The statute 9 & 10 Will. 3, c. 15, gave the courts an equitable power, and if the plt. had applied to have the award set aside, probably it would have been done; but here he seeks to rely on this remedy at the wrong time.

Rule discharged.

The plt. did not press for judgment on the other points.

Attorneys for plt., *Field, Roscoe, Field, and Francis.*

Attorneys for debt., *Chester and Urquhart.*

Saturday, Feb. 3, 1867.

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Contract for cotton to arrive.—Guaranteed equal to sample.—Allowance for inferiority of quality.—Different species of cotton.—Arbitration.—Repudiation of contract.

Upon a contract for cotton to arrive, the seller guaranteed the cotton to be equal to sample, and it was agreed that in case the quality proved inferior to the guarantee, a fair allowance should be made by arbitration. The bulk turned out to be composed of a different and inferior kind of cotton from that in the sample, and required different machinery for working it. The seller offered to submit to an arbitrator the difference in value between the sample and bulk in order to estimate the allowance to be made; the buyer declined arbitration upon any point, unless the question as to whether he might refuse to accept the cotton should also be submitted. To this the seller refused to consent, and the buyer then repudiated the contract:

Held, in an action by the seller against the buyer for not accepting, that the latter was not answerable for the failure to arbitrate; that the guarantee related to the quality and not to the species of cotton, and that the repudiation of the contract was justifiable:

Held, however, that a plea alleging only that the bulk was not equal to sample was bad.

This was an action brought to recover damages in consequence of the alleged non-fulfilment by the debt., of a contract for the purchase by them of 128 bales of cotton.

The cause came on for trial before Erle, C.J. and a special jury at the London sittings after Hilary Term 1865, when a verdict was found for plt. subject to the opinion of the court upon a special case. The demurrers to the pleadings raised the same

points as those contained in the case, and were decided at the same time.

The first count of the declaration was:

For that the plt. agreed to sell to the debt., and the debt. agreed to buy of the plt. certain goods, to wit, 128 bales of cotton D O expected to arrive in London per the *Cheriot*, from Madras, at 25d. per lb. upon certain terms then agreed upon between the plt. and the debt., and amongst them upon the terms that the cotton was guaranteed equal to sealed sample in the possession of Messrs. Barber, Nephew, and Co., and that should the quality prove inferior to the guarantee, a fair allowance should be made, say slight variation in marks not to vitiate the contract; the buyer to pay a deposit of 12s. per bale on the second Saturday after the final day of landing in exchange for dock or wharf weight notes, and the remainder of the purchase-money at the expiration of the usual three months prompt or on delivery of the warrants, interest being allowed at the rate of 5 per cent. per annum for prepayment; the first and second class sea-damaged bales (if any) to be made merchantable, and taken at 1s. 8d. per lb. less than the sound; the third and fourth class sea-damaged bales (if any) to be taken at a fair allowance; should the cotton or any portion thereof not arrive by the above-named vessel from loss of vessel or other unavoidable cause, the contract for such portion to be void, but should the cotton be transhipped and arrive in London by other vessel the contract still to hold good; and it was further agreed that in the event of any dispute arising out of the contract the matter should be referred to two disinterested London cotton brokers for arbitration, buyer and seller each nominating one. And the plt. says that the said cotton duly arrived in London, and that the plt. was always ready and willing to perform the said agreement in all things on his part, and to make such allowance to the debt., as stipulated by the said contract, and that before action brought all conditions had been fulfilled, and all warranties had been complied with, and all things had been done and happened, and all times had elapsed necessary to entitle the plt. to have the said agreement performed by the debt., and to sue them for the breaches thereof hereinafter respectively mentioned. Yet the debt. did not nor would accept or receive the said cotton according to the terms of the said agreement, or pay the plt. the said deposit of 12s. per bale, or the balance of the purchase-money, agreeably to the terms of the said agreement, but therein wholly made default. And the plt. further says that, although a dispute arose out of the said contract as to the fair allowance to be made to the debt. by reason of the quality of the said cotton proving inferior to the guarantee, and the plt. was ready and willing and desirous to have the said dispute referred in manner provided by the said agreement, and the plt. was ready and willing to nominate a disinterested London cotton broker for the purpose; of all which the debt. had due notice, yet the debt. refused to allow the matter to be so referred and settled contrary to the terms of the said agreement. And the plt. says that by means of the premises the plt. has lost the profits which he would have gained if the said cotton had been accepted and received by the debt., and the said agreement duly performed by them, and has also incurred great expense in keeping and warehousing the said cotton, and has been otherwise greatly damaged.

The declaration also contained the common money counts.

The first, second, fourth, and sixth pleas traversed certain allegations in the first count. In the third plea the debt. alleged that the cotton was not equal to the said sealed sample.

In the fifth plea the debt. set out the contract verbatim, as it appears subsequently in the special case; after which,

The debt. further say that the said sealed sample was a sample of, and consisted of, cotton of a certain particular kind and description, there being several kinds and descriptions of cotton, and several different qualities of cotton of one and the same kind and description, such qualities differently designated as "ordinary to middling," "middling to fair," "fair to good," "fair and good to fine." And that it was a condition of, and of the essence of the said contract, that the cotton to be delivered under and by virtue of the said contract should be cotton of that particular kind and description of which the said sealed sample consisted. And that the said cotton which the plt. was so ready and willing to deliver, and which the debt. so refused to accept or receive, as in the first count in that behalf alleged, was not cotton of that particular kind and description, but cotton of a wholly different kind and description, and of such as was wholly unfit for the purposes for which the cotton of such kind and description as the cotton of which the said sample consisted was and is fit and commonly used.

And for a further plea as to the said first count, so far as it related to the alleged breach of contract therein secondly mentioned, the debt. say, that a dispute also arose out of the said contract, and was then pending between the plt. and the debt., as to whether or not the debt. were bound to accept the said cotton, the debt. refusing to accept the same by reason of such matters as are in the said plea fully above pleaded, mentioned in that behalf

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And the defts. say that they were ready and willing to have all disputes which arose out of the said contract referred in manner provided by the said agreement, whereof the plt. had notice, but the plt. wholly refused to allow the matter of the dispute hereinafter mentioned to be so referred and settled. Whereupon the defts. refused to allow the matter in the said first count in that behalf mentioned to be so referred and settled as therein mentioned.

The third plea was demurred to by the plt. for the reason, amongst others, that the defts. were not justified in repudiating the contract on the ground of the goods not being equal to the sample, but were only entitled under the contract to a fair allowance. As the plea showed no answer to the breach for not settling the allowance, it was bad as to part, and therefore as to the whole of it.

The fifth and seventh pleas were demurred to upon grounds which appear in the special case, and in the arguments.

The special case stated that the plt. and the defts. are merchants in London. In the summer of 1864 Messrs. De Souza and Co., correspondents of the plt. at Madras, shipped on board the ship *Cheviot*, under a bill of lading, in the following form:

Shipped in good order and well conditioned, by F. de Souza Cammide, and Co., in and upon the good ship called the *Cheviot*, whereof is master for this present voyage J. H. Henderson, and now riding at anchor in Madras roads, and bound for London, 201 bales of cotton, being marked and numbered as in the margin, and are to be delivered in the like good order, and well conditioned at the aforesaid port of London, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever (save risks of boats so far as the ships are liable thereto) excepted, unto order. Freight for the said goods being payable on delivery at the rate of 8l. 10s. sterling per ton of fifty cubic feet noted in the margin, with prime and average accustomed. In witness whereof I, the master or purser of the said ship, have affixed my hand to three bills of lading, all of this tenor and date, the one of which three bills being accomplished, the other two to stand void.

Dated in Madras this thirty-first day of May 1864. Weight and contents unknown to. J. H. HENDERSON.

In the margin was written,

L. R.	30	} 201 Bales.
C. S.		
L. R.		
C. S.	9	
V.		
D. C.	128	
C.		
D. C.	34	
R.		

There were no other bales of cotton marked ^{D C} on board the *Cheviot* but the 128 noted in the margin of this bill of lading. De Souza and Co. consigned the said cotton to the plt., and they duly advised him of such consignment. They also sent him a sample of cotton by the Overland mail, which sample consisted of a kind of cotton known in the London market as "long-stapled Salem cotton of fine quality." The sample was in a paper which was marked on the outside,

^{D C} 128 bales Western cotton per *Cheviot*.

Upon receipt of the sample the plt. took it to Messrs. Barber, Nephew, and Co., London, cotton brokers, with whom he had conversation concerning the sale of the cotton. Mr. Barber expressed his opinion that, notwithstanding what was written on the outside of the paper, the sample was long staple Salem, and not Western cotton.

The defts. subsequently applied to Mr. Barber for the purchase of some long staple Salem cotton for some correspondents of theirs, when Mr. Barber showed them the sample which the plt. had left with him, and told them he considered it to be the cotton they required. No mention was made by Mr. Barber, and no notice was taken by the defts. of the writing on the paper.

After communicating with their correspondents, the defts. authorised Messrs. Barber and Co. to purchase the cotton, and the latter filled up a

printed form commonly used on the London market, and known as "The certified London contract," as follows; the words in italics are those inserted by the broker:

Certified London Contract.

London, 15th July 1864.

Sold by order and for account of Messrs. J. C. Azemar and Co., to Messrs. A. Casella and Co. the following cotton, viz. ^{D C} 128 bales at 25d. per lb., expected to arrive in London per *Cheviot* from Madras. The cotton guaranteed equal to sealed sample in our possession. Should the quality prove inferior to the guarantee a fair allowance to be made. Any slight variation in marks not to vitiate this contract. The cotton to be warehoused at seller's expense in one of the public docks or customary wharves. The buyer to pay a deposit of 12l. per bale, to be returned in the event of loss by fire on the second Saturday after the final day of landing in exchange for dock or wharf weight notes, and the remainder of the purchase-money at the expiration of the usual three months prompt, or on delivery of the warrants. Interest being allowed at the rate of 5 per cent. for prepayment. The first and second class sea-damaged bales (if any) to be made merchantable and taken at 1s. 8d. per lb. less than the sound. The third and fourth class sea-damaged bales (if any) to be taken at a fair allowance. The cotton after landing to be at the risk of the seller (only to the amount of this contract value) until the prompt day or the delivery of the warrants or orders of delivery, whichever may first happen. Should the cotton, or any portion thereof, not arrive by the above-named vessel from loss of vessel or other unavoidable cause, this contract for such portion to be void, but should the cotton be transhipped and arrive in London by other vessels this contract to hold good. In the event of any dispute arising out of this contract, the matter to be referred to two disinterested London cotton brokers for arbitration, buyer and seller each nominating one.

Brokerage $\frac{1}{2}$ per cent.

Guarantee $\frac{1}{2}$ per cent.

Barber, Nephew, and Co.

The eighth paragraph of the case stated:

"The *Cheviot* arrived in London on the 14th Oct. 1864 having on board several thousand bales of cotton, and amongst them the 128 bales shipped by De Souza as already mentioned, which were the only bales marked ^{D C}. The 128 bales were landed and warehoused by the plt. at Cotton's and Depot Wharf, and weight notes were made out by the wharfingers in the ordinary way. The cotton had been previously examined by the wharfingers for the purpose of ascertaining which of the bales (if any) were sea-damaged, and of classifying same, and for the purpose of making them merchantable when necessary and possible. . . . None of the 128 bales in question contained any sea-damaged cotton."

"The landing of the cotton was completed on Wednesday, 26th Oct. 1864, and the deposit, amounting to 1556l., would have become payable on Saturday, 5th Nov. 1864, and the prompt would have expired on the 28th Jan. 1865. The wharfingers drew samples from the bulk in the ordinary way, which were shown to the defts. by Barber, Nephew, and Co. The defts. upon seeing the bulk samples, at once stated to Barber, Nephew, and Co., that they claimed to reject the cotton on the ground that it was not long staple Salem cotton, and that they required an arbitration on that point. The cotton was not long staple Salem, but was a particularly good sample of Western Madras. The cotton was therefore not in accordance with the sample. Western Madras cotton is inferior to long staple Salem, and requires machinery for its manufacture different to that which is used for long staple Salem, and the market price of Western Madras was at date of contract only 23d. per pound. The defts.' correspondents have refused to accept the cotton by the *Cheviot* in fulfilment of the defts.' sale to them, on the ground that it was not long staple Salem, and that they could not employ it for the manufacturing purpose for which they had bought it, and the defts. have lost their commission amounting to 80l. 12s. 3d."

Some correspondence took place between the parties soon after the landing of the cotton, and arbitrators were nominated for the settlement of the dispute; the plt. however instructed his arbitrator to consider only the allowance to be made for the

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difference in value between the sample and the bulk, and the defts. demanded arbitration upon this right to repudiate the contract. No settlement, therefore, was arrived at.

After the trial the brokers appointed decided that the difference in value between the sample and bulk was 8d. per pound.

The question reserved for the opinion of the court was whether the plt. under the circumstances of the case was entitled to maintain this action.

Honyman, Q. C. (with him *Macleod*) argued for the plt.—The arbitrator finds that cotton comes from various places, and that from each place there are various kinds, and that of each kind there are various qualities. From Madras come the two kinds of cotton which compose the sample and bulk in this case, called long-stapled Salem and Western. The plt. says that the defts. must take this cotton, subject to a reduction of price; the defts. say the sample and bulk are so different that they are justified in throwing up the contract. First, with regard to the effect of this contract. It was held in the case of *Parsons v. Serton*, 4 C. B. 899, that upon the agreement to purchase a steam-engine described as "a certain fourteen-horse engine which our foreman has inspected," there was a bargain for a specific engine; and after its erection, assuming there was a warranty as to its power, and that the warranty was broken, that was no answer to an action for the price, but only ground for a reduction, or the subject of a cross-action." Upon the sale of specific goods, with a warranty that they are equal to sample, the vendee cannot, it seems by the case of *Dawson v. Collis*, 10 C. B. 523, refuse to receive them on the ground that they do not correspond with the sample, unless there be an express condition to that effect, but must resort to a cross-action, or rely on the non-correspondence with sample as a ground for reduction of damages. Upon the authority of these cases I submit that this was a bargain for specific goods, and that the property passed upon the making of the contract; it is not, therefore, in the power of the defts. to set up this defence against the action. Secondly, assuming that the cotton did not pass to the defts. before its arrival, the words "equal to sample" are a collateral warranty only. Lord Abinger said in his judgment in *Chanter v. Hopkins*, 4 M. & W. 404, "A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it." And in the concluding paragraph of the judgment in *Bannerman v. White*, 10 C. B., N. S., 860, Erle, C. J. laid down that "the intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute with a warranty superadded, or the sale may be conditional to be null if the warranty is broken." The decision of the Ex. Ch. in *Behn v. Burness*, 3 B. & S. 751, was in respect only of policies of insurance and charter-parties; it was there held that the words "now in Amsterdam" amounted to a warranty or condition precedent to the contract. The principle of all these cases is, that the remedy for the breach of a collateral warranty is either by cross-action or by deduction from the price. What I contend for is, if this is a sale of specific cotton the property passed to the defts. immediately; but if not, this guarantee must be taken not as a condition precedent, but as a collateral warranty. It is maintained on the other side that "quality" does not mean "kind" or "species," but "degree" or "variety of the same species;" but there is no authority for so limiting the interpretation of the word. The third plea, that the cotton is not equal to sample, is bad, for a special remedy is provided in the contract for this fact, if

it occurs. The inferiority to the sealed sample might consist either of the degree of the same kind of cotton, or of a different quality, both of which can be remedied by an allowance. The warranty cannot mean differently with regard to kind and quality. I submit that "guarantee" is not a word of condition, but a word of contract, and the remedy of the deft. is either by cross-action or allowance upon arbitration. Some questions arise as to the measure of the defts.' liability upon the facts mentioned in the special case. The contract price was 25d. per pound, and the brokers have fixed the difference between the value of the sample and bulk at 3d. per pound. The contract was made on the 15th July 1864, the deposit of 12l. per bale was payable on the 5th Nov., and this action was commenced on the 24th Nov. The contract was repudiated by the defts. on the 24th Oct., upon which day the price of the cotton was 15½d. per pound; the damages therefore should be the difference between 22d. and 15½d. per pound.

Brown, Q. C. (with him *Hannen*) for the defts.—The property does not pass by such a contract as this: (*Logan v. Le Mesurier*, 6 Moo. P. C. Cas. 116.) [The Court agreed to this, and stopped further argument on this point.] The plt. should have agreed to arbitration on all the points in dispute; but it is now for the court to say whether the defts. were right in refusing to accept the cotton. I submit, first, that the guarantee in this case was a condition precedent, the breach of which justified the defts. in cancelling the contract; secondly, that the allowance clause clearly applies to the quality only, and not to the kind of cotton. This was a sale with a warranty or condition: (*Syers v. Jonas*, 2 Ex. 111.) In what cases a breach of warranty gives a right to cancel a contract was considered and settled in *Behn v. Burness*, and in the note to *Cutler v. Powell*, which is quoted in the argument in that case. [WILLES, J.—We hold to the law laid down by Parke, B., in *Syers v. Jonas*, that an agreement that the bulk shall correspond with the sample authorises the purchaser to refuse to receive an article differing from the sample, if it has not been delivered, or the property has not passed by the bargain.] This is a contract for sale where the goods do not pass, and, unless there is something in the contract to the contrary, we were justified in refusing the goods. I say that the allowance clause applies only when the bulk differs in degree and not in kind from the sample. How could allowance be made, if the bulk were of a better quality and a more valuable kind than the sample? As the defts. could not use this cotton with their machinery, they would have been obliged to sell it at a loss. Some light may be thrown upon these clauses by the rule of law and equity concerning allowance in sales of realty. *Dart's Vend. & Pur.* ch. 4, p. 111: "A condition of sale as to compensation for misdescription by the vendor cannot, it appears, be enforced upon a sale." The different effects of a warranty upon the quality and kind of articles sold are clearly explained in the following cases:

Nichol v. Godts, 10 Ex. 191;

Wielor v. Schilizzi, 17 C. B. 619;

Josling v. Kingsford, 13 C. B., N. S., 447;

Gompertz v. Bartlett, 3 El. & B. 849.

(Stopped on the measure of liability.)

Honyman was heard in reply.

WILLES, J.—I am of opinion that our judgment ought to be for the defts. The action was on a contract for cotton to arrive by the ship *Cheviot* from Madras. Upon arrival the cotton was rejected by the defts., the purchasers, because it was not the same as the sample. The defts. maintained that the thing which the plt. attempted to make them

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take did not come within the terms of the contract, and refused arbitration, except on condition that their right to repudiate the purchase, as well as the difference in value, should be submitted to the arbitrators. The defts. are not answerable for the failure to arbitrate; they were not bound to refer less than the whole dispute. It is for us to decide whether the defts. are right in rejecting the cotton, or whether the plt. is right in maintaining that it was a case for an allowance. On the 15th July 1864, Barber, who was broker for both parties, sold 128 bales of cotton ^{DC}_O expected to arrive on board the *Cheviot* from Madras at 35d. per lb., and if the contract had stopped here, it would have been a description of specific goods, as was argued by Sir G. Honyman. The introductory paragraph fails to describe any particular kind of cotton, and any cotton from Madras on board that ship with this particular mark would have been within the contract under that description. The agreement then proceeds to describe the subject of the sale, "The cotton guaranteed equal to sealed sample in our possession." The sample turned out to consist of long staple Salem cotton. By a bargain for specific goods the property is vested in the buyer, and if the contract is not modified by what follows, the argument on the part of the plt. would hold, and the remedy would have been by cross-action on the warranty. But it cannot be successfully contended that this is a case in which the property passed by the contract. The only questions are, whether the words "equal to sealed sample" relate to the species of cotton, and whether the two cottons are of the same species, which latter point we have to decide upon the facts detailed in the eighth paragraph of the case. I entertain no doubt as to the first point; the contract cannot be extended to mean that the seller could force upon the buyer an article different to that which he intended to buy. The next sentence in the agreement is, "Should the quality prove inferior to the guarantee a fair allowance to be made," by which it was meant that the buyer should keep an article worse than the sample if it were of the same kind, and an allowance should be made to him. I do not see any similarity between cases of this kind and purchases of land, and I do not act upon the authorities concerning the latter. Let us see whether the contract ought to be construed to relate to the particular species of cotton contended for by the defts. The first remarkable fact is the description of the sample itself; it was long staple Salem cotton, a well-known cotton from Madras; this is unquestionable; the question is, whether it was of the same species as the bulk, which was proved to be a fine sort of Western Madras. We have to determine whether fine Western can be considered the same kind of cotton as long staple Salem. In my opinion this would be a good question for the decision of a jury. But we must consider the argument of Mr. Brown, which is, that when a man agrees to buy long staple Salem cotton and gets instead Western cotton, the difference described in the eighth paragraph is essential to the validity of the contract, and that it was implied in the words of the contract that the cotton must be of the same kind as the sample. I am confirmed in my opinion that the defts. had a right to repudiate the contract, by the fact that, although the bulk was composed of the finest Western cotton, yet the cotton in the sample, which was not the finest description of long staple Salem, was worth 3d. a lb. more than the other. I am compelled therefore to hold that what was delivered was not of the same kind as that which was the subject of the sale.

M. SMITH, J.—I am of the same opinion that our judgment should be for the defts. The contract did

not pass the property. If it depended upon the first sentence only the plt. might have been entitled to his claim; but the question arises whether the expression in the contract, that the bulk should be of the same description as the sample, is a condition or only a collateral warranty. I think there is as implied condition in this expression, and this would seem to justify the defts. in rescinding the contract. This, however, is qualified by what follows concerning the allowance to be made. The whole case turns upon the meaning of this clause. In order to discover whether the cotton was inferior to the sample we must examine the sample; there is no doubt that it consisted of long staple Salem cotton. It seems to me that the contract should be read as if it contained a description of the cotton in the bulk. It is clear that upon a contract so expressed in words, or as here referring to a sample, which is equivalent, the purchaser has a right to an article of the same sort or kind as that which he intended to purchase. The value of cotton depends upon the ease with which it can be spun, and the material into which it can be made; the cotton in the bulk is known in the market to be of a different kind, and to require different machinery from the cotton in the sample. The same difference in kind would be illustrated by a purchaser's agreeing to buy spirit according to a sample of brandy, and the seller's delivering instead a quantity of rum. You want here a standard of comparison, for, as I infer, no quality of Western cotton could be exactly the same as any long staple Salem cotton. The contract meant only that if the bulk varied in quality from a sample of the same description the purchaser should keep the cotton at an allowance. The other breach, for not proceeding to reference, was given up by the counsel for the plt., and it is clear that the defts. were justified in so doing.

WILLES, J. said:—So far as my brother Keating's views were formed by the part of the argument during which he was present, they were in favour of the defts.

Judgment for the defts. on the special case, and also on the demurrers with the exception of the third plea.

Attorneys for plt., *Thomas and Hollams.*

Attorney for defts., *W. A. Crump.*

EXCHEQUER CHAMBER.

Reported by *M. W. McKELLAR, Esq., Barrister-at-Law.*

ERRORS FROM THE COMMON PLEAS.

Monday, Feb. 4, 1867.

(Before *KELLY, C. B., CHANNELL, B., MELLOR, J., PIGOTT, B., and LUSH, J.*)

KAY v. WHEELER.

Bill of lading—Shipowners' responsibility—Damage done to cargo by rats.

A shipowner is responsible to the consignee for damage done by rats to the cargo shipped under a bill of lading with the usual exceptions, notwithstanding the fact that every possible precaution had been taken to clear the ship from vermin.

Laveroni v. Drury, 8 Ex. 166, affirmed by the Ex. Ch.

The following special case was stated without pleadings for the opinion of the Court of C. P. by the consent of the parties and by the order of Keating, J., dated the 31st Oct. 1865, pursuant to the 46th section of the C. L. P. A. 1852. Judgment was given for the plt., and the defts. now appealed to the Court of Ex. Ch.

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The *plts.* are merchants in the city of London, and the *defts.* in the month of Nov. 1863 were, and are now, the owners of the vessel *Victoria*.

In Nov. 1863, Messrs. Wilson, Ritchie, and Co. shipped on board the *Victoria* at Colombo, for carriage to London, 412 bags of coffee, and the following bill of lading was signed for the same by the master of the ship:

Shipped in good order and well conditioned, by Wilson, Ritchie, and Co., in and upon the good ship called the *Victoria*, whereof is master for the present voyage A. C. Fosse, and now riding at anchor in these roads and bound for London:

B 137 Bags.
B 23 "
T 252 "

412 Bags.

Four hundred and twelve bags native coffee, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of London (the act of God, the Queen's enemies, fire, all and every other dangers and accidents of the sea, rivers and navigation, of whatever nature or kind soever, excepted), unto Messrs. Kay, Finlay, and Co., or to their assigns, paying freight for the said goods at 14 1/2s. per ton of 16cwts. nett, with primeage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date, the one of which three bills being accomplished the other two to stand void.

Dated in Colombo, 25th Nov. 1863. Weight and contents unknown to A. C. Fosse.

The *plts.* were the consignees named in the bill of lading, and the said coffee was consigned to them by the said Messrs. Wilson, Ritchie, and Co., so as to pass the property in the coffee to the *plts.*

The *Victoria* arrived in London in April 1864, and was unloaded at the West India Docks.

Upon the coffee being discharged it was discovered that a portion of the bags had been gnawed by rats during the voyage, and the contents partly eaten and damaged by them, and that the coffee was thereby depreciated in value to the amount of 27*l*.

The *plts.* thereupon made a claim on the ship-owners for the damage done by rats.

The ship had on board during the time she was at and on leaving Colombo two cats and two mongoose, a species of Cingalese ferret, very destructive to rats, and also before leaving London for Ceylon a professed rat-killer was employed by the *defts.* to clear the ship of vermin, and he cleared the ship of rats, and every possible precaution was taken to keep rats out of the ship from the time she left until her return to London.

The *plts.* contend that the *defts.* are liable for the above damage to the coffee caused by the rats.

The *defts.*, on the contrary, contend that they are not liable for the said damage, as every precaution had been taken by them to preserve the coffee from rats.

The court is to be at liberty to draw inferences of fact in the same way as a jury would be entitled to do.

The question for the opinion of the court is, whether the *defts.* are, under the above circumstances, liable for the said damage.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for the *plts.* for 27*l*., together with costs of suit.

If the court shall be of opinion in the negative, then judgment of *nolle prosequi*, with costs of defence, shall be entered for the *defts.*

Afterwards, on the 24th Jan. 1866, came here the parties aforesaid, and the court is of opinion that the *defts.* are, under the above circumstances, liable for the said damage. Therefore it is considered that the *plts.* do recover against the said *defts.* the sum of 27*l*. and 33*l*. 17*s*. 8*d*. for their costs of suit.

The *defts.* say there is error in the above record and proceedings, and the *plts.* say that there is no error therein.

W. Williams argued for the *defts.*—This is an action by a merchant against a shipowner for damage done by rats to part of the cargo which was

shipped for the merchant under a bill of lading, in which were the usual exceptions to the shipowner's responsibility, viz., "the act of God, the Queen's enemies, fire, all and every other dangers and accidents of the sea, rivers and navigation, of what nature or kind soever, excepted." To the action the *defts.* plead that they had two cats and two Cingalese mongoose on board the ship; and also that a professed rat-killer was employed in London before sailing to clear the ship from vermin; all possible precautions against injury by rats had therefore been taken by the *defts.* In *Laveroni v. Drury*, 8 Ex. 166, it was held that "the owner of a general ship is subject to the same responsibility for loss or damage of goods as a common carrier. Therefore where by the terms of a bill of lading, containing the usual exceptions, the owner undertook absolutely to deliver goods shipped on board his vessel, he was not excused by reason of the goods having been damaged by rats, notwithstanding he had kept cats on board, such damage not being within any of the exceptions in the bill of lading. I submit first, that the present case can be distinguished from *Laveroni v. Drury*, and if I fail to show a distinction, I shall ask this court to overrule that decision. I maintain that a shipowner is not a common carrier, at all events when his contract of carriage consists of a bill of lading. In *Coyne v. Bernard*, 1 Sm. L. C. 171, it is laid down that a shipowner may be a common carrier; but I say that, in order to be a common carrier, a man must not only carry for hire, but ply publicly and habitually between the same places, and he must be liable to an action for refusing to carry goods. My authority for this is *Brind v. Dale*, 2 M. & R. 80, which however is somewhat modified by *Benett v. The Peninsula and Oriental Steamboat Company*, 6 C. B. 775. I shall next attempt to show that damage done by rats is, when proper precautions are taken, a peril of the sea and an exception to the shipowner's liability. The dangers and accidents of navigation are those which cannot be provided against; this is certainly an accident of that kind, for the damage happened notwithstanding the fact that all possible precautions had been taken. In the two cases mentioned in the argument of *Laveroni v. Drury*, viz., *Dale v. Hall*, 1 Wils. 281, and *Hunter v. Petts*, 4 Camp. 208, the injury was done by holes eaten by the rats through the bottom of the ship. Emerigon gives in *Traité des Assurances*, c. 12, s. 1 (1 Boulay Paty, 359), definitions of perils of the sea, and in the 4th section of the same chapter (p. 376), he maintains that a master is not responsible for damage caused by rats, if the cats which were on board have died during the voyage, provided that in the first port at which he touched he neglected no exertion to procure others: (see also Abbott on Shipping, 306, 9th edit.) It is said in 3 Kent's Commentaries, pt. 5, lec. 48, 576, 8th edit.: "It has even been a vexed question, whether damage done to a ship by rats was among the casualties comprehended under perils of the sea, and the authorities are much divided on the question. The better opinion would, however, seem to be that the insurer is not liable for this sort of damage, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity." As these reasons do not apply to this case, the conclusion derived from them cannot here be maintained. Damage by rats becomes an accident of navigation when it cannot be controlled by human prudence and sagacity.

Honyman, Q. C. appeared for the *plts.* but was not heard.

KELLY, C. B.—It is unnecessary for us to decide whether a shipowner is or is not liable as a common

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carrier. We need not, therefore, determine whether *Laveroni v. Drury* is for all purposes within the common custom of the realm with regard to common carriers. In this case there is a special contract, upon which we have to decide whether the carrier is responsible for the injury done by rats to the goods consigned to his care. We find in the bill of lading that the goods were put on board in good order and well conditioned, and were to be delivered in the like good order and well conditioned at the port of London (the act of God, the Queen's enemies, fire, all and every other dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever, excepted). Mr. Williams argues that this exception includes rats, and in support he cites *Emerigon* and the other cases mentioned in *Laveroni v. Drury*. But the whole of the doctrine laid down upon the matter relates to a policy of assurance with which we are not now concerned, and it has nothing to do with a bill of lading. We have, therefore, only to look at the instrument before us, by which the deft. contracted to deliver the goods in the like good order to which they were shipped. We think the contract was broken; and, with all deference, and without overruling the authorities quoted, we are in favour of the plts.

Judgment affirmed.

Attorneys for plts., *Farquhar and Leech.*

Attorneys for defts., *Cotterill and Sons.*

Feb. 4 and 6, 1867.

(Before KELLY, C. B., CHANNELL, B., MELLOR, J.,
PIGOTT, B., and LUSH, J.)

KIDSTONE v. THE EMPIRE MARINE INSURANCE
COMPANY.

Marine insurance—Policy on freight—Suing and labouring clause—Total loss—Transhipment of cargo—Liability of underwriters.

The charterers of a ship effected an insurance on freight, and the policy contained a warranty against particular average, with the usual suing and labouring clause. The ship, after sailing, was so greatly damaged that she was obliged to put into an intermediate port, where she became a total wreck. The cargo, however, was landed, warehoused, and afterwards shipped on board another vessel, and was forwarded in safety to its destination at an expense of about half the chartered freight; and the owners of the cargo paid the whole of the agreed freight.

The charterers brought an action against the underwriters of the policy for a total loss of freight, and also for the charges and expenses of conveying the cargo by the second ship:

Held, by the Court of Ex. Ch. (affirming the decision of the Court of C. P.), that, on the destruction of the ship and the landing of the cargo at the intermediate port, inasmuch as no freight *pro rata itineris* could be claimed under the law of England, a total loss of freight had arisen, and that the expense incurred in forwarding the goods by another ship was a particular charge within the true meaning of the suing and labouring clause in the policy, and not the conversion of a total loss into a partial loss, so as to bring the case within the warranty against particular average; and that this expense, having been incurred for the benefit of the defts. in order to protect them against a claim for a total loss of the freight, to which they would have otherwise been liable, was consequently recoverable under this clause in the policy:

Semble, if the owner of freight insured fails to earn it by any default of his own, he should be disentitled to recover it against the insurer.

Appeal from the decision of the Court of C. P.,

by which a rule of the defts. to set aside the plt's verdict upon leave reserved by Erle, C.J. was discharged. The case in the court below is reported in L. Rep., 1 C. P. 535; 15 L. T. Rep. N. S. 12.

Mellish, Q. C. (with him *Cohen*) argued for the defts.—This is a question arising out of a policy of insurance on chartered freight. The plts. were the charterers and insurers, and the defts. were the underwriters. The chartered ship *Sebastopol*, on her voyage from the Chincha Islands to the United Kingdom with a cargo of guano, after coming round Cape Horn, put in distress into Rio, where it was found that the cost of repairing her would amount to more than the value of the ship. Upon which, the cargo was warehoused, and afterwards shipped on board the *Caprice*, and by her safely conveyed to its owners. The cost of the freight by the *Caprice* amounted to about half the chartered freight of the *Sebastopol*; the whole of the latter was paid by the owners of the cargo, and the plts. paid the freight by the *Caprice*. The plts. now claim from the underwriters the extra freight and charges to which they were put by the transhipment to the *Caprice*, alleging that they were incurred under the suing and labouring clause in preserving the subject-matter of the insurance from a total loss. The defts. answer that this was a partial loss of the freight, and that they are exempt from liability by reason of the warranty against particular average in the policy. There is no authority upon a case of this kind, as policies on freight, free from particular average, are unusual. The general law was laid down by Lord Denman in the case of *Shipton v. Thornton*, 9 A. & E. 814: "Where goods are shipped under a bill of lading in a general ship which is prevented from completing the voyage in consequence of damage occasioned by tempest the master is at liberty, if he has an opportunity and thinks fit, to forward the goods by some other conveyance equally cheap to the place of destination; and if the goods arrive by such other conveyance, he is entitled on the freighter's obtaining the goods to the whole freight originally contracted for; even though by the second conveyance the goods are carried for less than the freight originally contracted for." In other countries freight is payable *pro rata itineris*, but by the law of England freight *pro rata* is payable only by agreement between the parties, as for instance if the agent of the owner takes charge of the cargo at the intermediate port, and the master gives it up. This is an insurance upon chartered freight; the ship is prevented from completing the voyage, but the freight is nevertheless earned. The first question is, was the original chartered freight wholly or partially lost? Now the freight cannot be said to have been wholly lost, when really it was wholly gained. If the loss of freight was partial, it comes within the exemption of the underwriters' liability as particular average; if however the loss was total, the expenses may be included within the suing and labouring clause. The court below have decided that there was a constructive total loss of freight at Rio, but I have to submit, by analogy to the definition of a partial loss of goods as laid down in *Farnworth v. Hyde*, 18 C. B. N. S., 835, and upon the cases there cited, this is in substance a partial loss of freight. The question whether there is a total loss of goods depends not upon whether they cannot be sold at the intermediate port, but whether they can only be sent on at a cost equal to or greater than their value, and it does not depend upon whether the master sent them on or not. There is no total loss if the master is able to send goods on at less cost than the original freight, but he is then entitled to recover for a partial loss, whether or not they are sent on. So with regard to freight, if a ship is in

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case the cargo can be sent on at less cost than the original freight, there is a partial loss whether the master sends on the cargo or sells it. The plts. are damaged only by half the freight from perils of the sea, and this can only be a partial loss. By 2 Phillips on Insurance, s. 1632, p. 838, 3rd edit.: "If the ship is rendered unnavigable, and cannot be repaired for the prosecution of the voyage, and another can be procured within a reasonable time and distance, and the master has means to procure such other at an expense materially less than the amount of the freight for the voyage, the underwriter on freight or profits is not liable to be prejudiced by the master's neglect to tranship any more than the underwriter upon the cargo, and the loss will be adjusted as if the cargo had been transhipped and forwarded; and will be partial or total, according to the amount of the loss:" (see *Jordan v. Warren*, Insurance Company; 1 Story's R. 342.) The effect of the judgment of the Court of C. P. is, that these expenses come within the suing and labouring clause, and that although there was no actual total loss, they were incurred in order to prevent a total loss. The proper construction of this clause was settled in *The Great Indian Peninsula Railway Company v. Saunders*, 1 B. & S. 41; and in error, 2 B. & S. 266; and in *Booth v. Gair*, 15 C. B., N. S., 291, by which I understand that the clause applies only if the subject-matter of the policy is in danger of being totally lost; and this is not in accordance with the judgment of the court below in this case. The following are further authorities that these charges arise from a particular average loss:

Emerigon, Traité des Assurances, 12, s. 89 (edit. by Boulay Paty, vol. 1, p. 584);

Code de Commerce, art. 397;

Arnould on Marine Insurance, p. 827;

2 *Parsons on Insurance*, 386; and 7 *Ib. c. 10*, s. 4.

With regard to the evidence received at the trial concerning the usually accepted meaning of particular average, I apprehend that a clearly established law cannot be overruled by custom:

Edie v. East India Company, 1 *Sir Wm. Bl.* 295;

Hall v. Jansen, 4 *E. & B.* 500;

Sues v. Pompe, 8 *O. B.*, N. S., 588.

E. James, Q. C. and *Sir G. Honyman*, Q. C. appeared for the plts., but were not heard.

KELLY, C. B.—In this case, which was an action on a policy for freight, a question of great importance to the mercantile community has arisen, and has for the first time, at least in this country, received judicial decision in the Court of C. P., which decision is now under appeal before us, and which we are called on to affirm or to reverse. The facts are few and simple. The plts. chartered the ship *Sebastopol* from the Chincha Islands to a port in Great Britain, and effected an insurance on freight for 2000*l.* by the policy in question, the freight being valued at 5000*l.*, and the policy contained a warranty against particular average, with the well-known suing and labouring clause as adopted in English insurances. The ship sailed from the Chincha Islands, and on rounding Cape Horn became so greatly damaged that she afterwards put into the port of Rio, where she became a wreck, and may be deemed to have been totally lost. The cargo of guano was landed and warehoused, and was afterwards shipped on board a vessel called the *Caprice*, chartered by the plts., and was forwarded in safety to its destined port in Great Britain at an expense for freight of 2467*l.* 11*s.* 10*d.* Under these circumstances the plts. brought this action with a count claiming for a total loss of freight, and another count for 1145*l.* 8*s.* 6*d.*, claimed under the suing and labouring clause, for the charges and expenses for conveying the cargo from Rio to this

country. It was contended for the plts. that when the ship had become a wreck, and the cargo had been landed at Rio, when no freight could be claimed by the law of England *pro ratâ itineris*, that a total loss of freight had been incurred, and that inasmuch as the proportion of the homeward freight by the *Caprice* was a charge incurred by preserving the subject-matters of insurance, and so relieving the defts., the underwriters, from their liability as for a total loss of freight, it was a charge within the suing and labouring clause which the plts. were entitled to recover. On the other hand it was insisted by the defts. that, inasmuch as the plts. were able to forward the goods to England by another vessel at an amount of freight substantially less than the entire freight as valued under the policy, a partial loss only, and not a total loss of freight, had been incurred, which the warranty against particular average precluded the plts. from recovering. It was argued that the master was bound under the circumstances that had occurred to forward the goods to England; that his ability to do so, and so to earn the whole of the freight, subject to the deduction of the cost of conveyance from Rio to this country, made the case one of partial and not of total loss, and so within the clause against particular average. We are of opinion, however, that upon the ship *Sebastopol* becoming a wreck at Rio, and the goods having been landed there, inasmuch as no freight *pro ratâ itineris* could be claimed, a total loss of freight had arisen, and that the expenses incurred in forwarding the goods to England by another ship were charged within the suing and labouring clause, having been incurred for the benefit of the underwriters, to protect them against a claim for a total loss of the freight, to which they would have been liable but for the incurring of these charges; and that consequently that amount is recoverable under the clause of the policy. The question raised by the defts., whether the owner was bound under those circumstances to forward the goods to England, is attended with some difficulty and uncertainty. It has been much considered, and in effect decided, in America. *Parsons*, vol. 7, c. 10, s. 4, lays it down, "that there is a total loss of freight when the ship and cargo are totally lost, or the vessel becomes wholly unnavigable, or is subject to a detention of such a character as to break up the voyage. It is said in some cases that if the loss of the ship be only constructively total, that is, made so by abandonment, the owner may abandon also the freight, and claim as for the total loss of it. But if, although the ship itself be wrecked and utterly lost, the master can reship and forward the goods by a reasonable endeavour and at a reasonable cost, we have seen that it is his duty to do so, and if he neglect this duty, the insurer is chargeable only in the same way and to the same extent as if the duty had been performed, and the loss may be partial or total, according to its amount when so adjusted." It appears in a note to *Parsons*, in a case reported in 9 *Johnson*, 19, where the vessel was lost at an intermediate port, but the goods remained and were seized by the Government, the underwriters were exempted from loss by seizure in port. It was held that, if the goods could have been sent on but for the seizure, the defts. were not liable, and *Kent, C. J.* said: "The point is, whether it be a good defence in any case to an action on a policy for freight, that the shipowner refuses or neglects to forward the goods by another vessel when he had it in his power. We have not met with any decided case on this point; but it appears to be reasonable and consistent with the principles of the contract that the insurer should in such case be discharged." This, however, has never been held to be law in this country; but it might be admitted that it is not unreasonable that if the owner of freight in-

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sured fails to earn it by any default of his own, he should be disentitled to recover it against the insurer. But it is unnecessary to decide this point, for whether or not a shipowner or charterer be under a legal obligation to forward the cargo by another ship to its destined port, it is still open to him, if he think fit, to forward them in fact, and so earn the entire freight; and we think, under a policy like this, he is entitled to claim the costs which he does incur under the suing and labouring clause, where such a clause is to be found in the policy, on the ground that he has thereby preserved the subject-matter of the insurance from total loss, to which the underwriter otherwise would have been liable under the policy. It would seem, too, that the rule of law which in this country entitles the shipowner to recover these charges under an insurance like this against the underwriters is in strict accordance with sound principles; for if the master knows where the ship has been lost and the cargo may be sent forward to its destined port, and its owner will be indemnified as to the costs he may incur in so forwarding the goods, he will have every inducement to save the property and complete his contract with the owner of the cargo; whereas, if the cost of the conveyance of the goods for the rest of the voyage (as would be the case where there is a warranty against particular average, if the argument of the debt. prevails) under such circumstances is to fall on his owner without recourse to the underwriter, he will be exposed to the temptation of evading the performance of what may at least be deemed a moral duty, and leave the cargo to its fate in a foreign port in which it may have been unshipped. We are of opinion, therefore, that, whether it be the duty or not of the master, under circumstances like these, to forward the cargo in another ship to its destined port, on the facts of the case now before us there was a total loss of the freight when the ship had become a wreck and the goods had been landed at Rio, and that the costs incurred by the master in shipping the goods by the *Caprice* and causing them to be conveyed to this country is a charge within the express terms of the suing and labouring clause, and that that amount, or the due proportion of it, is recoverable under that clause against the underwriters. The cases of the *Great Indian Peninsula Railway Company v. Saunders*, and *Booth v. Gair*, have been pressed on the attention of the court, as showing that a loss of this nature is a partial loss only, and cannot be recovered against the underwriter by reason of a warranty against particular average. But those were cases of insurance on goods, to which the *pro rata* doctrine has no application, and where the whole or a great portion of the goods still existing in specie it was impossible to hold that a total loss had arisen, and Blackburn, J. appears to have marked the distinction between the case of goods and that of freight, and forbore to intimate an opinion on the point we have now determined. But another case from the United States has been cited under the high authority of Story, J., where it is supposed to have been held that under circumstances like these there was a partial and not a total loss of the freight, and that the underwriters were not liable on the policy; but this case of *Jordan v. The Warren Insurance Company*, 1 Story, 342, has really no application to the case now before us. There the insurance was on freight from New Orleans to Havre; the ship was run aground and injured before it left the Mississippi, but returned to New Orleans, and after unshipping the cargo was completely repaired and reinstated, and might have taken the cargo on board again and completed the voyage to Havre, but the cargo having been much damaged was sold at New Orleans, under an arrangement between the

parties, and the ship proceeded on another voyage, not to Havre but to England. Under those circumstances the shipowner, who claimed as upon a total loss of freight, was held entitled to recover only for a partial loss, that is to say, the loss of freight on the same part of the cargo which had been destroyed before it was relanded at New Orleans, and which therefore could never have carried freight at all by the completion of the voyage. No question was raised there concerning particular average, or the suing and labouring clause in the policy. That case therefore has no bearing on the present. But it may be remarked that where any claim to freight at all was treated as reasonable, it seems to be on the footing of a total loss reduced to a smaller amount by the expenses incurred for the benefit of the underwriters, and spoken of as salvage. It remains only to observe on the evidence given in this case, that the expenses incurred in preserving the subject-matter of insurance were designated as particular charges, and not as particular average. We think that this evidence in no wise controls or varies the language of the policy, and that it is admissible to show the mode in which expenses of this nature are treated by mercantile men. But this evidence, or the usage which it is supposed to prove, is in affirmance of the common law of England, which of itself defines the nature and character of these charges; and if it was rejected and struck out of the case altogether it would leave the question in the cause as it was before. We think, therefore, on the whole, upon the true construction of the policy, that on the destruction of the ship and the landing the cargo at Rio there was a total loss of the freight unless it could be averted by the forwarding of the cargo by another ship to Great Britain; that the forwarding the cargo by the *Caprice* was a particular charge within the true meaning of the suing and labouring clause, and not the conversion of a total loss into a partial loss, which would bring the case within the warranty against particular average, and that the due proportion of that particular charge, the charge being thus within the suing and labouring clause, and incurred for the benefit of the underwriters to preserve the subject-matter of the insurance and prevent the total loss, is recoverable under the policy in this action. The judgment of the Court of C. P. will therefore be affirmed.

Attorneys for plts., *Thomas and Hollams*.

Attorneys for defts., *Chester and Urquhart*.

COURT OF ADMIRALTY.

Reported by HENRY F. PUNCELL, Esq., Barrister-at-Law.

June 12 and 15, 1866.

THE INNISFALLEN.

Cause of restraint—Mortgagee—Co-owner.

A mortgagee, not in possession of a vessel, under the 70th section of the Merchant Shipping Act of 1854, cannot maintain a cause of restraint.

In a transaction between alleged co-owners, the court will look behind the register, with a view to ascertain whether the real intention was to transfer the ownership, or to effect a mortgage.

Where an agreement is clearly proved and definite, that for some purposes a person is absolute owner, and for others mortgagee, the Court will recognise it.

Where a vessel was arrested in a cause of restraint by a person claiming to be owner, it being held that he was only mortgagee, the Court ordered the release of the vessel on the motion of a charterer.

This was a motion on the part of Mr. Nelson

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Hughes, shipbroker, of Liverpool, for the release of the ship *Innisfallen*, of which he was charterer, and which had been arrested in a cause of restraint brought by Mr. Pile, of West Hartlepool, who claimed 32-64th shares in the vessel, against his co-owners for chartering the vessel without his consent. They put in no appearance.

The facts of the case were as follow:—In 1864 the *Innisfallen* was built by the firm of which the plt. is a partner, in their yard at West Hartlepool, for Messrs. Pirie and Co. At the time of her completion, in Oct. 1864, half of the entire purchase-money (23,750*l.*) remained unpaid. Under these circumstances, the plt.'s firm drew bills for the balance due to them upon Messrs. Pirie and Co. Messrs. Pirie and Co. accepted the bills, and also caused the plt. to be duly registered as owner of thirty-two sixty-fourth shares in the vessel, the plt.'s firm at the same time writing to Messrs. Pirie and Co. a letter in the following terms:

Liverpool, 26th Oct. 1864.

Messrs. William Pirie and Co.
We hold the 32-64th shares of the ship *Innisfallen*, registered in the name of our Mr. John Pile, as security against the bills drawn by us on your firm in payment of the said ship, and we hereby bind ourselves to re-transfer to your firm the said 32-64th shares of said ship on due payment by you of these drafts.

Yours faithfully,
PILK, SERRA, and Co.

The above facts were not disputed. The plt. further deposed that the agreement between his firm and Messrs. Pirie and Co. was, that one-half the vessel should be and continue the absolute property of his firm until the balance of the purchase-money was paid. That this arrangement was insisted upon by the plt.'s firm in lieu of a mortgage because they considered that, as actual part owner, the plt. would be able to exercise control over the movements of the vessel, which, as a mortgagee, he would not be entitled to exercise, and that on no other terms would the plt.'s firm have let the vessel go out of their actual possession. The case stood thus: There was an absolute transfer into the plt.'s name; a letter, which converted the transfer into a mortgage; an alleged verbal conversation, which re-converted it from a mortgage into a transfer, for some purposes. Of the bills so drawn by the plt.'s firm, some were met, others from time to time were renewed, and there is now still owing to the plt.'s firm 3000*l.* upon the renewed bills. Such bills are not yet due; but Messrs. Pirie and Co. have suspended payment. The vessel made one voyage, and arrived in London on the 19th March in the present year. Three days before, however, viz. on the 16th, the vessel was chartered without the consent of the plt. to the deft. for a voyage to Bombay. The charter-party appears to be made by Messrs. Pirie and Co. as owners, but the plt. swore that at that time Messrs. Pirie and Co. had ceased to be even part owners, having transferred their shares to other persons. The plt. on discovery of the charter-party, instituted, as part owner of the vessel, this action of restraint, to prevent her from proceeding to sea until security be given by the other co-owners to the extent of the plt.'s interest in her for her safe return to Liverpool, and he swears that he verily believes that if the vessel be allowed to go to sea there is great danger of the whole, or a large portion of the balance of the purchase-money being lost. The vessel was accordingly arrested. Neither Messrs. Pirie and Co., nor their alleged transferees, appeared; but the deft., who is the charterer, appeared to defend the action, and now moves the court to order the vessel to be released without bail, and to condemn the plt. in costs.

Cohen appeared for the charterer.

C. P. Butt, for the plt., took a preliminary objection that the charterer as such had no *locus standi*.

Dr. LUSHINGTON.—This was so under the old practice; but of late, those who are substantially interested I have allowed to appear.

Cohen.—The plt.'s interest is merely that of a mortgagee; if he were part owner a court of equity would not allow him to restrain the execution of a charter-party into which he had entered by his agents. Clearly he permitted Pirie and Co. to charter this vessel to the defts.; at all events Pirie and Co. had authority to make charter as ship's husband: (Abbott on Shipping, 1st ed. p. 72.) The court can look behind the register to ascertain the rights of the parties. If the plt. is to be treated as a mortgagee, he has no right to arrest the vessel in a cause of restraint. The learned counsel in the course of his argument cited

Gardner v. Cazenove, 1 Hurl. & N. 423;
Ward v. Beck, 82 L. J., N. S., 113, C. P.;
The Highlander, 2 W. Rob. 109;
Collins v. Lamport, 84 L. J., N. S., 196, Ch.; 11 L. T. Rep. N. S. 497;
Williams v. Alsop, 80 L. J., N. S., 353, C. P.; 4 L. T. Rep. N. S. 550.

C. P. Butt.—This court will give no effect to the rights the charterer in this suit claims to exercise. In causes like this the court will only give effect to the legal title to shares in a ship. In *Ward v. Beck*, and other cases similar, the interests dealt with were those of parties over whom the court had no jurisdiction, but in a cause of restraint in a case of co-owners the court cannot give effect to the rights of persons who do not claim to be owners at all: (8th sect. Adm. Court Act, 29 Vict. c. 10.) The court will not treat Pile, and the co-owners as mortgagee and mortgagors unless it can do justice between them as such. Pile could not sue as a mortgagee, for there was no registered mortgage; consequently he has his remedy as co-owner, or none at all. *Collins v. Lamport* is distinguishable; that case turned on the 70th section of the Merchant Shipping Act, 25 & 26 Vict. c. 68. The judgment of the L. C. was founded on the fact of the mortgagor, who made the charter, being the registered owner of the vessel. Here we have a converse case, the plt., who it is said is to be treated as a mortgagee, being the registered owner of thirty shares. The learned counsel referred in the course of his argument to

The Valiant, 1 W. Rob. Adm. Rep. 64;
The Sisters, 5 C. Rob. Adm. Rep. 155;
The Frances, 2 Dod. Adm. Rep. 420.

Cohen replied.

Dr. LUSHINGTON.—The deft. maintains, first, that the court may look behind the register with a view to ascertain whether the real intention of the parties was to transfer the absolute ownership, or merely to effect a mortgage, and that the result of such an examination in the present case would be to show that the plt. was intended to be a mortgagee only; secondly, that a mortgagee has no right to bring an action of restraint. The plt. disputes these positions. To take the last first. In the case of *Collins v. Lamport*, Lord Chancellor Westbury, on appeal, decided that under the 70th section of the Merchant Shipping Act 1854, so long as the mortgagee does not take possession of the ship, the mortgagor being the registered owner subject to the mortgage, retains all the rights and powers of ownership, and that his contracts with regard to the ship will be valid, provided his dealings do not materially impair the security of the mortgagee, and consequently where the mortgagor in possession had made a charter-party which was not shown to be in any way prejudicial to the sufficiency of the security, he held the mortgagee bound and restrained him from dealing with the ship in any

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manner which might interfere with or prevent the execution of the charter-party. I accede to this view of the statute, and hold that a mortgagee not in possession cannot maintain an action of restraint. I may add, that this was the practice of the court even before the Merchant Shipping Act: (*The Highlander*.) In the present instance there is no proof that the charter-party which had been entered into is an injurious one, or likely to affect the position of a mortgagee of a vessel. Then as to the first point, the cases of *Gardner v. Cazenove* and *Ward v. Beck*, cited at the hearing, are conclusive that the right interpretation of the 66th section of the Merchant Shipping Act of 1854, and of the 3rd section of the Merchant Shipping Act Amendment Act of 1862, is, that the court is at liberty to look behind the register to the real character of the transaction, and to treat as a mortgage that which is on the face of it an absolute transfer, if it should appear that such was the intention of the parties. The question then remains, what was the intention of the parties in the present case? This is a question of fact. Looking to the documentary evidence alone, I could come to no other conclusion than that the plt. was a mere mortgagee. The letter which his firm wrote at the time to Messrs. Pirie and Co. states in so many words that the shares were held as a security, and were to be re-transferred on the due payment of the drafts; in short, converted the act of registration from a sale to a pledge. But then the plt. would superinduce a concurrent verbal agreement, which would have the effect of reconverting the pledge into an absolute transfer, at least for some purposes. The plt. swears that the arrangement was, that until the payment the vessel should continue the absolute property of his firm, and that the arrangement was insisted upon in lieu of a mortgage, in order that the plt. should, as actual part owner, exercise control over the movements of the vessel, to which, as a mortgagee, he would not be entitled. The result of the plt.'s contention would be, that he was not exactly an absolute owner, nor exactly a mortgagee, but that for some purposes he was an absolute owner, and for others a mortgagee. Now, without going the length of saying that the court would, in no case, recognise such an agreement, so involved, as it were, wheel within wheel, I shall hold that the court will not recognise it unless it is clearly proved, and definite and complete in all parts. In this respect, I think the decision in the case already adverted to, of *Gardner v. Cazenove*, is to the point. In the present instance it cannot be said that, according to the plt.'s view, the relations of the parties were defined. Whether or not, as between himself and Messrs. Pirie and Co., the plt. accepted all, or some, or which, of the liabilities of part owner, or with which of the rights of a part owner Messrs. Pirie and Co. intend to invest the plt. as distinguished from those which the plt. thought he would acquire on registration—all this the plt. leaves uncertain. On the whole I am constrained to hold that the effect of the transaction was to constitute the plt. a mortgagee, and not a part owner. This being so, the court would not have been able to grant a restraint against the vessel at the plt.'s instance, even if the deft. had had no *locus standi* to oppose the application. I must therefore grant the motion for the release of the vessel without bail; but, under the circumstances, I give no costs.

Motion granted.

Tuesday, July 31, 1866.

THE KESTREL.

Taxation of costs in a mortgage suit—Items disallowed.

This court, following the practice of the Court of Chancery in the taxation of costs in a mortgage suit, will allow mortgagees' costs, not as between solicitor and client, but as between party and party.

Where a decree had been obtained by mortgagees by consent for the sum claimed with "costs, charges, and expenses, properly incurred,"

The Court affirmed with costs the registrar's taxation, disallowing (1), charges by mortgagees' solicitors for attending to take particulars of other suits against the vessel to which their clients were not parties; (2), costs of futile negotiations between the several incumbrancers, and to which the owners of the vessel were not parties; (3), costs of a conference at a stage of the suit when it is unusual to allow for a conference.

The steamship *Kestrel* had been sold in a bottomry suit. A cause of mortgage was instituted against the proceeds in the registry by Messrs. Morrish and Nash, the first mortgagees by transfer of the vessel. In this cause a decree by consent was made in favour of the mortgagees for the amount claimed, with the costs, charges, and expenses properly incurred by them as such. A motion was now made on the part of the mortgagees to review the taxation by the registrar. The facts of the case appear at length in the judgment.

Osborne Morgan in support of the motion.—The registrar has in these cases taxed the costs as between party and party. This is a wrong principle to go on in such cases. A mortgagee should not be out of pocket if he incurs no costs wantonly, and his costs, charges, and expenses are reasonable, and should be repaid all moneys which he has fairly expended or for which he is liable. The learned counsel referred to

Fisher on the Law of Mortgage, 561;
Ramsden v. Langley, 2 Vern. 585;
Lomax v. Hyde, 2 Vern. 185;
Dryden v. Frost, 8 M. & Cr. 670.

Clarkson for the owners.—In this case the court will not review the registrar's taxation. This was a hostile suit by mortgagees to enforce their security, and they have no pretence to be entitled to other than costs as between party and party. The very terms of the decree "costs, charges, and expenses properly incurred," imply a discretion to the registrar as to what he should allow.

Osborne Morgan replied.

Dr. LUSHINGTON delivered judgment.—There is no question that can come before the court which is so disagreeable as that of reviewing the taxation of costs, because it is manifestly clear that, for the greater part, it is impossible to find a clear principle whereon to proceed, and whether the charge be right or wrong depends upon a practice, and upon a practice with which the court cannot be familiar, and can only obtain information by applying to other sources. This is a motion for the court to review the taxation of the registrar. This vessel has been the subject of much litigation. Amongst other suits instituted against her are the following:—1864. September, No. 2357, by a bottomry bondholder; October, No. 2398, by the third mortgagees; November, No. 2414, by the second mortgagee. In these suits the first mortgagees were defts. 1865. February, No. 2616, by the first mortgagees. The last cause, the one in which the first mortgagees were plts., is the one in which this motion is made. Besides these suits in the Admi-

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ralty Court, in which the first mortgagees were plts. or defts., there were other suits to which they were not parties, and there was also a Chancery suit (*Smith v. Morrish*) instituted by the trustees for the creditors of the owners of the vessel in which the first and other mortgagees were defts. The vessel was sold in the suit of the bondholder, No. 2357, and the proceeds, amounting to 12,050*l.*, were paid into the registry. On the 8th Dec. 1865 a compromise of the suit (No. 2616, by the first mortgagees) was entered into between the solicitors for the various parties interested in the proceeds of the vessel, viz., the trustees for the creditors of the late owners, the third mortgagees, the second mortgagees, and the first mortgagees. This compromise was carried into effect by the decree of the court of the 12th Dec. following. By that decree the proceeds of the ship were condemned in a special sum of 5655*l.* 6*s.* 1*d.* for principal and interest due to the first mortgagees, and in costs, charges, and expenses properly incurred by them as mortgagees, including therein the costs incurred by the first mortgagees as defts. in the above-mentioned Chancery suit, and in the causes in this court, Nos. 2357, 2398, 2414, instituted respectively by the bondholders, the third mortgagee, and the second mortgagee. Subsequently the plts., the first mortgagees, brought in their several accounts of costs to the registry, consisting of, first, costs of first mortgagees as plts. in 2616; secondly, costs of first mortgagees as defts. in 2357; thirdly, costs of first mortgagees in 2398; fourthly, costs of first mortgagees as defts. in 2414; fifthly, costs of first mortgagees as defts. in Chancery suit; sixthly, a separate account of charges by Messrs. Davidson and Co., the solicitors for the first mortgagees. The fifth account was taxed by the master in Chancery to whom it was referred. The other accounts were taxed by the registrar, and it is to review his taxation of the first account and of the sixth account that the present motion is made by the plts. The chief ground of complaint by the plts. is, that their costs have not been taxed as between solicitor and client. On this question I have endeavoured to obtain from the most competent persons information, and I am informed that in a mortgage suit in the Court of Ch., the mortgagee's costs are always taxed as costs between party and party; and I cannot construe the provision in the decree which was made by consent, that the plts. should receive their costs, charges, and expenses properly incurred, to mean that their costs should be taxed as between solicitor and client. The exact meaning of that term "costs, charges, and expenses properly incurred," it is impossible to define beforehand. In a mortgage suit it would, I apprehend, consist of expenses incurred by the mortgagee in the protection of his security. Whether or not any expense has been properly or improperly incurred, must obviously depend upon the circumstances of each case. It is necessary, therefore, to go into further detail. With regard to the registrar's taxation of the bill of costs for this suit in which the first mortgagees were plts., three classes of items are specified by the plts. as having been improperly disallowed. The first class consists of charges by the plts.' solicitors for attending to take particulars of the other suits instituted in this court against the vessel—suits in which the first mortgagees were not parties. As to those, however, I am of opinion that they are covered by the fees allowed to the plts. for instituting their own suit. In point of fact, such inquiries as to other suits are a necessary preliminary to any plt. in order to enable him to shape his suit aright. But such an inquiry consists simply in a reference to the cause-book, for no person who has not appeared in a suit can claim to see the documents in that suit. The second class consists of certain

negotiations that took place between the various incumbrancers of the fund. There are two reasons why these costs should not be considered as properly incurred, so as to be chargeable against the fund; one, that the negotiations led to nothing; the other, that the owners of the vessel (who would be entitled to the residue of the fund after paying off the incumbrances) were not parties to them. I quite agree, therefore, with the registrar, that it would be improper to saddle the fund with these costs. The third class were thus incurred: At the last moment the validity of the claim of the first mortgagees was disputed by the third mortgagee. The first mortgagees thereupon consulted their counsel as to whether they should get rid of the opposition of the third mortgagee by disputing his right to oppose on the ground that his mortgage had been obtained by fraud. I had some doubt as to that item, but upon further consideration I think the costs of this conference were rightly disallowed by the registrar on the ground that the conference was held at a stage of the suit when it is not usual to allow for a conference to be held. The registrar further disallowed most of the items in the bill No. 6. The bill seems to have been sent in by the plts. as an account of costs, charges, and expenses properly incurred, as distinct from the proper costs of the several suits. On examination it professes to contain many items of a kind already alluded to, viz., items for the costs of negotiations between the rival incumbrancers on the fund, which I have already held were properly disallowed by the registrar. It also includes items for consultations between the proctors and solicitors of the plts., for communication between the proctors and their clients, although charges in the other bills had been allowed for instructions; also items which are duplicates of charges made in the other bills and allowed. All these items the registrar, in my opinion, did right to disallow, and generally he seems to me in this taxation to have proceeded upon a correct principle, and to have exercised his discretion in a just manner. I shall therefore refuse the motion with costs.

Proctors for plts. in mortgage suit, *Deacon, Son, and Rogers*.

Solicitors for plts. in Chancery suit, *Davidson, Carr, and Bannister*.

Solicitors for defts., *Gregory and Rowcliffes; Lawson, Nelson, and Goodman*.

Tuesday, July 31, 1867.

THE COLLIER.

Salvage service where the owners of the salving are charterers of the salved vessel—Pleading.

The owners of a salving vessel may claim remuneration for salvage services from the owners of a salved vessel though they themselves be the charterers of the salved vessel.

But where in such case the effect of the charter-party is for the time to divest the owners completely of the possession and control of the vessel and transfer it to the charterer, no claim for salvage service will be allowed.

On a motion by salvors plts. in objection to portions of defts.' answer which averred the fact that the owners of the salving and charterers of the salved vessel were the same persons, and that hence no salvage was due, the Court ordered that the part denying plts.' claim should be struck out, but the other articles objected to be retained, for they might affect the quantum of salvage.

ADM.]

THE COLLIER.

[ADM.]

A cause of salvage had been instituted against this vessel, her cargo and freight, by the Brighton Railway Company, the owners, and the master and crew of the steamship *Lyons*. On the 31st Oct., as appeared by the petition, the *Lyons* on a voyage from Newhaven to Dieppe fell in with the *Collier* in a disabled state, and with some difficulty safely towed her into Newhaven.

Dr. Deane, Q. C., moved in this cause that certain portions of the defts.' answer should be struck out; the effect of these was, that the *Collier*, at the time of the salvage service, was under a charter-party to plts., and was engaged in their regular packet service between Littlehampton and Honfleur, and that the cargo and passengers were being carried by the plts. for their own benefit, and the freight and passage money belonged to them; that those on board the *Collier* signalled the *Lyons*, aware that she belonged to the London, Brighton, and South Coast Railway Company, and believing it to be for the best interest of the company that the *Lyons* should assist her, the *Lyons* hove down to her assistance, and the master of the *Collier* requested the *Lyons* to tow her with them to Dieppe, those on board the *Lyons* knowing that she was in the service of the same owners, the company; and by reason of these premises that neither the owners nor the master and crew of the *Lyons* were entitled to salvage remuneration for their services. In support of the motion he cited the judgment of Lord Stowell in

The Waterloo, 2 Dods. 433.

E. C. Clarkson, contra, argued that the *Lyons* was bound to take the *Collier* in tow, the master and crew of the salving vessel being in the service of the charterers of the salved vessel, and referred to

The Maria Jane, 14 Jur. 857.

Dr. Deane, Q. C. replied.

Dr. LUSHINGTON now delivered judgment.—This is a case of salvage by the master, owners, and crew of the *Lyons* against this vessel, the *Collier*, her cargo and freight. A petition has been given in, and an answer filed on behalf of the owners of the *Collier* and of the owners of her cargo. The plts. now object to the admission of the 2nd, 3rd, 4th, and 12th articles of the answer—articles the effect of which is to aver, that though the services rendered by the *Lyons* may have been of the nature of salvage service, yet that no salvage is due because the owners of the *Lyons* and the charterers of the *Collier* are the same persons, viz., the London, Brighton, and South Coast Railway Company. It appears that at the time the salvage service was rendered the *Collier* was under a charter-party to the railway company. The terms, so far as are material to the present motion, were, that the *Collier* was let for the sole use of the charterers for the space of three months; that the captain should use all dispatch in prosecuting the voyage, and that the crew should render all possible assistance with the vessel's boat, and in loading and discharging the vessel, consistent with their other duties; that the owners (not the charterers) should find ship's stores and pay crew's wages; that all derelicts and salvages should be for owners' and charterers' benefit in moieties to each after settling with the crew; that the owners should appoint their own captain and engineer, who, with all the crew, should be under the control of the superintendent and agent of the charterers; and should any occasion arise for appointing a new captain, officers, and crew, the appointment was to be made jointly by the charterers' superintendent, and the owners. The *Lyons*, as I have said, belonged to and was in the

employ of the railway company. The defts. in support of their articles to which objection is made, relied on the case of the *Maria Jane* as a case where a claim for salvage against a ship was rejected although salvage services had been rendered, because the ships rendering the services belonged to the person who was the charterer of the vessel receiving those services. But in that case the effect of the charter-party was to divest the owners of the possession and control of the vessel, and to transfer the same for the time to the charterer, who was required to provide and pay for the master and crew. And it was on this ground—the ground of the charterer being in possession of the salved vessel—that the judgment proceeded. The Court held that the claim for salvage could not be maintained against the owners of the salved vessel by the charterer of that vessel in his other capacity as owner of the vessels rendering the salvage services, or by his servants on board those vessels. In the present case the circumstances are obviously different. The charterers of the *Collier* were not in possession: the owners paid the wages of the crew. The *Maria Jane*, therefore, is not a case in point. On the other hand, the plts. cited the case of the *Waterloo*. This was a claim of salvage preferred by the owners, officers, and crew of the *Winchelsea*, for services rendered to the *Waterloo* and her cargo. The *Winchelsea* at the time was chartered to the East India Company, but her commander, officers, and crew were appointed by her owners. The *Waterloo* and the bulk of her cargo were owned by the East India Company. Lord Stowell allowed the claim for salvage, having, in a very luminous judgment, discussed all the circumstances of that case. I think that the *Maria Jane* does not apply to the present case, and that the principles laid down in the *Waterloo* govern it. The argument against a claim for salvage is founded on the supposition that the salvor is claiming in substance for the salving his own property which, certainly, is against reason. There is no place for such an argument here, as the owners of the *Collier* are not owners of the *Lyons*. The *Collier* is chartered to the Brighton Company, but the owners of the *Collier* are not divested of possession, as was substantially the case in the *Maria Jane*. These questions are not without difficulty, for distinctions might be taken between the owners of the salving ship and the crew. In reference to the cargo. Again, I am not prepared to say that there may not be such a connection between two ships which, though it would not bar a claim for salvage, might affect the quantum. I shall order the 12th article to be struck out which denies that any salvage whatever was due, but not the three first articles, which, though the facts therein detailed, if proved, would not bar a claim for salvage, might possibly affect the quantum. I think it right to be upon my guard, because no doubt the amount and quantum of a salvage service may be affected by particular circumstances, though the claim for salvage is not barred. I speak for instance where fishing vessels render assistance to each other, and matters of that description. That is the view the court holds.

Proctors for plts., Deacon, Son, and Rogers.

Proctors for defts., Clarkson, Son, and Cooper.

ADM.]

THE TROUBADOUR.

Tuesday, Nov. 27, 1866.

THE TROUBADOUR.

Necessaries—Mortgage—Pleading.

In a cause of necessities the transferee of a mortgage, though in possession of a ship when the necessities are supplied, is not liable for them unless the master in ordering them was acting as his agent.

And where in an article of the reply by plts. to defts.'s answer it was left open whether the person in possession of the ship when the necessities were supplied was the original mortgagee, or the deft., the transferee of the mortgage, the article was held bad on the ground of vagueness.

And an allegation that deft. was in possession at the date of the supply, and was responsible for the master's orders, and personally liable for the supplies, is not a good reply to the defts.'s answer claiming to be a mortgagee prior to the date of supply.

A cause had been instituted against this vessel, which belonged to Wexford, in Ireland, for necessities supplied her between June 1865 and March 1866, while at Liverpool. The petition merely stated that the necessities were supplied on the master's orders. The deft., Mr. E. F. Sichel, entered an appearance and filed an answer to the effect that, in April 1863, the vessel was mortgaged to one Gustave Sichel, that this was subsequently assigned in Dec. 1864, and vested in the deft.; that the necessities were ordered by Gustave Sichel or his agent solely on the personal credit of Gustave Sichel, and not on that of the deft. or the owners. The answer further alleged that, even though the averments of the petition were true, the deft.'s claim as transferee of the mortgage should have priority over the claim of the plts. for necessities supplied.

The second article of the plts.' reply stated that at the time the necessities were supplied, the persons entitled as mortgagees under the mortgage set forth in the first article of the said answer to the principal money and interest thereby secured had entered into and were in possession as such mortgagees, and that the vessel thenceforth, until after the institution of the suit, remained in the possession of the persons from time to time entitled to the principal and interest secured by the said mortgage as mortgagees in possession of the said ship, and therefore the plts. are entitled in priority over the claim of the defts. as mortgagees of the said ship.

On the 13th Nov. a motion was made to reject the second article of the plts.' reply.

Cohen in support of the motion.—When the supplies were furnished the plts. acquired a lien in the ship; this lien was subject to the mortgage. This case differs from the *Pacific* (Brow. & Lush. 243) only in this point, that in this case the mortgagees were in possession when the necessities were supplied, but there is nothing to show that they expressly or impliedly undertook to pay for them. The question is, to whom was the credit given? There is no statement that the master had authority from the mortgagees to order these necessities, and if he had none, the mortgagees are not liable. If the credit was given to the ship, it was to the ship subject to the mortgage; if credit was given to the mortgagees, then they were liable:

The Salacia, Lush. 545.

E. C. Clarkson, contra, argued that, as the necessities were supplied while the mortgagee was in possession, he was liable as if he had been owner, and referred to

The Perla, Swab. 353;

Jackson v. Vernon, 1 H. Bl. 114;

De Mattos v. Gibson, 1 J. & H. 79-84.

Dr. LUSHINGTON.—I am of opinion that the second article of the reply should be rejected, and for the reasons stated in Mr. Cohen's argument. In the first place, the article as it stands leaves it open whether the person in possession of the vessel at the time of the supply was the original mortgagee or the deft., who was the transferee of the mortgage. The plt. cannot call upon the court to supply the defect of his reply by reference to the deft.'s answer; the dates mentioned in which might seem to show that if, as alleged in the reply, the person entitled to the mortgage-money was in possession, that person was the deft. And besides, the reply seems to speak of a series of persons successively becoming entitled, and successively being in possession. This vagueness of the reply as to who was in possession, the original mortgagee or the deft., constitutes a serious defect, because, supposing the original mortgagee to be meant, the allegation would be immaterial, for until suit brought the necessities man would have no claim on the vessel (*The Pacific*); and a mere personal liability of the original mortgagee would not pass to the deft. by virtue of a transfer of the mortgage. If this were the only ground of objection I should require the reply to be reformed. In the second place, it would not be enough to allege that the deft., as transferee of the mortgage, was in possession at the date of the supply for the mortgagee in possession. I am of opinion he would not be liable for necessities supplied to the ship unless the master, in ordering the necessities, was acting as the agent of such mortgagee: (*Hibbs v. Ross*, L. Rep., 1 Q. B. 534; *Frost v. Oliver*, 2 Ell. & Bl. 301; *Mitcheson v. Oliver*, 5 Ell. & Bl. 419). Reformation of the reply in this respect also would be necessary. In the third place, even an allegation that the deft. was in possession of the vessel at the date of the supply, was responsible for the orders given by the master, and personally liable for the supplies, would in my opinion not be a good reply to the answer of the deft., who claims to be a mortgagee prior to the date of the supply. The case of *The Pacific* decides that a necessities man has until institution of suit no claim upon a vessel owned, I will say, by A., and consequently that a claim arising upon institution of suit is subject to the existing mortgage of B. I cannot see that this order of priority should be reversed because, through B. having been in possession at the date of the supplies, A. and B. are practically one and the same person. The opposite would complicate the law of mortgage. I come to this conclusion after due consideration of the *Jonathan Goodhue*, Swab. 524. I therefore reject the second article of the reply.

Second article rejected.

There were two other suits instituted against this vessel in which the allegations in the answers were to the same effect as in the cause of necessities—the one by S. Baker, an engineer, for repairs to the boilers of the vessel whilst lying at Liverpool in Feb. and March 1866; the other by Mc Donald and Co., shipwrights, for repairs while at Liverpool in Jan. 1865, and Feb. and March 1866. The second and third article of the replies to these answers were as follows:

2. The deft. at the several times mentioned in the petition was in possession of the said ship, and thereby the master of the said ship was impliedly authorised by the deft. to do all things necessary to keep the ship in a proper condition to earn freight, and for that purpose to order the necessary repairs in question, and to bind the ship for the same in priority to the deft.'s claim as alleged transferee of the mortgage.

3. Even if the deft. was not in possession of the said ship at the said times, the said Gustave Sichel in the first article of the petition mentioned, was then in possession of the said ship by and with the assent of the deft., and thereby the master of the said ship was impliedly authorised, &c.

The fourth article stated that the deft. impliedly authorised the mortgagee and the master to do

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THE PHILIPPINE.

[ADM.]

all things necessary by allowing the mortgagor to remain in possession.

R. G. Williams for the plts.

Cohen for the defts.

DR. LUSHINGTON.—The second and third articles of the replies in the other two suits instituted against the same vessel are open to this last objection, viz., that the necessities man could not by institution of suit acquire against the ship a claim which should take priority over the claim of the mortgagee in possession, who had ordered those necessities. I may also state that they are open to the lesser objection, that they do not allege that the master was actually authorised by the deft. to order the necessities; they only allege that he was impliedly authorised by reason of the deft. being mortgagee in possession, and no such implication is raised by law. They are, however, not open to the objection that they leave it doubtful whether the person in possession was the deft., the transferee of the mortgage, or the original mortgagee, for they state that the deft. was in possession. I need not consider the fourth article of the replies, which would rest the priority of the plts.' claim over that of the deft. upon the alleged fact of *Gustave Sichel* having been in possession. It does not appear who *Gustave Sichel* was, except that previous to the supply of the necessities he had been, and had ceased to be, a mortgagee of the vessel.

Proctors for plts. in first suit, *Lowless, Nelson, and Goodman*.

Solicitors for plts. in other suits, *Sharpe, Parker, and Jackson*.

Proctors for deft., *Cotterill and Sons*.

Tuesday, Jan. 22, 1867.

THE PHILIPPINE.

The 23 & 24 Vict. c. 127, s. 28—Costs.

This statute applies to solicitors practising in the Court of Admiralty.

Where, in a suit by a master against an owner for wages and disbursements, a sum of money was found to be due to him as master by the owner; but a counter claim being set up, the registrar took all the accounts between the parties, and reported that there was a balance due by the master for unpaid purchase-money for shares in the vessel; but the transfer of the shares had not been registered:

Held, that the solicitors who acted in the suit had preserved property of the plt. under the Act, and were entitled to their costs out of the master's shares, subject to the claim of the owner for the balance found to be due.

On the 15th Jan. *V. Lushington* moved, on the part of the Messrs. Howard, solicitors, that they should be declared entitled to a charge for the payment of their costs out of shares held in this vessel by her late master and for an order for such payment. They had originally appeared for the master in a suit by him against the owners for wages and disbursements. This was met by a counter claim against the master for the purchase-money of certain shares in the vessel. The shares had not been registered in his name, but they were bargained and sold, and he had an equitable right to them. The matter was referred to the registrar, who allowed the counter claim, and found that the master was indebted in the sum of 70*l.*, afterwards reduced by consent to 48*l.* 13*s.* 11*d.* to the owners.

V. Lushington, in support of the motion, cited 23 & 24 Vict. c. 127, and argued that in a wide sense the master's property might be said to have been preserved by the Messrs. Howard, as they had prevented his suffering any further undefinable loss.

Clarkson represented the owner.

V. Lushington objected to his being heard, having no *locus standi*, as appearing for a stranger to the suit.

The Learned Judge decided on hearing him.

Clarkson.—The 23 & 24 Vict. c. 127, does not apply to attorneys practising in this court; secondly, it gives a charge to a solicitor only in cases where property has been preserved through his instrumentality; and in this case, as the registrar's report showed, a balance against instead of for the plt., there was nothing for the statute to operate upon.

The Learned Judge reserved judgment, three questions remaining for consideration, viz., whether the 23 & 24 Vict. c. 127, applied to attorneys practising in the Court of Admiralty; secondly, the meaning of the word "preserved" in that Act; and thirdly, whether Mr. *Clarkson* had any *locus standi* in the case.

On the 22nd Jan. judgment was given.

DR. LUSHINGTON.—It is of importance to inquire how it happened that the master instead of recovering any amount for his wages is by the report found to be indebted to the owners to the amount of 48*l.* At the reference was produced the agreement made between the deft. Young, the owner of the *Philippine*, and the plt. upon the occasion of the appointment of the plt. to be master of the vessel. The agreement was dated 25th March 1863. After reciting that the deft. Young was the owner of the *Philippine* subject to a certain mortgage, and that he had recently sold to the plt. four sixty-fourth shares in the vessel for 250*l.*, went on to provide that the deft. Young should be the managing owner of the vessel, receive freight, &c., and should account to the plt. for four sixty-fourth shares in her net earnings, and the plt. should bear four sixty-fourth shares in her losses, and four sixty-fourth shares in the expenses of her outfit, and that in case the deft. Young should pay off the said mortgage-debt, and the plt. should have paid off his share in the expenses of the outfit, the deft. Young should transfer to the plt. four sixty-fourth shares in the vessel. The registrar in taking the account took this agreement into consideration, being of opinion, as I understand, that it was obligatory on him to do so under the 191st section of the Merchant Shipping Act (which prescribes that "upon any right of set-off or counter claim being set up by an owner against a master's claim for wages, it should be lawful for the court to enter into and adjudicate upon all questions, and settle all accounts then arising or outstanding between the parties"). The result was that whilst 103*l.* 7*s.* 8*d.* was found due to the plt. upon the balance of his account as master, 178*l.* 11*s.* 1*d.* was found due from him on account of the purchase-money of the four sixty-fourth shares, and his proportion of the loss upon the first voyage, and the registrar accordingly reported that upon the whole 70*l.* 3*s.* 5*d.* was due from the plt. to the deft. This sum was, as I have stated afterwards, reduced by consent to 48*l.* 15*s.* 11*d.* I have stated the facts, as I believe them to have been, but I cannot abstain from saying that the matter is presented to the court in a most unsatisfactory condition. The registrar's report has not been filed, neither party having thought proper to take it up. The paper which has

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been furnished to the court purporting to be a copy of the report simply states that 70*l.* 3*s.* 5*d.* is the balance due from the plt., but that this balance has been arrived at in the way I have already mentioned, there is no evidence to show beyond that the same sum 70*l.* 3*s.* 5*d.* appears to be the balance of an account which I find among the papers and which purports to have been put in by an accountant; however, in arguing the motion before me, there was no dispute as to the facts. It was admitted also, as I understand, that the four sixty-fourth shares in the vessel had not been transferred to the plt., but that the plt. had an equitable right to have them transferred. This preliminary statement makes intelligible the present motion, which is that the plt.'s solicitors may have a charge upon the plt.'s interest in the ship for the amount of their taxed costs, charges, and expenses in the suit, and that an order may be made for payment of same out of plt.'s interest. The motion is made under the 28th section of the 23 & 24 Vict., c. 137, which is in the following terms: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon, against, and a right of payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of such attorney or solicitor for the taxed costs, charges, and expenses of, or in reference to, such suit, matter, or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and raising and payment of such costs, charges, and expenses, out of the said property, as to such court or judge shall appear just and proper." Mr. Clarkson was allowed to be heard on the part of the deft. Young, the legal owner of the whole ship. He first contended that the statute did not apply to the court. His argument, however, seems to me contrary to the plain words of the statute, "any court of justice." He contended secondly, that as the statute gives to the solicitor a charge only on the property recovered or preserved through his instrumentality, and as the suit, so far from preserving or recovering any of the plt.'s property, resulted in a balance being found by the registrar's report against the plt., there was nothing for the statute to operate upon. I am, however, of a different opinion. The plt. sued for his wages and disbursements as master, and the registrar found that on his account as master the plt. was entitled to 103*l.* 7*s.* 8*d.*, and though this balance in favour of the plt. was turned to a balance against him, upon the registrar taking other accounts, viz., in respect of purchase-money due from him for the shares of the vessel, and of his proportion of the loss upon the first voyage, yet the result of the suit to the plt. is, that he is entitled to a transfer of the four shares in the vessel, for a sum less by 103*l.* 7*s.* 8*d.*, than he would have been if this suit had never been instituted. I am of opinion, therefore, that the plt.'s solicitor has recovered or preserved for the plt. in this suit property to the value of 103*l.* 7*s.* 8*d.* and represented by or rather contained in his right to be made registered owner of four shares in the vessel, and that the plt.'s solicitor is entitled to a charge upon the plt.'s four shares for his costs, not exceeding the sum of 103*l.* 7*s.* 8*d.* This charge, however, is of course subject to the payment of the 48*l.* 15*s.* 11*d.*, which has been agreed to be due to the deft. With regard to the remainder of the motion, the court can make no such order as that prayed for, directing the payment

of the solicitor's costs out of the plt.'s interest in the vessel. Before I can make any such order, I must have complete evidence of all the necessary facts of the case. At present, the evidence before the court is very insufficient.

Tuesday, March 5, 1867.

THE MARY, otherwise ALEXANDRA.

Cause of possession—Plt. not in the jurisdiction—Security.

In a cause of possession where the plt. is not in the jurisdiction, by the practice of the court security for costs must be given, but not for damages, though the vessel be not released on bail.

On Tuesday, Feb. 26, *Milward*, Q. C. (*Bull* with him) moved, in a cause instituted by the United States of America, against Mr. Prioleau, the duly registered owner of the *Mary*, for the possession of that vessel; that the plts. be compelled to give security for costs, and also for damages, as the vessel had not been released on bail.

Milward, Q. C. in support of the motion.—It is the usual practice of this court to order security for costs where the plt. is out of the jurisdiction; *à fortiori*, it would be just to order security for damages in a case like this. At common law we get security for costs as a matter of course, and as no damage can there accrue, for we always retain the possession of our vessel, no security for damages is needed. In Chancery, again, in the case of an interim injunction, the court will only grant it on the condition of an undertaking to pay both costs and damages if the ultimate decision be adverse.

Dr. *Twiss*, Q. C. (*Brett*, Q. C. and *Clarkson* with him).—I am not aware of any cause of possession where this court has ordered the plt. to give security for damages. We do not object to give security for costs. In the case of *The Peri*, 11 W. R. 44; *Pritchard's Adm. Dig.* 427, which was a collision case by foreigners, and the British owner disputed the identity of his vessel, this Court refused to entertain an application that security should be given for damages. If the vessel turns out to be ours, we are entitled to damages as much as they are, and they, if they took her out, should give bail for damages and costs. They must give us security for damages if we give it them. In *The Virgin*, 8 Peter 539, security was ordered to be given by defts. for damages, costs, and interest in a possession suit.

Brett, Q. C.—In the case of an interim injunction there is this difference, that a decision of the court is obtained, which cannot be said in this case.

Milward, Q. C. in reply.—In the *Peri* no security for damage was required, because it was not the practice of the court in such cases to give damages to the successful party at all (*The Evangelisnos*, *Pritch. Digest*, 427); hence the application was refused. In the cases of the *Wasp*, the *Ariel*, and the *Bee*, vessels also belonging to Mr. Prioleau, this court, during the vacation, said that it would not hear the United States unless they gave security for both damages and costs.

V. *Lushington* (*amicus curiæ*).—In reference to these cases I may state that I made an application that they should stand over till term time; but the learned judge, being displeased that petitions had not been filed in compliance with the order of the court, refused to grant the application without the security for both damages and costs.

Dr. *Lushington* this day gave judgment as follows:—This is a cause of possession by the

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THE JEUNE PAUL.

[ADM.]

United States. The debts move that the plts. may give security for costs and damage. The plts. do not dispute that they are liable to give security so far as costs are concerned. The question is as to damage. On behalf of the debts, it is argued that, this being a cause of possession, in which by the practice of the court the vessel is not released on bail, damages must accrue to them from the institution of the cause—that is, supposing the cause to have been improperly instituted; that the reasons for requiring a plt. out of the jurisdiction to give security for costs apply *a fortiori* to his giving security for damages; and I was referred also to what was stated to be the practice of the Court of Ch. in granting injunctions. I do not deny that there is force in these arguments; but, on the other hand, it has not been the practice of this court to require from a plt. out of the jurisdiction security for damages: (*D. H. Neri*, Lushington, 543.) The only case to the contrary is a recent one decided in the vacation. I must decline to change in a particular case the settled practice of the court, and least of all in a case like the present, where there is no reason to suspect the solvency or good faith of the plts. I refuse, therefore, so much of the motion as refers to security for damages.

Proctors: for plts., *Rothery and Co.*; for debt., *Gregory*.

THE JEUNE PAUL.

Salvage services within the Cinque Ports—25 & 26 Vict. c. 63, s. 49—Jurisdiction.

*Where salvage services are rendered within the boundaries of the Cinque Ports, though the value of the property saved is under 1000*l.*, this court still retains its concurrent jurisdiction with the Court of Admiralty of the Cinque Ports unaffected by the above section.*

*And a motion to dismiss a suit for salvage services within these boundaries brought in this court where the value of the property saved was about 500*l.* was dismissed with costs.*

This was a motion, in a salvage suit, where the salvage services were rendered within the boundaries of the Cinque Ports, and the value of the property saved not quite 500*l.*, that the suit should be dismissed, this not being the proper tribunal. The motion was made and the question argued on the 26th ult.

Cohen, in support of the motion.—Salvage suits where the value of property saved is under 1000*l.* are not to be heard in this court under the 49th section of the Merchant Shipping Amendment Act of 1862, but as this case arose within the jurisdiction of the Court of Admiralty of the Cinque Ports, the question arises whether this court has in this case concurrent jurisdiction with the court of the Cinque Ports. It was decided in the *Maria Louisa*, Sw. 67, that this court did retain its concurrent jurisdiction under the 460th section of the Merchant Shipping Act of 1854, and hence in cases arising within the boundaries of the Cinque Ports had still jurisdiction, though the value of the property saved was under 200*l.*; but my contention is, that under the 49th section of the Merchant Shipping Amendment Act 1862, this court no longer retains jurisdiction in cases where the value of the property is under 1000*l.*, even though they arise within the boundaries of the Cinque Ports. The words in that section are general; they are, “all cases where the value of the property saved is under 1000*l.*” These words include the cases arising within the Cinque Ports, and hence the jurisdiction of this court is ousted. The

costs of coming to this court are very heavy, and this court will be inclined to exclude a claim brought here where the property is small. The question here is not whether the jurisdiction of the Court of Admiralty of the Cinque Ports should be excluded, but whether the jurisdiction of this court is to be excluded in such cases.

Clarkson contra.—The 460th section of the Merchant Shipping Act has laid down that the jurisdiction of the Court of the Cinque Ports should exist as it always had done. The *Maria Louisa* decided the question of concurrent jurisdiction; hence this case, arising within the Cinque Ports, has a right to be brought here. The 49th section of the Amendment Act certainly extends the jurisdiction of justices, but can its terms be said to repeal the provision in the 460th section of the principal Act reserving the Cinque Port jurisdiction as it had been? By the 1st section of the Amendment Act it is to be construed with and as part of the Act of 1854, and hence the reservation to the Cinque Ports remains unchanged by it. In the 49th section the words “all cases” are explained further on, for it says, under the 2nd head, “such provision shall apply, whether the services have been rendered in the United Kingdom or not;” and in reference to this the words are thus used generally.

Cohen in reply.

Dr. LUSHINGTON this day gave judgment as follows:—This is a cause of salvage for services rendered within the boundaries of the Cinque Ports. The value of the property saved, as appears from the affidavits, is under 1000*l.*; indeed, does not amount to 500*l.* The debts, the owners of the ship and cargo, now move to be dismissed from the suit, on the ground that, under the circumstances, the court has no jurisdiction. The question depends upon the joint operation of the Merchant Shipping Acts. Previous to 1 & 2 Geo. 4, c. 76, in the case of salvage services rendered within the boundaries of the Cinque Ports, this court had concurrent jurisdiction with the Court of Admiralty of the Cinque Ports. The stat. 1 & 2 Geo. 4, c. 76, conferred a further jurisdiction upon commissioners appointed by the Lord Warden. In 1854, the Merchant Shipping Act was passed; and the repealing Act, which accompanied it, repealed the stat. 1 & 2 Geo. 4, c. 76, except certain sections which are expressly excepted, and which maintain the jurisdiction of the commissioners. The 460th section of the Merchant Shipping Act (which occurs in part 8 of the Act) commences by providing that disputes with respect to salvage “arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same had been hitherto determined,” the effect of which is to leave concurrent jurisdiction in this court, and in the Court of Admiralty of the Cinque Ports, and the commissioners appointed by the Lord Warden, and so the Court held in the case of the *Maria Louisa*, Sw. 67. The same 460th section proceeded to give an exclusive jurisdiction to justices in case of any salvage dispute arising elsewhere (than within the boundaries of the Cinque Ports) in the United Kingdom, if the sum claimed did not exceed 200*l.* In 1862 the Merchant Shipping Amendment Act was passed, the 49th section of which is as follows: “The provisions contained in the 8th part of the principal Act for giving summary jurisdiction to two justices in salvage cases, and for preventing unnecessary appeal and litigation in such cases, shall be amended as follows (that is to say)—(1), such provisions shall extend to all cases in which the value of the property saved does not exceed 1000*l.* as well

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as to the cases provided for by the principal Act; (2), such provisions shall be held to apply whether the salvage service has been rendered within the limits of the United Kingdom or not." Now the court has held that, in the cases to which this section applies, the justices are invested with an *exclusive* jurisdiction. It is now contended on behalf of the defts., that the words of the section are quite general (which is true); that they apply to cases within the Cinque Ports, and therefore that the jurisdiction of this court is ousted. But if this reasoning is good, then—although different considerations of policy might apply—it would follow that the jurisdiction of the Court of Admiralty of the Cinque Ports, and the commissioners appointed by the Lord Warden, is ousted also. But this is clearly not so; for the sections of 1 & 2 Geo. 4, c. 76, left unrepealed by the Merchant Shipping (principal) Act are not to be found in the schedule of statutory provisions repealed by the Merchant Shipping Amendment Act. Moreover, I am satisfied that the general words used in the 49th section of the amending Act, namely, that the provisions shall extend to *all* cases in which the value of the property saved does not exceed 1000*l.*, and shall apply whether the salvage services have been rendered within the limits of the United Kingdom or not, refer to the latter part of the 460th section of the principal Act, in which provision had been made only for cases where the sum claimed did not exceed 200*l.*, and for cases occurring in the United Kingdom elsewhere than within the boundaries of the Cinque Ports, and does not refer to the earlier part of the 460th section, which provided that "disputes with respect to salvage arising within the boundaries of the Cinque Ports should be determined in the manner in which the same had previously been determined. I am of opinion, therefore, that the Merchant Shipping Amendment Act leaves untouched the concurrent jurisdiction of the court over salvage cases like the present, arising within the boundaries of the Cinque Ports; and this being so, I do not hold myself at liberty to entertain considerations of the policy of ousting the jurisdiction of this court in trifling cases. I refuse this motion with costs.

Proctors for plts., Deacon, Son, and Rogers.

Proctors for defts., Clarkson, Son, and Cooper.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATERSON, Esq., of the Middle Temple,
Barrister-at-Law.

Friday, March 8, 1867.

(Present—The Right Hon. Lord ROMILLY, Sir J. W. COLVILLE, and Sir R. T. KINDERSLEY.)

LONDON AND EDINBURGH SHIPPING COMPANY v.
EATON.

THE IONA.

Ship—Collision—Pilot—Evidence of negligence—Look-out—Contributory negligence.

Where the services of a pilot are compulsory, and he has charge of a vessel, and a collision occurs, caused by negligence, the owner cannot escape liability unless he can establish that the negligent act was exclusively that of the pilot. Hence, if there was no vigilant look-out kept by the crew, but they relied on the pilot, who did not see a barge ahead till it was too late to avoid collision, this is prima facie contributory negligence, which renders the owners liable.

This was a cause of damage brought against the London and Edinburgh Shipping Company, owners

of the screw steamship *Iona*, by John Eaton, of Brentford, the owner of the sailing barge *Emily Fanny*.

At 8 p.m. on the 11th March 1866 the barge was in Blackwall Reach, in the river Thames, laden with sand, the tide nearly at high water, and a dead calm. The screw steamer was observed at a distance of a quarter of a mile steaming down at seven miles an hour, and went clear over the barge, cutting her in two.

The learned Judge of the Admiralty Court gave judgment to the effect that there was no proper look-out kept on board the *Iona*, and she ought to have seen the barge earlier and prevented the collision. The owners of the *Iona* appealed against that judgment.

Brett, Q. C. and Clarkson, for the app., contended that if any blame was to be attributed to anyone on board the *Iona* such blame was solely that of the pilot, and that the apps. were not liable for damage arising from his neglect or default. The barge was seen by the pilot in ample time for him to have taken proper measures and to have avoided the collision. The court below, therefore, was wrong in holding that it was material to consider whether there was any proper look-out kept by the crew of the steamer. The pilot from his elevated position was best able to see a craft ahead. In point of fact there was such look-out kept by the crew; but inasmuch as the steamer was bound to take a pilot, and this collision was caused exclusively by his negligence, the owners were not liable:

Merchant Shipping Act (17 & 18 Vict.), sect. 388:

Pilot Act (6 Geo. 4, c. 125), sect. 55.

Deane, Q. C. and V. Lushington, for the resps., contended that the court below was right, for it was well settled that under the sections of the Pilot and Merchant Shipping Acts, the owner, in order to escape liability, was bound to establish that the fault was that of the pilot exclusively, and that there was no contributory negligence on the part of the crew:

The Diana, 1 W. Rob. 135;

The Christiansa, 7 Moo. P. C. 160;

The Schwalbe, 11 Moo. P. C. 250;

The Killarney, 6 L. T. Rep. N. S. 908.

Here it was substantially admitted that the look-out kept on board the steamer was lax, and the master had no right to expect the pilot, who had other duties, to take upon himself the office of searching for vessels ahead: the judgment, therefore, was right.

Lord ROMILLY.—This is an appeal from a decree of the High Court of Admiralty, pronounced on the 24th July 1866, in a cause of damage brought by the owner and crew of the sailing barge *Emily Fanny* (the present resps.), against the owners of the screw steamship *Iona*, arising from a collision which occurred in Blackwall Reach of the river Thames, on the 11th March 1866. At about eight o'clock in the morning of that day, and therefore in broad daylight, the barge, laden with sand, was coming up the river under sail and with two men pulling at the oars, and heading nearly north; the steamer (a newly built iron ship of 648 tons) was going down the river at the rate of six or seven miles an hour. The weather was nearly calm, what little wind there was being (as stated by the apps. in the preliminary act) from the southward and eastward. The state of the tide was "last quarter flood," that is, nearly high water, running up the river at the rate of about a knot an hour. The steamer was in charge of William George Allen, a licensed Trinity-house pilot, who was standing on the high bridge, his proper place, whence he gave his directions to the man at the wheel by waving his hand in the

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usual manner. The master of the steamer, Thomas Raison, was standing on the roof of the midships house, which forms a sort of lower bridge. The boatswain was stationed on the fore-castle to keep a look-out ahead. As the steamer was rounding Blackwall-point, she came stem on, against the port side of the barge, which immediately filled and sank. About these facts there is no controversy. The resps. instituted proceedings in the High Court of Admiralty against the apps. in a cause of damage; and by their petition, after stating the facts, alleged that the collision was entirely attributable to the improper navigation of the steamer, and to the negligence and default of those on board her. The apps., by their answer, alleged that whilst the course of the steamer was being shaped to round Blackwall-point, the barge was seen ahead, and rather on the starboard bow of the steamer, and at the distance of between 200 and 300 yards, apparently proceeding to the northward; that thereupon the helm of the steamer, which was then a-port, for the purpose of rounding Blackwall-point, was, by order of the pilot, put hard a-port, with a view to pass under the stern of the barge, but the tide took the steamer and prevented her from answering her helm; and although the engines were, by order of the pilot, eased, stopped and reversed, a collision could not be prevented, and the steamer, with her stem and port bow struck the barge on her port side, and notwithstanding that a fender was put over the side of the steamer, the barge sank. The answer also asserted that the collision, and the damages and losses consequent thereon, were not caused by or attributable to any improper navigation of the steamer, or to any negligence or default of those, or any of those, on board her, but was the result of inevitable accident. The answer further asserted that if the collision was in any way occasioned by any one on board the steamer, it was solely occasioned by the pilot, and they (the apps.) were not liable for any damage caused thereby. The cause came on to be heard on the 24th July last, before the learned judge of the High Court of Admiralty, assisted by two elder brethren of the Trinity-house. Four witnesses were called by the apps.: Allen, the pilot; Raison, the master of the steamer; Edgar, the second engineer; and Williamson, the second officer, who was at the wheel, with two other men, when the collision occurred. They were examined *vidé voce* in court. The resps. called no witnesses. The learned judge, having pointed out to his two assessors the questions upon which their opinions were required, and after consultation with them, declared his opinion to be, that there was no proof that a proper look-out was kept on board the steamer; that she ought to have seen the barge earlier, and prevented the collision; and therefore he pronounced against the steamer, and condemned the owners thereof in damages and costs. From that decision the present appeal is brought by the owners of the steamer. In arguing this appeal, the apps., by their counsel, no longer contend that the collision was not occasioned by the negligence or default of any one on board the steamer, but was the result of inevitable accident. That point they abandon; and the only ground upon which they insist that the decision ought to be reversed is, that the collision was, as they allege, occasioned entirely by the default of the pilot, and that therefore the owners of the steamer are exempt from liability. This is the only point which their Lordships have now to consider. By the Merchant Shipping Act (17 & 18 Vict. c. 104), s. 388, it is enacted that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment

of such pilot is compulsory by law. An enactment substantially to the same effect, though expressed in different language, was contained in the Pilotage Act (6 Geo. 4, c. 125), s. 55. Now, in construing those Acts, it has been established as a principle, that, in order to entitle the owners to the benefit of the exemption from liability thereby provided, they must prove that the damage, for which it is sought to make them liable, was occasioned exclusively by the default of the pilot. It is not enough for them to prove that there was fault or negligence in the pilot—they must prove to the satisfaction of the court, which has to try the question, that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage. This principle was very clearly laid down by Dr. Lushington in the case of the *Diana*, 1 W. Rob. 183, which was a case under the earlier of the two statutes. That learned judge there says: "To obtain the exemption from responsibility conferred by the Act, I think that the owners of the *Diana* should prove that the accident arose entirely from the fault of the pilot; that the exception under the Act ought to be construed strictly, and that if the accident was occasioned by the joint misconduct of the pilot and crew, I am bound to hold that the liability still attaches to the owners." The same principle was upheld and acted upon by this court in the case of the *Christiana*, 7 Moo. P. C. C. 160, which was also under the statute of Geo. 4; and in the case of the *Schoalbe*, 11 Moo. P. C. C. 250, under the Act of the Queen; and it has been treated as the established law in several other cases, both in this and in other courts. The question, therefore, which their Lordships have to determine, is simply this: Is it proved to their satisfaction that there was no default in any of the crew of the steamer, which may have conducted to the collision? And upon this question their Lordships, having fully considered the evidence, entirely concur in the opinion of the learned judge of the court below that it is not so proved; for it is not proved that a good look-out was kept on board the steamer. The importance of alleging and proving that a good look-out was kept was of course felt by the apps.; and accordingly in the second article of their answer to the petition in the court below, they expressly allege that "a good and vigilant look-out was being kept from on board her." Now what evidence do they adduce in support of that allegation? They prove that the boatswain was stationed on the fore-castle to keep a look-out; but they prove no more. Now what was the duty of the man thus stationed on the look-out? Surely his duty was to keep a vigilant look-out, and when he saw any craft ahead to report to the pilot. There was nothing to prevent the barge being seen from the steamer some time before they were within three hundred yards of each other, when the pilot first saw her. Although the apps., in the preliminary act, allege that the weather was hazy (contrary to the allegation of the resps. that it was clear), there is no evidence of the presence of any haze. Nor is it suggested that there were any other vessels in the way, or any other obstruction to a wide and distant view. Indeed, it is plain from a comparison of the evidence of the pilot and of the master, that the barge was actually seen by at least one individual on board the steamer (namely, the master) before the pilot saw her; for the pilot says that, for the purpose of rounding the point, and before he saw the barge, he had given an order to "slow" the engines, and had waved to port the helm, and that he afterwards saw the barge, distant about three hundred yards, and then waved to put the helm hard a-port; and the master says, that at the time when the pilot gave the first order to "slow," and

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the first order to port, he (the master) had already seen the barge, and that in fact he saw her as the steamer was passing the factory before she came to Blackwall-point; thus clearly showing that the master saw the barge before the pilot did. And if the master could see her, the boatswain on the fore-castle might have seen her, and ought to have seen her, and would have seen her if he had been keeping a vigilant look-out. Whether the man saw the barge or not, or whether he was or was not keeping any look-out at all, does not appear; but it is not suggested that he made any report whatever. The learned counsel for the apps. was therefore driven to the necessity of arguing that it was the pilot's duty to keep a look-out, which his elevated position on the high bridge well enabled him to do; and that it was unnecessary for the man stationed on the look-out to make any report, or indeed to keep a look-out at all. This argument cannot be admitted. Its admission would produce very mischievous consequences, and very much increase the risk of navigation. No doubt the pilot may, and probably in most cases does, see a craft ahead as soon as any one else on board; but his attention is necessarily directed, from time to time, to other matters relating to the navigation of the vessel under his charge, besides keeping a look-out; and on that account it may happen that he does not see an object ahead so soon as he ought to have been aware of it, in order to enable him to take measures to avoid it. Hence arises the necessity for having a man stationed on the fore-castle, with the special and sole duty of keeping a vigilant look-out, a necessity fully recognised on the part of those on board the steamer, by their stationing the boatswain on the fore-castle for that special purpose. And it is impossible to hold that the man so stationed was justified in neglecting to keep a look-out, on the ground that it is the duty of the pilot to keep a look-out. The only remaining question is, whether the failure of the look-out man to perform his duty did not conduce, or may not have conduced (for that is sufficient for the present purpose) to bring about the collision. Allen, the pilot, in his examination, says, that when he first saw the barge, she was distant about 300 yards. At the rate at which the steamer was going, six or seven miles an hour (say six and a half miles an hour), it would take only about a minute and a half to go over that space. He says, that as soon as he saw the barge he ordered the helm (which was already a-port to round the point) to be put hard a-port, which was immediately done; that the steamer at first answered to the helm, and payed off to starboard; but that when she came to the tide (which, it is obvious, from the very sharp and sudden bend of the river at that place, would be running somewhat across the channel of the river from the southern towards the northern shore), the tide took her on the starboard bow, and she ceased to obey the helm, and in consequence thereof she ran into the barge. The master's evidence corroborates this representation of the pilot. No doubt the pilot ought (as it was argued for the apps.) to have known that, in the then state of the tide, and at that part of the river, such would be the effect of the tide on the starboard bow. But there seems no reason for supposing that he did not know it; indeed, it does not require the knowledge or experience of a pilot to know, from the remarkable bend of the river round Blackwall-point, that such must be the effect of the tide in its then state. Now if the pilot had been earlier made aware of the position of the barge, he might have sooner put the helm hard a-port so as to avoid a collision, and we are bound to assume that he would have done so. As it was, he was not made aware of the position of the barge till he saw her only about 300 yards distant, when it was too

late to prevent the collision. Thus the neglect of duty on the part of the look-out man not only might have been conducive to the disaster, but was in all probability the ultimate cause of it. Upon the whole case, their Lordships are of opinion that there was neglect of duty on the part of the look-out man; that this neglect of duty conduced to the collision; and that it was such default on the part of the crew of the steamer as to disentitle the owners to the benefit of that exemption from responsibility which the statute provides. They will therefore humbly advise Her Majesty to affirm the decision of the court below, and to dismiss this appeal with costs.

Judgment affirmed with costs.

Apps.' proctors, Clarkson, Son, and Cooper.

Resps.' proctors, Lawrie and Keen.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHER,
Esqrs., Barristers-at-Law.

Dec. 8 and 10, 1866, and Jan. 26, 1867.

(Before the LORD CHANCELLOR (Chelmsford) and
TURNER, L. J.)

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Mortgage of vessel—American register—Purchase in England—Notice to purchaser—Title to ship—Inquiries—Laches.

Shipbuilders in the United States were in the habit of building vessels, mortgaging them to the plt. H. and others, and then sending them to England with a power of attorney to sell. The American law requires, in order to render valid a sale or mortgage of a ship, that it shall be recorded in the proper office of the port where the ship is registered, and does not require notice of the mortgage to be indorsed on the certificate of the ship's registry. H.'s mortgages were duly recorded, and in some cases the certificates were indorsed, but the evidence showed that as this had hindered a sale the practice was, with H.'s consent, not adhered to in the case of the ship E. E. This vessel was sent to England for sale in the usual way, and was there sold to G., but neither H., nor a subsequent mortgagee, the plt. M., was paid, and the builders having failed, two bills were filed to establish the mortgages against the purchaser:

Held, that the law of this country will recognise and give effect to rights acquired under the laws of foreign states, where it is not contrary to English law and policy to do so; but that the rights arising from the sale in England must be determined according to the lex loci contractus; that accordingly the legal title to the ship was in the plt. H. at the time of the purchase; but that, by joining the builders in the intentional concealment of the mortgage, he had misled the purchaser, and his bill must be dismissed.

Turner, L. J. was very strongly inclined to think that in the purchase of a foreign ship an English purchaser ought not to rely merely on what the ship's papers may show, but that he is bound to make further inquiry into the title.

These were two appeals from decrees of Wood, V. C.; in the former suit the appeal being by the deft., and in the latter one by the plt. The hearing before his Honour is reported in 13 L. T. Rep. N. S. 187, and the facts are briefly these:—

Two brothers named Gardiner were shipbuilders at Boston, in the United States of America, and were in the habit of sending ships to England for sale, amongst which were the *Laughing Water*, the

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Cushanger, the *Leaping Water*, and the *Edward Everett*. The plt. Hooper, a merchant at Boston, made advances to the Gardiners upon these ships built by them, to be repaid out of the purchase-moneys. The plt. in the second suit was the captain of the *Edward Everett*, and he advanced money upon her, which was also to be repaid out of the proceeds of sale. By an Act of Congress it is provided that no bill of sale, mortgage, &c., of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice, unless it be recorded in the office of the collector of customs where such vessel is registered or enrolled. In conformity with this Act all the mortgages were duly recorded; and in the case of the *Laughing Water* Hooper's mortgage was also indorsed upon the certificate of registry, but none of the other mortgages was so indorsed. The reason for this omission appeared to be, that such indorsement had proved an impediment to the sale of the *Laughing Water*. This vessel was sold in England in 1857, and Hooper's advances were paid out of the purchase-money. The *Cushanger* was burnt at sea; the *Leaping Water* was sold in England in 1860, and Hooper's mortgage was paid.

By a bill of sale dated the 9th May 1860, and recorded under the provisions of the Act of Congress, the *Edward Everett* was mortgaged to Hooper by Charles Gardiner, in whose name she was registered, to secure 25,000 dollars; and by a second bill of sale, dated the 30th May 1860, she was also mortgaged to Maclellan to secure 10,000 dollars. By a power of attorney, dated the same 30th May, Charles Gardiner empowered Maclellan to sell this vessel, and to receive the purchase-money; and on the same day he gave him instructions by letter to pay Hooper's mortgage out of the price. Maclellan, thus empowered, brought the ship to England, but was unable to sell her, and took her back to America. Next year she was again sent to England in charge of Maclellan, who still held the power of attorney and the letter of instructions. He arrived in London on the 7th Feb. 1861, and opened negotiations with the deft. Gunn for the sale of the ship. But a few days after his arrival in this country Henry Gardiner arrived, bringing with him another power of attorney from Charles Gardiner, dated the 22nd Jan. 1861, by which the earlier power was revoked, and Henry Gardiner was authorised to sell the vessel. He on the 1st April agreed orally to sell the ship to the deft. Gunn for 10,000*l.*, and by bill of sale (30th May 1861) he conveyed the ship to him. Gunn, in Aug. 1861, registered the ship as an English vessel. Meanwhile Maclellan left England in April, and on reaching Boston informed Hooper of the sale to Gunn. Gunn paid his purchase-money to Henry Gardiner, who also returned to America in June, and soon afterwards the Gardiners became insolvent.

Hooper filed his bill in Aug. 1861, alleging his ignorance of the second power of attorney until after he heard of the sale; that he then at once instructed his agents here to enforce his security; that the deft. Gunn had not completed, and could not complete, his title to her, on account of the mortgages, and that he was throughout well aware that the ship was liable to be seized, and would be seized, by the mortgagees on her arrival in an American port. He alleged that the rights of all parties must be decided by American law, by which notice of the mortgage of a ship need not, and in fact could not, be indorsed on the certificate of registry, but that the mortgage became valid by being recorded as already mentioned. He charged that Gunn was bound to make inquiries as to incumbrances upon the ship, and that if he had done so the plt.'s rights must have been disclosed; and,

further, that he was expressly informed of the mortgages of both the plts. by Henry Gardiner.

The bill prayed a declaration that Hooper was entitled to a first charge upon the vessel; and that she might be sold, and the purchase-money applied according to the priorities of the persons interested.

The second bill was filed in Sept. 1861, and its statements and the relief prayed were similar to those of the former bill.

Gunn, by his answer, relied upon Maclellan's bringing the ship to England the second time with the same power of attorney from Charles Gardiner as in the previous year. He then, in accordance with his instructions, was endeavouring to sell her, when Henry Gardiner arrived with the subsequent power of attorney, and instructed him to continue to seek a purchaser for the vessel; that while he was so engaged, Maclellan and Henry Gardiner were constantly at his office, and frequently discussed the matter, and that Maclellan was well aware that Henry Gardiner had the power of attorney referred to, and knew that his own authority was superseded. He then stated his own agreement to buy the vessel; that he paid the price (10,000*l.*) and possession of the ship was given to him; that there was no mention in the certificate, or other papers of the ship, of her being subject to any incumbrance; that he had no notice or knowledge whatever that she was subject to any incumbrance when he completed his purchase, and he then believed that she was not subject to any. He alleged that Maclellan was throughout aware of the negotiations and contract between him (Gunn) and Henry Gardiner, and of the payment of the purchase-money; but that Maclellan never informed him of his or of any other mortgage. He also stated his belief that Hooper was well aware of the existence of the latter power of attorney, and knew that Henry Gardiner came to England expecting to sell the ship; that the transfer to himself had never been registered, as transfers of American ships are not registered here, and transfers of American ships to persons not American citizens are not registered in the United States. He alleged that by American law, although notice of a mortgage of a ship need not be indorsed on the certificate of registry, yet that it may be so indorsed, and that it is the practice so to indorse it; and he submitted that he was not bound to make such inquiries as the bill charged that he ought to have made.

Wood, V. C. declared by his decree in the first suit that Hooper was entitled to the first charge upon the ship for his principal, interest, and costs of suits, and that, on Gunn's paying him the amount thereof within one month from the chief clerk's certificate finding what was the amount due, Hooper should convey the vessel to him, and in default of payment his Honour ordered a sale, and application of the purchase-moneys.

His Honour dismissed Maclellan's bill, but without costs. (See 13 L. T. Rep. N. S. 187.)

Mr. Gunn appealed against the former decree, and Mr. Maclellan against the latter.

The appeals were originally argued in June and July 1866, before the then Lords Justices; but Knight Bruce, L. J. having resigned before judgment, the cases were now reargued before the L. C. and Turner, L. J.; Cairns, L. J. having been engaged as counsel in the causes.

Sir Roundell Pabner, Q. C., and Dickinson, Q. C. supported Mr. Gunn's appeal.

The Attorney-General and Karslake, Q. C. resisted it on behalf of the plt. Hooper.

Kekewich was for the app. Maclellan.

Giffard, Q. C. and Druce, Q. C. appeared for the defts., the Gardiners.

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The following authorities were cited:

Dann v. Spurrier, 7 Ves. 231;
Perry-Herrick v. Attwood, 25 Beav. 205; and on
 appeal, 2 De G. & J. 21;
The Duke of Beaufort v. Neeld, 12 Cl. & Fin. 273;
Simpson v. Fojo, 1 H. & M. 195; 8 L. T. Rep. N. S.
 61.

Judgment was reserved until 26th Jan. when

The LORD CHANCELLOR said:—The question upon these two appeals is, whether the deft., a purchaser for valuable consideration of an American ship, called the *Edward Everett*, can claim the property against the respective plts., the first and second mortgagees. The ship was built at Boston, in America, and registered there on the 9th May 1860, in the name of Charles Gardiner. On the same day she was mortgaged by Gardiner to the plt. Hooper for 25,000 dols., equal to 6000l. The mortgage to Hooper was in pursuance of an agreement that upon the ship being built Hooper should advance upon her, and she should be sent to England for sale, and Hooper's mortgage be paid out of the purchase-money. Hooper had had prior transactions of a similar kind with Gardiner. By the American law, of which evidence was given, it is not necessary that the mortgage of a ship should be indorsed upon her register in order to give the mortgagee a legal title; and the title of a mortgagee is available against a subsequent purchaser, whether he has notice or not of the mortgage. Whether, notwithstanding that it is not required for the protection of a mortgage, it is customary to indorse mortgages upon the copies of register of American vessels, and whether, if no such indorsement appears, a purchaser in this country is justified in considering the ship to be free from incumbrances, are questions upon which there is conflicting evidence. [His Lordship referred to the evidence on this part of the case, and then proceeded:] It would appear from this evidence that, according to the experience of the witness, a clean register did not necessarily prove that the ship was free from incumbrances, but the assurance of the vendor to that effect was always required. As the *Edward Everett* was built expressly for sale in this country, and the plt. therefore advanced his money upon her knowing the object, and for the express purpose of furthering it, he may fairly be considered as being in the same situation as the vendor. His legal title to the ship would, of course, be determined by American law, but the contract for sale, and the effect of the intervention of the title of a *bond fide* purchaser for valuable consideration, must be governed by the law of England where the contract was made. The plt. Hooper being a party to the intended sale in this country, through which he was to obtain payment of his advances, may be presumed to have known that the probable consequence of the copy of the register containing no notice of his mortgage would be, that the ship might be purchased and the money paid to the agent for sale without any inquiry as to incumbrances. If therefore he chose to permit the register to appear without any indorsement of his mortgage upon it, he should have taken care that notice of his claim was given to a purchaser. But the absence of all notice of the mortgage upon the copy of the certificate of registry did not arise in this case from reliance upon the plt.'s title under the American law, nor from considering it unnecessary for the plt.'s protection, but the mortgage was advisedly kept off from the register for the purpose of facilitating the sale of the ship. In a previous transaction between Gardiner and the plt. Hooper with respect to a vessel called the *Laughing Water* (which transaction was precisely similar to that relating to the *Edward Everett*) difficulty and delay had arisen in the completion of

the purchase in consequence of the mortgage to the plt. Hooper being indorsed upon the register. In order to prevent a similar obstruction to the sale in the case of the *Edward Everett*, it was agreed that Hooper's mortgage should not appear upon the certificate of registry. There was, therefore, an intentional concealment of the fact by the plt. Hooper, which, as against him, may be taken to amount to a representation that there were no incumbrances upon the ship, and he was therefore bound to take care to correct the impression which was intended to be conveyed by the appearance of the register by communicating the fact of his interest to a purchaser. Whether any such communication was made to the purchaser will be presently examined.

As I understand the case of the plt. Hooper, it is this: he says that the *Edward Everett*, on the 30th May 1860, was entrusted to the plt. Maclellan to take to England and sell, under a power of attorney from Gardiner. Maclellan at the same time received an authority from Gardiner instructing him, in the event of his selling the ship, to pay or remit to Messrs. Barings, of London, the sum of 6000l. to be placed by them to the credit of the plt. Hooper, and to be held subject to his order. Maclellan took the ship to England, but being unable to sell returned with her to Boston. In the following year Maclellan was again sent with the ship to England, having the same power of attorney and the same authority. But it appears to me to be the result of the evidence that Gardiner, without the knowledge of Hooper, revoked the power of attorney to Maclellan, and granted one to his brother Henry Gardiner, who arrived in England two days after Maclellan had arrived with the ship. Henry Gardiner immediately assumed the conduct of the sale, and sold the ship to the plt., and received the purchase-money without paying any portion of it to the plt. The plt. alleges that he has been defrauded by the Gardiners; that as long as he believed that Maclellan had an unrevoked power of attorney and authority to pay the amount of his advances to his credit, there was no occasion for him to interpose, and that he has not stood by or encouraged the deft. to deal with Henry Gardiner; even if, the deft. is equally innocent with himself, his claim must prevail, though the deft. is a purchaser for value. In the view which I have taken of the case, it appears necessary to examine much of the evidence. The previous transactions between Gardiner and Hooper, in all of which Henry Gardiner was the agent, are immaterial, except so far as the circumstances connected with the *Laughing Water* led to the determination to keep all notice of the plt.'s mortgage from the certificate of registry of the *Edward Everett*. I am satisfied, notwithstanding the evidence of the Gardiners, that Hooper was left in ignorance of the revocation of the power to Maclellan, who was allowed by them to sail in the *Edward Everett* in order to blind the plt.'s eyes, and to make him believe that Maclellan held, and was intended to hold, an efficient power of attorney, while the Gardiners were scheming to supersede him and get the purchase-money of the ship into their own hands. Under these circumstances, I think the plt. might have stood upon his legal title, and that the deft. must have suffered the loss which has been occasioned by the fraud of the Gardiners, if the plt. had not intentionally permitted them to possess the means of making that fraud available. It is distinctly proved that the plt. agreed to allow the Gardiners to have a clean register of the ship in order that the sale might not be impeded. He, therefore, so far as the ship's documents were concerned, was a party to the concealment of his claim. Even if the evidence leaves it a matter of doubt whether the appearance which the register presented was in itself a proof that the ship was

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free from incumbrances, or that inquiry should have been made upon the subject, I am of opinion that in a case like the present, where the very object of the plt. was to keep the mortgage from the knowledge of persons dealing for the purchase of the ship, his legal title thus intentionally concealed ought not to prevail against a purchaser, unless it could be proved that the purchaser had in some manner distinct notice of it before his purchase, or before the payment of the whole of the purchase-money. No such notice, however, appears to have been given to the deft. He himself swears that he had no notice, and Maclellan, who tried to effect a sale in 1860, says that upon that occasion he deposited in the office of the deft. the power of attorney and letter of instructions to pay the 6000*l.* to Barings to the credit of the plt., and that he told the deft. that the plt. and he had large claims upon the ship. But in the following year, when the sale took place, it does not appear either from his affidavit or cross-examination, that he gave any notice at all of the plt.'s mortgage or of his own. Indeed, with respect to his own claim upon the ship, the V. C. felt himself obliged to hold upon the evidence that he had given no notice whatever, and said that, having misled the deft. into the belief that he was a person having no claim beyond the ship's charges, his case was exactly in the same position in which he should have thought Hooper's would have been if Hooper had known of the second power of attorney. His Honour seems here to assume the fact that the deft. had no notice of the plt.'s mortgage, for if he had the plt.'s knowledge of the second power of attorney would have been immaterial. I have already stated my opinion upon the evidence that the plt. had no knowledge of the power of attorney to Henry Gardiner, and his legal title would therefore have prevailed even against a purchaser for value, if it had not been for his intentional concealment of it. The appearance of the certificate of registry was calculated to lead purchasers to believe that the ship was free from incumbrances, and it appears to me that the plt. could not thus deal with his legal title, and at the same time render it available against a purchaser as if he had knowledge of it. In the competition between the parties, I think that the plt. has disabled himself from standing merely on his legal title, and that the claim of the deft. as a purchaser for value without notice must prevail. I am of opinion that in this case the decree of the V. C. must be reversed.

The case of Maclellan is much weaker than that of Hooper, as he may be said literally to have stood by without the least assertion of his claim. I think that the decree of the V. C. in this case ought to be affirmed, and the appeal dismissed with costs.

Lord Justice TURNER said :—These appeals involve questions of much importance and of no inconsiderable difficulty. First, as to the appeal in Hooper's suit. Three points were mainly relied upon in its support: first, that the purchaser of a foreign ship is entitled to proceed in his purchase upon the footing of what may appear upon the ship's papers, and is not bound to make further inquiry into the title to the ship; secondly, that Hooper intentionally withheld notice of his mortgage, and assented to the sale of the ship being made by the Gardiners and under their title, and that this assent upon his part ought to be held binding upon him in favour of the app., the purchaser; and, thirdly, that Hooper, if he had not acquiesced in the purchase, had at all events so conducted himself as to disentitle him from impeaching it. On the part of Hooper, it was argued in support of the decree that he had the legal title to the ship, which could only be displaced by proof that he had authorised or sanctioned the sale, or had been guilty of

conduct amounting to fraud with respect to it, and that no such case was proved against him; and further that the app. ought to be held or be taken to have had notice of the mortgage.

Some question was raised in the argument as to the law by which this case ought to be decided, though this point was not much gone into on either side; it was more fully discussed when the appeal was first argued before the late Lord Justice and myself, and it may, therefore, be right for me to say that, in my opinion, the law of this country ought to govern the decision of this case, for the purchase of the ship, on which the rights of the question depend, was made and completed here. In saying this, however, I must not be understood to mean that the shipping law of America is not to be regarded in deciding the case; on the contrary, I think that great regard must be paid to it. In order to determine what the rights of these parties now are, it must be ascertained what their rights were at the time when the purchase was made, and, in order to ascertain this, resort must be had to the American shipping law. The rights of the parties stood upon that law at the time when the purchase was made, and I apprehend that where rights are acquired under the laws of foreign states, the law of this country recognises and gives effect to those rights, unless it is contrary to the law and policy of this country to do so. There is nothing, so far as I am aware, opposed to the law of this country in the recognition of the rights of an American mortgagee in an American ship; and so far as the policy of this country is concerned, it is obvious that, unless the courts of this country recognise rights acquired under the laws of foreign states, these foreign states would not recognise rights acquired under our laws, and the consequence of this would be that no mortgages of a British ship could with safety allow her to go to any foreign port under the control of the mortgagor, the owner; and all investments of money upon mortgages of ships would, to say the least, be rendered insecure. I take it, therefore, that in this point of view regard must be had to the American shipping law, and looking to the Registry Act of the United States, which the plts. have put in evidence, and to the opinions of the counsel in America upon the effect of that Act, no reasonable doubt can, I think, be entertained that, according to the law of America, the legal interest in this ship was at the time when the app. Gumm became the purchaser well and effectually vested in Hooper. This point must, therefore, be assumed in Hooper's favour. We come, then, to the question whether the purchaser of a foreign ship is entitled to proceed in his purchase upon the footing of what may appear upon the ship's papers, or is bound to make further inquiry into the title to the ship, a question certainly of great importance. In the view which I have ultimately taken of this case, it is not necessary for us to give any opinion upon this point, nor do I intend to give any final opinion upon it. I say no more than that, as at present advised, the purchaser is bound to make inquiry as to the title. A ship is not like an ordinary personal chattel; it does not pass by delivery, nor does the possession of it prove the title to it. There is no market overt for ships; the laws of the United States have provided the means of evidencing the title to them. In ordinary cases of purchases of property not purchased in market overt, the purchasers are bound to inquire into the title to the property purchased by them. They cannot shut their eyes and ears, and claim the benefit of want of notice, and if they think proper to buy without inquiring into the title of the persons from whom they buy, they must be held to be affected with notice of what would have appeared if the inquiry had been made. It is true

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that there is in this case strong evidence that, in the cases of purchases in this country of American ships, it has not been usual that inquiries into the title should be made; but this may well have arisen from the purchasers having felt that they were safe in relying upon the *bona fides* of the vendors. This, no doubt, would generally be the case, and it is only where there has been *mala fides* on the part of the vendors that the question of the obligation of the purchaser to inquire can arise. At all events, the course which has been pursued in purchases of property of this description cannot, I think, alter the law. In my opinion, then, this point must also be ruled in favour of the app. Hooper.

The only material question which then remains is, whether Hooper ought to be held to have authorised the sale in question, or to have so acted with respect to it as to disentitle him from impeaching it; and I agree with the V. C. that this is the real question in the cause. Now the evidence quite satisfies me that Hooper intended that this ship should be sold by the Gardiners, and under their title, and without his mortgage being disclosed to the purchaser. In the case of the *Laughing Water* his mortgage had been indorsed on the certificate of registry, and in consequence of this indorsement difficulties arose with the purchaser and the completion of the purchase was long delayed. In order to prevent these difficulties and this delay arising in other cases, he had agreed that for the future his mortgages should not be indorsed upon the certificate of registry of the ships that should be mortgaged to him. He thus, as it seems to me, put it in the power of the Gardiners to sell to purchasers without notice of the mortgages, and to sell not under his title, but under their title. It cannot be said on his part, that he did this in reliance upon inquiries being made by the purchasers, which would disclose his mortgages, for the very object with which he did it was to avoid inquiries being made; and it cannot, of course, be said that he did it with intent to charge the purchasers, for this would be a fraud on his part, and I am far from thinking that any fraud was contemplated by him. Let us consider, then, the effect of what was then done by him. There is not only a deliberate intention of suppressing the mortgage, but a power given to the Gardiners to sell under their title, and not under his. I should feel great difficulty in holding that, after such conduct on his part, he could maintain any claim in equity against any purchaser from the Gardiners. But the case appears to me to stand yet higher against him. What was done by him amounts, I think, to an authority to the Gardiners to sell for themselves and for him. He, in effect, constituted the Gardiners his agents to sell the ship, and it was not attempted to be denied, nor could it be denied, that if he did this the bill in this suit could not be maintained. That he intended to authorise, and did authorise, the sale of the ship by the Gardiners is, I think, confirmed by the evidence in the cause; but it is plain from the evidence that he placed great trust and confidence in the Gardiners. The fact of his having received from them the moneys secured to him by his mortgages on the *Laughing Water* and the *Leaping Water* ought not, perhaps, to be relied upon against him, as it may be accounted for by the indorsement upon the certificate of registry in the former case, and by the power of attorney which was stated at the bar to have been given by him in the other. But there is this further fact—he had notice of this ship having been sold by the Gardiners to Gumm as early as the 1st May 1861, and it was not till the 18th June in that year, when the Gardiners were on the point of failing, that he began to raise any question as to the sale; having in the meantime left the purchaser to pay, as he in fact during that interval did pay, a considerable part of the purchase-money. It was

said, however, on the part of Hooper, that assuming him to have authorised the sale by the Gardiners, he did so only if the sale was made under the power of attorney given to Maclellan; but I do not think that his case can, either in point of law or of fact, be maintained upon this ground. In point of law I do not think he could throw upon the purchaser from the Gardiners the obligation of inquiring into the circumstances under which the power of attorney to sell was given. It would be sufficient for the purchaser to be satisfied that it was given by the person who was authorised to sell; and in point of fact there is neither allegation nor proof that the plt. acted upon the faith of Maclellan's power of attorney being continued in force. The evidence, I think, proves the contrary. It may be, and I have little doubt but that fraud was practised by the Gardiners upon the app., but I cannot see my way to hold that the app. can be affected by that fraud. The question of acquiescence, upon which the app. also relied, is not, I think, of any weight, otherwise than as evidencing the plt.'s assent to the sale, and I do not therefore enter further into it. For the reasons which I have stated, my opinion is that this decree cannot be maintained, and that Hooper's bill ought to have been dismissed. But as there has certainly been a want of caution on the part of the app., I think it should have been dismissed without costs, and of course there will be no costs of the appeal. As to the other appeal by Maclellan, I think it suffices to say that the case against him is, in my opinion, stronger in some points than the case against Hooper, and that his bill was therefore properly dismissed. And for the same reasons as in the other case, I think that it was properly dismissed without costs. The order upon this appeal will therefore simply be, to dismiss the appeal without costs.

The LORD CHANCELLOR.—I think that the petition of appeal in Maclellan's case ought to be dismissed with costs.

Solicitors for Mr. Hooper and for Mr. Maclellan, *Freshfields and Newman*.

Solicitors for Gumm, *Cotterill and Son*.

Jan. 16, 17, and 28, 1867.

(Before the LORD CHANCELLOR (Chelmsford) and Lord Justice CLARKE.)

SCHOTSMANNS v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Stoppage in transitu—Unpaid vendor—Goods shipped in vessel of purchaser—Knowledge of vendor of ownership—Delivery—Jurisdiction of the Court of Ch.

C., a merchant at Goole, trading as F. and Co., bought flour of the plt., residing in France, which was to be shipped at Rouen. From that port there was a line of steamers running to Goole, which belonged to a firm of W., C., and Co., in which C. was a partner. C. directed that the flour should be shipped by one of these vessels, speaking of them as "our steamers," and mentioning one, the L., which was about to sail, in which there would be room. The L. was registered in the sole name of C., and she was advertised as a vessel trading between Rouen and Goole. The flour was shipped by her, and she took a general cargo in addition. The bills of lading were signed by the master, and made the flour deliverable to F. and Co., or assigns, he or they paying freight as per agreement. When the vessel arrived in the river Humber, the plt.'s agent served a notice on the master that the flour was the property of the plt., and was not to be delivered to F. and Co. without the plt.'s further order, and gave

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notice to the railway company, which had received a part of it, to warehouse it to his (the agent's) order :

Held, that although the agent was entitled to serve such a notice, and the notice itself was sufficient in form, yet the delivery of the goods on board the vessel was a complete delivery to C. himself, and there was no such middleman concerned as to render a stoppage in transitu possible. The master of the ship was merely the servant of the owner, and did not fill such a character :

Held, also (differing from the M. R.), that it would make no difference whether the L. was a ship trading generally, or was specially sent to receive the flour, as the vendor was aware that she was the property of the purchaser.

This Court has jurisdiction to entertain a bill of this kind, for the case depends on the ordinary principles regulating in equity the relations between mortgagor and mortgagee.

Semble, stoppage in transitu does not rescind the contract, but only gives or restores to the vendor a lien for the price.

This was an appeal by the defts., the Lancashire and Yorkshire Railway Company, against a decree of the M. R., declaring that the plt. Mr. Schotsmann was entitled to a lien upon a cargo of flour for unpaid purchase-money, directing certain inquiries as to the amount due and otherwise, and ordering that the plt. should be at liberty to add his costs up to the hearing to his security.

The hearing of the cause before his Lordship is reported in 13 L. T. Rep. N. S. 733, and from that report and the judgments in the Court of Appeal the facts sufficiently appear.

Jessel, Q. C. and Bird supported the appeal on behalf of the company, and stated that there were several grounds upon which they relied, the principal one being that the shipment of the flour in question on board a vessel which the vendor knew to be the property of the purchaser was a complete delivery to him, and prevented the possibility of a stoppage in transitu. They accordingly referred upon this question to

Gibson v. Carruthers, 8 M. & W. 321, 328;
The London and North-Western Railway Company v. Bartlett, 7 H. & N. 400; 5 L. T. Rep. N. S. 399;
Re Humberston, 1 De G. Bank. Cas. 263;
Van Casteel v. Booker, 2 Ex. 691;
Dutton v. Solomonson, 3 Bos. & Pull. 582.

They also contended that there was no jurisdiction in equity to support such a bill, citing in reference thereto

Shee v. Prescott, 1 Atk. 245;
Goodhart v. Lowe, 2 J. & W. 349;
Straker v. Ewing, 34 Beav. 147; 11 L. T. Rep. N. S. 588.

Baggallay, Q.C., Eddis, and C. P. Butt (of the Common Law Bar), for the plt., in support of the decree, were directed to address themselves to the question whether there had been a complete delivery of the flour to the purchaser by shipping it on board his vessel. If the vessel had been dispatched by the purchaser specially to receive the flour, then the shipping of the flour on board her would have been a complete delivery; but she was a general trader, plying regularly between the two ports; it was open to anybody to consign cargo by her. On this occasion she had a considerable freight in addition to the flour, and that she chanced to belong wholly or in part to the purchaser could not make the shipping of the flour by her a complete delivery. The M. R. had considered this as expressly decided in the case of *Mitchell v. Ede*, 11 Ad. & El. 888; in addition to which they relied on

Bohlingk v. Inglis, 3 East, 381;
Cyle v. Atkinson, 5 Taunt. 759;

Turner v. The Trustees of the Liverpool Docks, 6 Ex. 542;
Mason v. Lickbarrow, and other cases in 1 Sm. L. Cas. 681;
Abbott on Shipping, 264.

Jessel, Q.C. having replied, judgment was reserved until the 28th Jan., when

The LORD CHANCELLOR said:—This is an appeal from the decree of the M.R. in favour of the plts., who by their bill had claimed a right as against the defts. to stop certain goods in transitu under the following circumstances:—The plts. were Emile Schotsmann, a merchant at Lille, and Geo. Gwyn Craig, his agent and correspondent in England. The defts. were the Lancashire and Yorkshire Railway Company. James Cunliffe, who carried on business at Goole, under the firm of James Fort and Co., and Harwood Walcot Banner, the assignee under Cunliffe's bankruptcy. In July 1864 the plt. Schotsmann having entered into a contract to sell to Fort and Co. 1870 sacks of wheat flour, directed his agents, Messrs. Delafosse and Co., of Rouen, to purchase and ship the same, and Messrs. Delafosse and Co. accordingly, towards the end of Sept. 1864, shipped 1870 sacks of flour on board a vessel called the *Londos*, then at Rouen, and bound for Goole. Four bills of lading were signed by the master, making the flour deliverable to "Fort and Co., or assigns, he or they paying freight for the same at and after the rate of , as per agreement." Three of the bills were handed to Messrs. Delafosse, and the fourth was retained by the master. The *Londos* was one of several trading vessels belonging to the firm of Watson, Cunliffe, and Co., of which firm the deft. Cunliffe was a member. She was registered in the name of Cunliffe as sole owner, and was advertised as a vessel trading between the ports of Rouen and Goole. Besides the flour consigned to Fort and Co. the *Londos* had a general cargo belonging to other persons. On the 30th Sept., in consequence of reports that Fort and Co. were in embarrassed circumstances, Messrs. Delafosse indorsed one of the bills of lading in their possession with these words: "Do not deliver to Messrs. Fort and Co. but only to Emile Schotsmann or his order," and forwarded it to Schotsmann, who indorsed it to Craig his agent. The *Londos* arrived in the Humber on the 3rd Oct., and Craig served a notice on the master that Schotsmann was owner of the flour, and discharged him from delivering it to Fort and Co. or to any other person, without Schotsmann's order. He also on the same day produced to the master the bill of lading, and pointed out the indorsement thereon, and on the following day hearing that the flour was being received into the warehouses of the defts the Lancashire and Yorkshire Railway Company, he gave notice to them to warehouse it to his order, which they declined to do. This bill was accordingly filed, praying that the plts. might be declared entitled to have the flour delivered up to them, or if not entitled, the plt. Schotsmann might be declared entitled to a lien on the flour for the payment of the purchase-money, and that the defts. might be restrained by injunction from removing or parting with the flour. The cause was brought on upon the motion for a decree, when the M. R. by order declared that the plt. Schotsmann was entitled to a lien for unpaid purchase-money and his costs of suit upon the cargo of flour or the produce, and directed certain inquiries in respect thereof.

Upon the argument of the appeal it was objected that, although stoppage in transitu is an equitable doctrine, it is not the proper subject of a bill in equity. But assuming that such a bill might be maintained, the deft.'s counsel urged several objections to the right of the plt. to stop in transitu, the principal one being that there was a complete delivery of the

flour to the consignee at Rouen. We felt the force of this objection so strongly that we desired the plt.'s counsel to confine their argument to it, intimating to them that if necessary we would afterwards hear them on the other points raised on the part of the defts. Upon full consideration we are agreed that the case must be disposed of upon this ground alone. I think it right, however, to say that I entertain no doubt of the plt.'s claim being the proper subject of a bill in equity.

It is of the essence of the doctrine of stoppage *in transitu*, as was most correctly and clearly stated by Lord Cranworth, when Rolfe, B., in the case of *Gibson v. Carruthers*, 8 M. & W. 328, "that during the *transitus* the goods should be in the custody of some third person intermediate between the seller who has parted with, and the buyer who has not yet acquired, actual possession." If the goods are actually delivered to an agent of the vendee employed by him to receive delivery, the vendor is divested of his right of stoppage *in transitu*. On the other hand, although there is an actual delivery to the vendee's agent, the vendor may annex terms to such delivery, and so prevent it from being absolute and irrevocable. In this case the goods were shipped on board the consignee's own ship, and delivered into the possession of his own servant, the master, who signed bills of lading making the goods deliverable to the consignee or assigns. There was therefore a delivery to the agent for his principal, and no control over the delivery was in terms reserved to the vendor. The possession of three out of the four bills of lading by the agent of the vendor was a fact of no importance. It gave him no authority over the delivery of the goods, nor any power to transfer the bills of lading themselves. Supposing the plt. to have been ignorant of the fact that the vessel in which he shipped his goods belonged to the consignee, a question might have arisen whether the delivery could properly be held to be complete. It would seem to be scarcely just to a person who had delivered goods to be carried to a consignee under the belief that he could exercise the ordinary right of an unpaid vendor over them to deprive him of that right, because he had ignorantly placed the goods on board the consignee's own vessel, and therefore must be taken to have made an absolute delivery of them. It is unnecessary, however, to dwell upon this point, because I think there is satisfactory evidence that the plt.'s agent knew that the vessel in question belonged to Cunliffe, the consignee named in the bill of lading as Fort and Co.

The plt. having, therefore, placed his goods in the *Londos*, with full knowledge that the consignee was the owner, can it be said that the delivery at Rouen was not absolute and complete? The authorities upon this subject appear to make no distinction between the case of the ship of the vendee being sent out expressly to receive the goods, and that of the goods being shipped without any previous arrangement for the purpose. In either case, the words of Parke, B. in *Van Casteel v. Booker* apply: "The delivery in the purchaser's own ship is a final delivery at the place of destination." If the vendor desires to protect himself under these circumstances he may restrain the effect of such delivery, and preserve his right of stoppage *in transitu* by taking bills of lading making the goods deliverable to his order or assigns. Not only was this precaution not taken in the present case, but the bill of lading, which is always made out by the direction, or at least with the assent, of the shipper, makes the goods deliverable to the consignee or assigns. The M. R. thought that the whole case was involved in the question whether the *Londos* was a ship trading generally, or was specially sent for the

express purpose of receiving the flour. I cannot discover that this distinction has ever been made the ground of any previous decision. His Lordship thinks that it is to be found in the case of *Mitchell v. Ede*, 11 Ad. & Ell. 888, which he regards as having decided that a general ship "stands expressly in the same situation as a common carrier." But *Mitchell v. Ede* was, as was frequently observed in the course of the argument, not a case of stoppage *in transitu*, but a question whether, between two persons creditors of Mackenzie, a Jamaica planter, the property in certain sugars shipped by him on board one of the vessels of the defts. which were in the habit of being sent out with supplies to estates in Jamaica, and receiving consignments from the estates of Mackenzie and other planters in return, and of taking out and bringing home goods from different shippers, when offered, passed to the plt. or the defts. The bill of lading signed by the captain, made the sugar deliverable to the defts. or their assigns, but it was indorsed by Mackenzie, with a condition that it should be delivered to the defts. only on their giving security for the payment of certain bills of exchange. The bill of lading was never in the hands of the defts. Mackenzie being indebted to the plt. for advances made to him indorsed and delivered the bill of lading to the plt., and it was held that no property in the sugar passed to the defts. by the delivery into their ship under the above circumstances. It appears to me that this case was not decided upon the distinction between a general ship and one sent for the express purpose of receiving the sugar, for if it had been a question of stoppage *in transitu* upon a sale of the sugar to the defts., and it had been delivered into the defts.' own vessel sent out for the purpose, although the property in the goods would have passed, yet the effect of the delivery would have been restrained by the indorsement on the bill of lading and the right to stop *in transitu* would have been preserved. This appears to be established by the case of *Turner v. The Trustees of the Liverpool Docks*, 6 Ex. 548. The M. R. is reported to have said that if the bills of lading had been sent to Fort and Co. (that is to Mr. Cunliffe), he apprehended that "the right of stoppage *in transitu* would have been at an end as soon as he got the bills of lading. So also if delivered to his agent on board the vessel." I think there must be here some mistake in the report, because the mere possession of the bill of lading by the consignee or his agent will not in general prevent the right of stoppage *in transitu*. It will certainly enable the consignee, by indorsing it over, to deprive the vendor of this right, and the delivery of it in a certain form to the consignee or his agent may be part of a state of facts from which a complete delivery of the goods may be established. But by itself the mere possession of the bill of lading by a consignee or his agent will not prevent the exercise of the right of stoppage *in transitu*.

I have said that the question of the continuance or termination of the *transitus* is one which must be determined by the facts of each particular case. I have founded my opinion that there was a complete delivery of the flour at Rouen entirely upon the evidence. The consignee was the owner of the vessel on board of which the flour was shipped. The master was his servant, or agent. The vendor's agent, with a knowledge of these facts, delivered the flour to the consignee's agent to be conveyed to the consignee, and he assented to the bills of lading being made out for the delivery of the flour to the consignee or assigns. He placed no condition or restriction upon the delivery so as to leave the vendor any control from the moment the flour was shipped in the consignee's known ship under such a bill of lading. If the intention of a vendor has

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[CHAN.]

anything to do with this question these facts and circumstances are an undoubted indication of the intention that the possession as well as the property of the flour should pass to the consignee at the time of its shipment at Rouen. For these reasons, I think the order of the M. R. must be reversed, and the bill dismissed with costs.

Lord Justice CAIRNS said:—The foundation of the title of the plts. in this case is, that the plt. Schotsmanns is the unpaid vendor of the flour mentioned in the bill, and that the plt. stopped this flour in its *transitu* to the purchaser Cunliffe, who had since become bankrupt. The Lancashire and Yorkshire Railway Company, who are the apps., among many objections which they take to the decree made by the M. R. in favour of the plts., contend that on the 3rd Oct. 1864, the time of this alleged stoppage, there was in fact no *transitu*, but that the flour had antecedently, namely on or before the 28th Sept., been delivered to the purchaser. There is no dispute as to the facts: Cunliffe, trading at Goole as J. Fort and Co., bought the flour in July 1864 of Schotsmanns. It was to be paid for by an acceptance due the 31st Oct. 1864, and it was to be shipped for Goole free on board at Rouen. There was a line of steam traders plying between Rouen and Goole, some of which belonged to Cunliffe, and others to Watson, a partner with Cunliffe in another firm of Watson, Cunliffe and Co. Schotsmanns, or his agent Delafosse, was directed by Cunliffe, by a letter of the 28th Aug. 1864, to ship the flour by this line of steamers, Cunliffe in the letter calling them "our steamers," and informing his correspondent that there would be room in the steamer of the 30th Sept. In this steamer, which was the *Londos*, belonging to Cunliffe, the flour was shipped by Delafosse, agent of Schotsmanns. Four bills of lading were signed by the master stating that the flour was shipped by Delafosse and making it deliverable to "J. Fort and Co." or assigns. One of these was retained by the master, and the other three were handed to Delafosse. The place in the bill of lading in which the rate of freight was intended to be specified was filled up "as per agreement;" but it is not suggested that this was otherwise than a mode of expressing that no freight would be payable on the property of the owner of the ship. On the 3rd Oct. the *Londos* arrived in the Humber, and a notice to stop *in transitu* was given on that day by the plt. Craig as agent for Schotsmanns. This notice was, in my opinion, sufficient in form if the right to stop *in transitu* existed. And there was, as I think, sufficient evidence of the authority of Craig to stop *in transitu* on behalf of Schotsmanns, and also of the insolvency at that time of Cunliffe.

The question is, did the right to stop *in transitu* exist? or, in other words, was the delivery on board the *Londos* a delivery to Cunliffe, the purchaser of the goods? The property in the goods, it is admitted, vested in Cunliffe on the contract of purchase and the appropriation of the goods. The goods were to be delivered on board at Rouen. The *Londos* was the ship of Cunliffe, and was indicated as such for the delivery of the goods. The master of the ship was his servant. No special contract was entered into by the master to carry the goods for or to deliver them to any person other than Cunliffe, the purchaser. In point of fact no contract of affreightment was entered into, for the person to sue on such a contract would be Cunliffe, in whom was vested the property in the goods, and the person to be sued would be the same Cunliffe as owner of the *Londos*. The essential feature of stoppage *in transitu*, as has been remarked in many cases, is that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted

with, and the purchaser who has not yet received them. It was suggested here that the master of the ship was a person filling this character. But the master of the ship is a servant of the owner, and if the master would be liable because of the delivery of the goods to him, the same delivery of the goods to him would be a delivery to the owner, because delivery to the agent is delivery to the principal. In the absence therefore of direct authority to the contrary, I should be clearly of opinion that the flour in question had been delivered to Cunliffe at Rouen, and could not afterwards be stopped *in transitu*.

It was said, however, and this appears to have been the opinion of the M. R., that the case of *Mitchell v. Ede*, in 11 Ad. & El., determined that delivery on board a general ship like the *Londos* could not be a delivery to the purchaser through the owner of the ship. The case of *Mitchell v. Ede* was not a case of stoppage *in transitu*, or of vendor and purchaser. The question in it was, whether a Jamaica planter, who had promised to consign sugars to his London correspondent, to whom he was indebted, had by shipping sugars on board a general ship of this correspondent irrevocably appropriated them so as to pass the property, and debar himself from altering their destination? It was necessary therefore to ascertain *quo animo* was the delivery made, and the Court on a special case held that the circumstance of the ship being a general ship or a seeking ship, negated the inference that the delivery was meant to pass the property. In that case the delivery to the owner of the ship was admitted, and the question was whether the property passed. Here it is admitted that the property had passed to the purchaser, and the question is, was there a delivery? The case of *Mitchell v. Ede* has, in my opinion, no application to the present.

I may add, that the case of *Corvas-jee v. Thompson*, 5 Moo. P. C. Cas. 165, which was not, I think, referred to in the argument in this case, is, if authority be wanted, strongly opposed to the right of the plts.

These observations, if well founded, would dispose of the present appeal. But I cannot avoid adverting to an argument very strongly urged by the apps., and on which we did not hear counsel for the plts. It was said that there was no jurisdiction in a court of equity to entertain a bill of this description, which was described as a bill calling on a court of equity to give effect to a stoppage *in transitu*, and filed by plts. alleging a legal title to chattels for which trover or detinue might be brought at law. And it was said that Lord Eldon, in *Goodhart v. Lowe*, 2 J. & W., had expressed an opinion that such a bill could not be maintained. The case of the plt. Schotsmanns, as I understand it, may thus be stated: He says he had sold the goods thereby transferring the property at law to Cunliffe, that by stoppage *in transitu*, alleged to be effectual, he has re-vested in himself a legal title to these goods; but that although he holds this title merely as security for the price of the goods, and is liable to be called on to surrender it on payment of the price, he is an incumbrancer only, or a person having what Lord Kenyon, in *Hodgson v. Loy*, 7 T. R. 440, described as a kind of equitable lien for the price of the goods, which lien or incumbrance he is entitled to realise, the account of what is due being at the same time taken; that the goods are in the meantime in the possession of one of the debts, who is a stakeholder or agent, holding them merely for the person who is the owner, subject to the lien; and that the goods require the protection of an injunction. I should be prepared to hold this case to be entirely within the province of this court, and depending on the ordinary principles which regulate in equity the relation of mortgagor and mortgagee, whether of real or personal prop-

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perty, although for obvious reasons cases of this kind are more generally and more conveniently brought into a court of law. In *Goodhart v. Lowe* some goods had been shipped on board a general ship in the London Docks, and the plt., an unpaid vendor of the particular goods, applied to Lord Eldon for an injunction to restrain the sailing of the ship, and for a *ne exeat* against the master. The application was to stop the *transitus* of the ship containing the goods of several persons upon a default of one, and it was to this view of the case that the general observations of Lord Eldon on a motion *ex parte* for an injunction are addressed. The bill in that case, at the original of which I have looked, was not framed as a bill of an unpaid vendor to realise a lien, or to take accounts. And it is, moreover, during the period since 1819, the date of that case, that the courts have more clearly shown a disposition to hold that stoppage *in transitu* does not rescind the contract, in which case there would be no privity in a court of equity between the parties, but only gives or restores to the vendor a lien for the price. The foundation of the case of the plts. however having failed, the decree of the M. R. must be reversed, and the bill dismissed with costs.

Solicitors for the railway company, *Clarke, Woodcock, and Ryland*, agents for *Grundy and Co.*, of Manchester.

Solicitors for the plts., *Pritchard and Sons*, agents for *George England*, of Howden.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and C. W. LOVET, Esqrs.,
Barristers-at-Law.

Wednesday, Nov. 14, 1866.

LEWIS (app.) v. JEWHRST (resp.)

Seaman's wages—Desertion—Consular certificate of desertion abroad.

A seaman having remained ashore all night at a foreign port, the master went to the consul without any notice to the seaman and obtained his certificate, with an indorsement thereon that the seaman had deserted: (17 & 18 Vict. c. 104, s. 107.)

In a summary proceeding before justices in this country by the seaman to recover his wages, the consul's certificate was

Held, not to be conclusive evidence of the fact of desertion.

Case stated under 20 & 21 Vict. c. 43.

The app., master of the British ship *Plover*, was summoned before the justices of the peace for the borough of Sunderland, in the county of Durham, on the 21st March 1866, under the Merchant Shipping Act 1854, sect. 188, by the resp. for a balance of wages amounting to 6*l.* 7*s.* 6*d.*

The resp. shipped as an able seaman on board the *Plover* in 1865 on a voyage from Sunderland to Alexandria and Taganrog and back at a rate of wages of 3*l.* per month.

After leaving Alexandria the vessel called at Constantinople on the 11th Aug., and on 12th Aug., in consequence of some difference arising out of the app. having found fault with the resp. whilst on duty at the wheel a few days before, the resp. requested leave to go on shore at Constantinople to make a complaint to the consul and endeavour to obtain his discharge, but the app. refused to allow him to go on shore for that purpose until the app. could accompany him.

On the 14th Aug. the resp., after packing up his clothes in expectation of his discharge, went on shore with the app. a distance of three miles from the

ship when at anchor in the Bosphorus, but without taking his clothes with him, and after reaching the shore the app. discovered that he had not brought the ship's papers with him, and sent the resp. back to the ship in a shore boat for them. On his return they went before the consul, who refused to discharge the resp. After leaving the office of the consul, the app. and the resp. agreed that the latter should be discharged and leave the ship, and they went together to the shipping office to adjust the question of wages for that purpose, but the shipping master declined to act in the matter without the assent of the consul, who, upon being applied to, refused to assent, on the ground that if he did so he would have numerous similar applications.

On leaving the shipping office, the resp. alleges that he was directed by the app. to go to the wharf and wait there until the app. came to take him back to the ship, and that in consequence of such directions he did go to the wharf and remained there waiting for the app. till the afternoon, but the app. did not come for him as he had promised, and having no money to pay for a lodging he, the resp., slept on the wharf all night.

On the contrary, the app. alleges that he requested the resp. to accompany him back to the ship immediately upon leaving the shipping office, which the resp. declined to do, asking for a shilling or two to spend on shore, after which he would return to the ship, but the app. refused to advance him the money, and went back to the ship without him.

The resp. states, but unsupported by other evidence, that he went to the consul's office early next morning, 14th Aug., and reported himself, but could learn nothing of the app., and therefore waited about for him expecting him to come on shore again. He met him in the middle of the day and asked him what he was going to do with him, whereupon the app. replied to the effect that he did not now belong to the ship, and he had nothing further to do with him. In the meantime the app. appears to have made an entry in the ship's log-book to the effect that the resp. had deserted, and then proceeded on shore in the forenoon of the 14th Aug. and reported it to the consul and obtained from the consul, on the app.'s own statement and application, a certificate to that effect, the resp. not being present before the consul. On returning from the consul's office he met the resp. and made the observation before stated.

The app. returned to the ship the same night without the resp., taking with him another man in his place, and soon after midnight got the ship under weigh in tow of a tug-boat and proceeded to Taganrog, taking with him the resp.'s clothes, alleged to be worth 10*l.*, and ultimately returned to England, where he arrived for the time on the 25th Nov. last, being within six months next before the making of the complaint before justices.

The resp. after three days (having pawned his jacket for a maintenance) obtained another ship at 3*l.* a-month wages, the same as he had had on board the *Plover*, and which was admitted to be the current rate of wages at Constantinople at that time.

It was contended on the part of the app. that the question of the resp.'s desertion had been adjudicated upon by the British consul at Constantinople, whereby his wages and clothes had become forfeited, and therefore the magistrates at Sunderland had no jurisdiction; then that the entry in the official log and the consul's certificate were conclusive evidence of the fact of desertion.

On the part of the resp., it was contended that the proceeding before the consul being *ex parte*, and merely to protect the app. from the penalties under the provisions of the Merchant Shipping Act, could not amount to an adjudication, and that, although the entry in the official log and the consul's certificate might be admissible in evidence, they

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were not conclusive, and still left the fact of the desertion to be determined by the justices on the evidence before them.

The justices being of opinion that the resp. had not in fact deserted, and had not intended to desert, and that their jurisdiction was not affected by the proceeding before the consul at Constantinople, made an order for part of the amount of the wages claimed after allowing certain deductions admitted to be due to the app. The app. thereupon applied for a case for the opinion of this court.

Shield for the resp.—The justices acted under sect. 186 of 17 & 18 Vict. c. 104, and found as a fact that the resp. had not deserted at Constantinople, and did not intend to do so, and they were not estopped from adjudicating by the consul's certificate with the indorsement thereon that the resp. had deserted.

C. Pollock, Q.C. for the app.—The consul acted under sect. 207 of the 17 & 18 Vict. c. 104, and he has power by the section to inquire into the allegation of desertion, and having done so and given his certificate it is conclusive of the fact of desertion, and the wages were therefore forfeited.

COCKBURN, C. J.—The consul's certificate obtained in the absence of the seaman was not conclusive evidence of the fact of desertion. That is a provision made for the protection of the master. In this case the justices had jurisdiction to inquire into the fact of desertion.

Judgment for the resp.

COURT OF COMMON PLEAS.

Reported by W. GRAHAM and M. W. McKILLAR, Esqrs.
Barristers-at-Law.

Thursday, May 16, 1867.

BANNISTER v. BRESLAUER.

Charter-party—Charterer's liability—Foreign consignees—Lien for demurrage.

In an action upon a charter-party by shipowners against charterers, agents of foreign consignees, for not loading with all dispatch, according to a clause in the charter-party, the defts. pleaded another clause to this effect, "the charterers' liability on this charter to cease when the cargo is shipped (provided the same is worth the freight on arrival at the port of discharge), the captain having an absolute lien on it for freight, dead freight, and demurrage, which he or owner shall be bound to exercise." The plea averred fulfilment of the proviso, and therefore defts.' exemption from liability:

Held, upon demurrer to the plea, that this condition in the charter-party was a good answer to the action.

Declaration:

For that a charter-party was made and entered into by and between the plt. by one Thomas Clarkson, his agent in that behalf and therein described, the plt. being owner of the ship therein described, and the defts. therein described as Messrs. Breslau and Thomas, and which said charter-party was and is to the tenor following, that is to say:—Charter-party, London, 7th Aug. 1866. It is this day mutually agreed between Thomas Clarkson, of the good ship or vessel called the *F. Edwards*, of the measurement of 116 tons or thereabouts, now in the Thames, and Messrs. Breslau and Thomas, of London, merchants, that the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to a safe berth in the Thames or dock clear of dues, or so near thereunto as she may safely get, and there load from the factors of the said freighter a full and complete cargo of coal tar pitch, in bulk not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to Antwerp, or so near thereunto as she may safely get, and deliver the same on being paid freight as follows:—Seven shillings per ton of 20 cwt. delivered with half a guinea gratuity in full of all port charges

and pilotage (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever during the said voyage always excepted). The freight to be paid on the unloading and right delivery of the cargo in cash, to be loaded and discharged with all dispatch. The cargo to be brought to and taken from alongside the vessel at merchant's risk and expense. The ship shall be consigned to charterers' agent at port of discharge on customary terms, sufficient cash for ship's ordinary disbursement at port of loading; an account of freight to be advanced by the charterers subject to 5 per cent. and insurance. The charterers' liability on this charter to cease when the cargo is shipped (provided the same is worth the freight on arrival at the port of discharge), the captain having an absolute lien on it for freight, dead freight, and demurrage, which he or owner shall be bound to exercise. Penalty for non-performance of this agreement, estimated amount of freight. Should the pitch be weighed on board, captain to sign bills of lading for weight; 5 per cent. commission is due on the shipment of this charter-party on the amount of freight, primage, and demurrage, to Breslau and Thomas, to whom the vessel is to be addressed and reported at the Custom-house on her return to London, or their agents if to an "outport." And the said ship being tight, staunch, and strong, and every way fitted for the voyage, did, with all convenient speed, sail and proceed to the place agreed on by the said charter-party, and was there ready to load from the factors of the defts. the said agreed cargo, and did and performed all things, and all things happened and exist, and times elapsed to entitle the plt. to have the said agreed cargo loaded on board the said ship. Yet the defts. did not load the said ship with the said agreed cargo with all dispatch, or within a reasonable time, and wholly neglected so to do, and did not load the same, and kept and detained the said ship in and about the loading of the same as aforesaid for a long and unreasonable time, whereby the plt. during all that time was deprived of the use of the said ship, and incurred expense in keeping the same and maintaining the crew thereof.

Plea 3:

And for a third plea the defts. say that the said charter-party was made subject to certain terms or conditions, that is to say, upon the terms or conditions that the charterers' liability on the said charter-party was to cease when the cargo was shipped (provided the same was worth the freight on arrival at the port of discharge) the captain having an absolute lien on it for freight, dead freight, and demurrage, which he or owner should be bound to exercise; and the defts. say that the said cargo was shipped, and that the same was worth the said freight on arrival at the said port of discharge, and that thereupon the defts.' liability as charterers upon and under the said charter-party ceased.

There was a demurrer to this plea.

The following are the particulars of plt.'s claim indorsed on the writ:

1866.	To 15 days demurrage of plt.'s vessel, the
17th Aug.	<i>F. Edwards</i> , in loading cargo of pitch
To 1st Sept.	by defts. as per charter-party, at 2l. per
	day.....
	£45

Keane, Q.C. for plt.—The plt. is a shipowner, and the defts. were charterers of a cargo by plt.'s ship, and agents of the consignees. The charter-party provides that the cargo is to be loaded and discharged with all dispatch; but the ship waited twenty-three days for the completion of the loading, and the owner has brought this action for fifteen days' demurrage, having allowed eight days as a reasonable time for loading. To this the defts. plead that their liability ceased, according to a clause in the charter-party, when the cargo was shipped. The first case to which I shall call attention is that of *Oglesby v. Yglesias*, E. B. & E. 930, in which the following provision in the memorandum for charter-party was held to exempt the defts. as agent for the freighter, from liability for demurrage at the port of discharge: "It is further agreed that, this charter being concluded by J. R. Yglesias for another party, the liability of the former is every respect, and as to all matters and things, as well before as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo." The next case is *Milvain v. Perez*, 3 E. & E. 493, where the exempting clause was: "This charter being concluded by Messrs. Perez and Co. on behalf of another party, resident abroad, it is agreed that all liability of the former in every respect, and as to all matters and things, as well before and during as after the shipping of the said cargo, shall cease so

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[Ex.]

soon as they have shipped the cargo; and further, that the vessel shall be cleared at the Custom-house by them." The contention on the other side is, that the words in the present charter-party have the same effect as those in each of the two cases I have cited; but they are merely "the charterers' liability on this charter to cease when the cargo is shipped." Besides, this case is distinguishable because, by the decision of the Ex. Ch. in *Smith v. Sieveking*, 5 E. & B. 589, there is no lien provided by this charter-party for this demurrage. In the case of *Bromhead v. Johnassohn*, argued before the Court of Ex. on the 16th Jan. last, not yet reported (see 42 L. T. Business of the Week, 253) it was held that this provision was no defence to an action for not shipping within a specified time.

Brown, Q.C.—This provision is always introduced by the defts. into their foreign charter-parties on account of their being agents only, and their object is, as it was in the cases mentioned, to transfer the shipowner's remedy, in case of dispute, to their principals abroad. Our answer to the action is in effect that, from the shipping of the cargo, the plt. must look for recompence in all matters of complaint to the consignees at Antwerp. *Smith v. Sieveking* decided that the consignee, under a bill of lading, "paying for the said goods as per charter-party," had nothing to do with the provisions of the charter-party concerning demurrage. In *Milvain v. Perez*, (p. 500), Crompton, J. said: "If the argument for the pls. were well founded, the defts. would be liable for everything that occurred either before, during, or after the loading, if the loading was not in regular turn. But it is evident that the defts. were not to be in any way responsible, provided the loading took place under the contract, although the cargo might be shipped a day or two later than was regular." [Byles, J.—Is it customary to pay demurrage before the ship sails?] I believe not. The freight and demurrage are generally paid together. Here the captain has an absolute lien for freight, dead freight, and demurrage, which he or the owner shall be bound to exercise. The charterers undertake no more than to put the cargo on board.

Keane, in reply, referred to the case of *Pearson v. Göschen*, 17 C. B., N. S., 352; 10 L. T. Rep. N. S. 758, an action for freight and demurrage, in which Williams, J. said: "The words relied on (viz., master and owners to have an absolute lien for all freight, dead freight, demurrage, and other charges) in support of this claim are the printed words inserted in all these documents; and . . . if there are no special provisions they are not to be regarded. There are many words in most mercantile instruments which have no meaning at all if the contract in hand does not fit them."

Byles, J.—I am of opinion that this is a good plea. It certainly does not contain so express a provision for the charterers' exemption after shipment as there was in each of the two cases of *Oglesby v. Yglesias* and *Milvain v. Perez*; but expressions similar to that in this charter-party intended to include demurrage before the sailing of the ship are not I believe unusual. In construing this stipulation literally, we are not therefore doing anything contrary to the custom of merchants. Here the cargo is to be loaded with all dispatch; this creates a liability on the defts.'s part to exercise dispatch in loading. By this plea the deft. does not dispute this, but he says that his liability ceased when the cargo was shipped, according to the express terms of the charter-party, provided the cargo, upon which the captain had a lien for such charges as this, is worth the freight at the port of discharge. This condition the plea goes on to aver was satisfied, and

I think that the demurrage, for which the captain or owner is to exercise an absolute lien, includes delay in loading and unloading. This plea then is within the express condition of the charter-party, and is therefore good.

KEATING, J.—I am of the same opinion, and looking at this charter-party I think the plea was intended by both parties to be good. The words are certainly less expressive than those in the cases mentioned by Mr. Keane, but they are sufficient to make the condition clear, and also the proviso which has to be fulfilled. It was the general intention of the parties to have recourse to the charter-party to settle any question of liability, and we shall not be straining its language by holding that it exempts the defts. by this condition. I agree with the remarks of my brother Byles.

M. SMITH, J.—I am of the same opinion. We must arrive at the intention as well as we can from the words of the document. They might have been more specific, but the clause is sufficiently clear to exempt the charterers from liability after the ship was loaded, on condition that the cargo was worth the freight. The exemption is from liability on the charter-party; Mr. Keane says the charterers' liability does not comprehend this claim, which arose prior to the ship's sailing. It seems, however, to me that the liability includes demurrage at loading port as well as at discharging port. The cargo was to be loaded and discharged with all dispatch, and both are charterers' liabilities under the charter-party.

Judgment for defts.

Attorney for plt., J. S. Bennett.

Attorneys for defts., G. and W. Webb.

COURT OF EXCHEQUER.

Reported by H. LEMON and E. LUMLEY, Esqrs., Barristers-at-Law.

Thursday, Jan. 17, 1867.

BUCKLE v. KNOOP AND ANOTHER.

Charter-party—Measurement of cargo at port of loading or of delivery—Calculation and payment of freight accordingly—Construction of charter-party—Custom of trade at Bombay—Admissibility of evidence of—Knowledge of.

By the terms of a charter-party between plt. and the defts., the plt.'s ship was to load a cargo of cotton at Bombay and proceed with and deliver the same at Liverpool, "on being paid freight as follows, viz., 75s. per ton of 50 cubic feet delivered." The ship was duly loaded at Bombay with the stipulated cargo, the measurement of which was, in accordance with the established custom there, ascertained by submitting the bales, immediately before shipping them, to powerful hydraulic pressure, whereby they were compressed into the smallest possible compass and, so compressed, occupied a space of from six to eight tons of fifty cubic feet each less than the entire capacity of the ship, but when unloaded at Liverpool, and released from the restraint of the hold, they expanded to an extent exceeding by some 180 tons the capacity of the ship to contain them. The plt. claimed to be paid freight on the measurement of the cotton as "delivered" at Liverpool, which the defts. resisted, contending that the payment was to be calculated on the measurement of the cargo at the port of shipment. Evidence was admitted at the trial of a custom in the Bombay trade to pay freight on measurement of the cargo at Bombay, ascertained as above mentioned, which custom was found by the jury to exist, but there was no direct proof that the plt. was cognizant of its existence:

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Held, first, that, upon the construction of the charter-party, and without reference to any question of usage, the amount payable for freight was to be ascertained by the measurement of the cotton at Bombay, the port of loading, and not at Liverpool, the port of delivery:

Secondly, that evidence of the custom was properly admitted. Parties entering into a contract relating to a particular trade must be assumed to be cognisant of all the usages connected with that trade.

Gibson v. Sturge, 10 Ex. 626; 24 L. J. 121, Ex.; and *Coulthurst v. Sweet*, L. Rep., 1 C. P. 649, discussed and distinguished.

The plt. in this action was a shipowner residing at Bristol, and the owner of the ship *Gloucestershire*, and the defts. were merchants at Manchester, carrying on business under the trading name of De Jersey and Co. The action was brought to recover the balance of freight of a cargo of cotton from Bombay to Liverpool, due to plt. under a charter-party of the ship *Gloucestershire*, made and dated at London, 18th Jan. 1864, and by which, so far as is material to this report, it was mutually agreed between the plt. and defts. that the said ship should forthwith proceed to Bombay and there load from the factors of the said affreighters a full and complete cargo of cotton and [or] wool . . . and being so loaded, shall therewith proceed to Liverpool, and deliver the same in any dock freighters may appoint on being paid freight as follows, viz., *seventy-five shillings per ton of fifty cubic feet delivered for cotton and [or] wool, in full of all port-charges and pilotages (restraint of princes, &c.)* The freight to be paid on unloading and right delivery of cargo (in the manner therein specified). . . . The captain to sign bills of lading, if requested, at any rate of freight, but at not less than chartered rate, without prejudice to this charter, and the owner to have an absolute lien on the cargo for all freight, dead-freight, and demurrage.

It was proved at the trial before Lush, J. and a special jury, at the last summer assizes at Liverpool, that the ship sailed to Bombay, where she was loaded by the defts.' factors with the stipulated cargo of cotton, and that, in conformity with the established custom in such cases at Bombay, the measurement of the cotton with reference to the capacity of the hold of the ship was ascertained by submitting the bales immediately before shipping them on board to powerful hydraulic pressure, whereby they were compressed into the smallest possible compass; and it appeared that on the present occasion the cotton when so compressed occupied a space of from six to eight tons of fifty cubic feet each less than the entire hold of the ship was capable of containing; and also that, when unloaded at Liverpool and released from the pressure and restraint of the hold, it expanded to such an extent that it attained a bulk exceeding, by some 180 tons, the capacity of the ship to contain it. The captain was requested by the defts.' Bombay agent to sign bills of lading, in which the freight was expressed to be "as per margin," and there the measurement of the cotton was stated to be made in the manner above mentioned; and this he in the first instance declined to do on account of the measurement stated therein, contending that the measurement was to take place under the special terms of the charter-party at the port of discharge, and not at Bombay, but ultimately he consented to sign them without prejudice to the owner's interests and rights.

The question at issue was as to the mode of calculation to be adopted, whether it was to be according to the defts.' calculation on the measurement at Bombay at the time of shipment, or, as plt. maintained it should be, on the measurement at the port of discharge upon the cargo being unloaded and

delivered at Liverpool. If the plt. was right he was entitled to a sum beyond that which defts. upon their construction of the charter-party had paid him according to the Bombay measurement, and for that sum he had brought the present action. The custom in the Bombay trade to pay freight on measurement at Bombay, as above named, was found by the jury to exist, but there was no direct proof that the plt. was cognisant of its existence. The verdict was entered by direction for the defts., leave being reserved for the plt. to move to enter it for himself for 140l. 7s. 3d., the balance of freight so claimed by him as aforesaid on the ground that the freight was to be calculated on the measurement of the cargo as delivered at the port of discharge.

E. James, Q. C. accordingly in *Michaelmas Term* moved for and obtained a rule nisi to set aside the defts.' verdict, and to enter it for the plt. for 140l. 7s. 3d. on the above-named ground, also for a new trial on the ground that evidence of the usage had been improperly admitted, first, because it contradicted the terms of the charter-party; and, secondly, because it was not proved affirmatively that the plt. was aware of the alleged usage; and against that rule

Mellish, Q. C. and *Potter*, for the defts., now showed cause.—The Bombay measurement contended for by the defts. as the correct one actually represents the cubical contents which the bales occupied in the hold throughout the voyage, and which came to within six or seven tons of the ship's capacity, whereas by the plt.'s measurement the cargo would represent some 180 tons more than the ship could contain. The question turned on the meaning of the word "delivered" in the charter-party. That word had nothing to do with the measurement, but was inserted only to show that any cotton *not* delivered was not to be paid freight for. Even if there were no usage in the matter, the words "per ton of fifty cubic feet" must mean the space occupied in the hold by the cargo which the Bombay measurement accurately represents, and which the Liverpool measurement does not. The plt.'s witnesses proved that printed forms of charter-parties in the precise form of the present one, with the word "delivered" in them, had for years been used, and freight been invariably paid under them, according to the Bombay measurement. The word "delivered" meant only that freight was not to be paid for what was not delivered. On the other hand, no doubt, the learned judge, Lush, J., at the trial said, that in our construction the word "delivered" would be superfluous, as it would be implied by law, to which the answer is, that it is not unusual to find superfluous expressions in a mercantile instrument. Brokers stick to printed forms as if magic were in them, and will not use other words, for fear the courts should put some non-natural interpretation on them. It is not as if the document had been drawn by a lawyer, who would know what the law would and would not imply. Then as to the admissibility of evidence of usage. The usage proved extended to this particular form of charter, and not only to charters generally, and therefore it was binding. It will be said not so, for want of notice on plt.'s part; but the law assumes that a person entering upon a certain trade knows the custom of that trade, and that a shipowner trading to Bombay must know the usage of that port.

E. James, Q. C. and *J. A. Russell*, contra, for the plt. (the shipowner), supported their rule.—The construction that the defts. contend for is not the true and logical one, as it renders necessary the striking out from the contract of the material word "delivered," which makes it a different contract for

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the parties from that which they made for themselves. The court will look at the instrument and endeavour to ascertain its meaning, as if no evidence of usage had been given, although after it has been given it is difficult to prevent its importation into the case. In the absence of such evidence, can there be a doubt as to the right construction of the charter? The words "deliver," "delivered," and "delivery" occur in the charter-party three times in close connection, and without doubt in the first and third instances the words "deliver" and "delivery" mean *ex necessitate* at the port of discharge; and there is no reason either on the face of the document or otherwise for putting a different construction on the word "delivered." If more goods were delivered at the port of discharge than were apparently received at the port of lading, freight would be payable on the increased quantity at the port of discharge. That was settled by *Gibson v. Sturge*, 10 Ex. 626; 24 L. J. 121, Ex., in which the majority of the Court of Ex. (*dissentiente* Martin, B.) held, that the freight was payable on the measurement at the port of shipment. That case, no doubt, was commented on in the C. P., in the case of *Coulthurst v. Sweet*, L. Rep., 1 C. P. 649, in which there was the word "delivered," which did not occur in *Gibson v. Sturge*, thus showing that in a charter-party like the present that word makes all the difference. The shipper at the port of shipment of course endeavours to get as much on board as possible; but, even after leaving the press and before getting on board, it expands, and so the whole expansion does not, as is assumed by defts., take place in the interval between unloading and delivery. [KELLY, C. B.—You, in fact, claim freight for 178 tons more than the ship would actually hold.] The true principle of construction is to give effect to the words used, and not to treat any of them as surplusage. Here, not giving a different construction to the word "delivered" from that given to the words "deliver" and "delivery," in the same instrument, and not rejecting it as superfluous, it clearly means and shows the parties contemplated payment on the quantity upon delivery. If that be so, no usage or evidence of usage inconsistent with or varying or contradicting the charter can be admissible. And even where it is admissible it cannot prevail unless it be shown, which was not done here, that both parties to the contract were cognisant of the usage:

Kirchner and others v. Venus, 12 Moo. P. C. C. 361.

KELLY, C. B.—I am of opinion that the defts. are entitled to retain their verdict, and to the judgment of the court upon this rule. The first question depends upon the construction of a clause in the charter-party entered into between the plt. and the defts. The contract was for the conveyance of a cargo of cotton from Bombay to London or Liverpool, as the charterers might order on signing the bills of lading, at a certain freight which is thus provided for by the charter-party, which says that the master, on signing bills of lading, shall "deliver the same in any dock the freighters may appoint, on being paid freight as follows, viz., 75s. per ton of 50 cubic feet delivered." Now, I am of opinion that the true construction of that clause, supposing there is nothing to qualify the words of it, is that the amount of freight is to be calculated upon and determined by the quantity of cotton as measured and shipped at the port of loading, and not the quantity as delivered at the port of discharge. There can, I think, be no doubt, taking the words themselves, namely, that freight is to be paid at the rate of 75s. per ton of 50 cubic feet, that, if they stopped there, the payment would be upon the quantity as ascertained by measure at the port of loading. But then it is said, and especially on the authority of the

recent case of *Coulthurst v. Sweet*, that the introduction here of the word "delivered" creates a difference, and that it clearly must mean that the cotton was to be measured and paid for according to its measurement upon its delivery at the port of discharge. To my mind, however, the contract is clear, that freight is to be paid upon the quantity measured and shipped at Bombay, and that the word "delivered" simply refers here to the actual quantity delivered at the port of discharge, and means no more than the word "deliver" in the previous part of the clause, "and deliver the same in any dock freighters may appoint," and is used merely to complete the sentence. I do not think the word can be struck out, because it has, I think, a reasonable meaning, although I by no means think it was at all necessary to the full effect of the contract. But it is not uncommon in mercantile contracts of this character to find expressions used which are wholly superfluous and unnecessary. Upon looking at the cases which have been cited in the course of the argument, we find, in the first place, the case of *Gibson v. Sturge*, 10 Ex. 626; 24 L. J. 121, Ex., which is a stronger case than the present one now before the court; for there the freight was held to be payable on the quantity of corn as shipped only, although the bulk of it had increased in size from various causes in the course of the voyage, and the shipowner there might naturally and justly have said: "I have conveyed a larger quantity of goods than you, the shipper, supposed were shipped, or than you imagined you were bound to pay freight upon, and I am entitled to a larger freight for the increased space so occupied." But in the present case the increase in bulk was not proved to have taken place during the voyage; and though my brother Martin differed from the rest of the court in *Gibson v. Sturge*, we must take that case as we find it, and consider it, as decided by the majority of the court, as an authority in favour of the defts. With regard to the other case of *Coulthurst v. Sweet*, L. Rep., 1 C. P. 649, it appears that, with reference to this very point, the words "nett weight delivered" were expressly introduced into the charter-party in that case, in order to avoid the very difficulty which occurred in *Gibson v. Sturge*, and on which Mr. James has relied, the freight being, in *Coulthurst v. Sweet*, expressed in the bills of lading to be payable at so much per ton "nett weight delivered," conclusively showing the intention of the parties that payment of the freight was to be made upon the actual weight of the cargo at the time and place of delivery. That case, therefore, is not, so far as it goes to the point, an authority against our decision in the present case. It appears that the quantity of cotton shipped in the present case, and on which it is admitted that freight is payable, amounts to within some seven or eight tons of the total quantity of cotton which the ship could by possibility contain, and that the larger quantity, upon which the plt. seeks to be paid freight, exceeds that total quantity by some 180 tons. Now, it seems to me, in the absence of express authority, and looking at the merits of the case as between the parties, that it would be inequitable to permit a claim to be sustained for freight upon a far larger quantity, not merely than was actually carried and delivered, but than the ship could have contained. Under these circumstances, therefore, I think that upon authority, and also upon principle and justice, the right construction of this particular clause in this charter-party is, that the amount payable for freight is to be ascertained by the measurement of the cotton at Bombay. Then, secondly, with regard to the evidence of the custom which was given at the trial. It has been argued before us to-day that it was not admissible in the present case, but I cannot accede to that proposition. I think, on the

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contrary, that it was properly admitted. In mercantile contracts, when words are used that are capable of various interpretations, they must be construed by the meaning which is put upon them by mercantile men of experience conversant with the subject-matter. This course has been followed to such an extent as in some cases almost to contradict the natural meaning of the words used. But, in the present case, the evidence of the usage only gave effect to what, even without the aid of such usage, would seem to be the plain and natural construction of the contract, and as such it was clearly admissible. The decision of the Privy Council in the case of *Kirchner v. Venus*, 12 Moo. P. C. Cas. 361, shows merely that persons in Liverpool may well be supposed to be ignorant of rules that exist at Sydney, on the other side of the globe, and that in such a case they are not bound to be acquainted with them. But in this case the contract, which related to a matter connected with London, Liverpool, and Bombay, was entered into between merchants of London and Liverpool, who were cognisant, or must be assumed to have been cognisant, of the customs of the Bombay trade. Under these circumstances, I think evidence of usage, in proof of the ordinary interpretation put upon such a contract by parties in the constant habit of entering into similar contracts, was admissible, although there was not, as it was contended by Mr. James there should have been, affirmative proof first given that both parties had previously heard or were aware of the existence of the custom in question. I think that the jury were not only right, but bound, to presume knowledge on the part of all the parties to such a contract of all the usages connected with or bearing upon it. Therefore, upon all the above grounds, whether with respect to the terms of the contract itself, or the admissibility of the evidence of usage, I am of opinion that the defts. are entitled to retain their verdict, and that this rule should be discharged.

CHANNELL, B.—I also am of opinion that this rule should be discharged, and have but little to add to what has fallen from the Lord Chief Baron. Three questions have been submitted to us. I think that the construction of the charter-party contended for by Mr. Mellish is, without reference to any question of usage, the true one; and that on the authority of *Gibson v. Sturge*. I do not, I confess, feel at all pressed by the case of *Coulthurst v. Sweet*, which in my judgment by no means proves that the decision of the majority of the court in *Gibson v. Sturge* was wrong. As to the second point, I am of opinion that the evidence of usage was properly admitted. It was not offered to contradict, but to explain the contract, and I think that the case of *Bottomley v. Forbes*, 5 Bing. N. C. 121; 8 L. J., N. S., 85, C. P., is an authority showing its admissibility. But then it was objected, thirdly, that even if such evidence were admissible as a general rule, nevertheless it was improperly admitted in the present case, for the reason that it was not proved that both parties to the contract were aware of the existence of the usage, and the case of *Kirchner v. Venus*, in the Privy Council, was cited as an authority to that effect. Now this objection to my mind amounts only to saying, not that the evidence was inadmissible but, that it was incomplete for want of other evidence that the usage was known to both parties; being, in fact, an objection rather to the weight or value of the evidence than to its admissibility. The three points originally made are thus reduced in fact to two, namely, first, the construction of the contract itself; and, secondly, whether the verdict can be set aside, and a new trial had on the ground of that evidence having been admitted. Upon the first question I concur entirely with the Lord Chief

Baron. With respect to the second, it is to be observed that the rule in this case was obtained only on the ground of the improper reception of evidence, and therefore the verdict cannot be set aside upon this rule, because evidence was properly admitted which possibly was incomplete. But being of opinion that, although the evidence was admissible, yet that it was not at all necessary to the arriving at a true construction of the contract, its incompleteness could form no ground for a new trial, even had the rule been obtained in a different form.

FIGOTT, B.—I am of the same opinion. I entertain not the least doubt with regard to the views expressed by my Lord Chief Baron and my brother Channell with regard to this contract, but I desire to rest my judgment upon the second ground that the evidence of usage was admissible, rather than upon the construction of the contract apart from that evidence. I am of opinion that such evidence was admissible here. The case of *Bottomley v. Forbes*, which has been referred to by my brother Channell, was very like the present case; and indeed in principle there is no difference between them. There was nothing said in this charter-party as to where the measurement was to be made. The parol evidence, both here and in *Bottomley v. Forbes*, was offered in explanation, and not in contradiction of the terms of the written contract.

Rule discharged. (a)

Attorneys for the plt., *Clarke, Woodcock, and Ryland*, 14, Lincoln's-inn-fields, agents for *C. Taddy*, Bristol.

Attorneys for the defts., *Upton, Johnson, and Upton*, 20, Austin-friars, agents for *Lourenses and Co.*, Liverpool.

April 18 and May 11, 1867.

BURTON v. PINKERTON.

Contract to employ as seaman—Ordinary voyage—Nature of voyage altered by declaration of war—Increase of risk—Illegality—Breach of contract—59 Geo. 3, c. 69.

The deft. agreed to employ the plt. on board a ship called the Thames, for a period not to exceed twelve months, on a voyage from London to Rio de Janeiro or any port or ports in North and South America, or certain other places specified by the contract, and back to a port of discharge in the United Kingdom or continent of Europe between the Elbe and Brest.

The vessel in question was let under a charter-party, which stipulated that the said vessel being intended for the service of the Peruvian Government, in case of her capture or loss, the charterers should pay to the owners a certain sum as her agreed value. She started from the Thames having on board coal, ammunition, and two launches, and being under the orders of a Peruvian on board. At this time the Peruvian Government was at peace with Spain, but soon after the departure of

(a) The defts. in this action, the charterers, brought a cross-action (*Knoop and another v. Buckle*) against the present pl., the shipowner, to recover money paid to him over and above the sum due for freight according to their calculation by the Bombay measurement, which action was tried at the same time and as one action with the present case, and a verdict was taken for the plts. (the charterers) for £221 3s 3d, and leave was reserved to the shipowner, the deft., to move to reduce that amount to £44 18s 9d, and a rule was accordingly obtained by *E. James, Q. C.* to that effect, and it was arranged that, inasmuch as the two cases depended entirely upon the same point, the decision on the argument of the rule in the one case should bind and decide the rule in the other. Consequently the last-mentioned rule obtained by the deft. (the charterers) in *Knoop and another v. Buckle* was also discharged.

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the Thames, war was declared between Peru and Spain, and the usual proclamation was issued by Her Majesty enjoining neutrality on English subjects. At Brest the Thames was joined by a Peruvian steam-ram; she then proceeded alone to Madeira, where she was joined again by the same ram and another. After putting some coal on board one of the rams, she went in company with both of them to St. Vincent, signals passing between them on the way. At St. Vincent the launches were put on board the rams, and the vessel then proceeded to Pedro Bay, where the two rams arrived shortly afterwards, and the ammunition was put on board one of them. The Thames then proceeded to Rio and the two rams arrived there the next day. Two days afterwards one of them captured a Spanish brig and burnt her. The captain then announced his intention, acting under the orders of the Peruvian agent, to proceed to Callao, but the existence of war having then become notorious, the plt. refused to proceed any further in the Thames on the ground of the illegal and dangerous character of the voyage, and was left behind at Rio. Upon returning to England he brought an action for breach of the engagement under which he shipped:

Held, that by the breaking out of war such a voyage as that the vessel was engaged upon became, if not illegal, at least one of extraordinary risk, and not of an ordinary character: such as was contemplated by the terms of the plt.'s engagement, and therefore that the further prosecution of it, and the failure to employ the plt. on some other ordinary voyage within the terms of his engagement, was a breach of contract: (dubitante Bramwell, B.)

Semble, per Kelly, C. B., that proceeding on the voyage became illegal under the Foreign Enlistment Act (59 Geo. 3, c. 69).

The first count of the declaration stated,

That in the year 1866, the deft. being the master of a foreign going British steamship registered in the port of London in England, to wit, a vessel called the *Thames*, by an agreement then made by and between the plt. and the deft. in England, to wit, the county of Middlesex, contained in a written and printed document which was made and signed by the plt. and the deft. according to the Merchant Shipping Act 1854, retained and employed the plt. to serve on board the said ship as one of her crew for the voyage, and on the terms stated in the said document as follows:

Name of Ship.	Port of Registry.	Master's Name.
Thames.	London.	J. Pinkerton.

The several persons whose names are hereto subscribed, and whose descriptions are contained below, and of whom twenty-two are engaged as sailors, hereby agree to serve on board the said ship in the several capacities expressed against their respective names on the voyage from London to Rio Janeiro, or any port or ports in North and South America, Northern and Southern Pacific and Atlantic Oceans, West Indies, Cape Colonies, Mediterranean, India, China, and Arabian seas, Australia, New Zealand, backwards and forwards if required, for a period not to exceed twelve months, and back to a final port of discharge in the United Kingdom or continent of Europe between the Elbe and Brest; and the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the said ship, and the stores and cargo thereof, whether on board, in boats, or on shore, in consideration of which services to be duly performed, the said master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the annexed scale. . . . And the plt. and deft. respectively signed the said agreement, and the capacity in which, and the wages per calendar month at which the plt. was retained as aforesaid, were then respectively expressed in the said agreement against the name and signature of the plt. . . . And all conditions have been fulfilled necessary to entitle the plt. to recover in this action in respect of the matter herein stated. Yet the deft. did not employ the plt. to serve on board the said ship according to the said agreement as aforesaid, and the plt. was employed and required to serve by the deft. otherwise than according to the said agreement, and thereby the plt. lost the opportunity of earning wages, and was left at Rio de

Janeiro, and arrested and imprisoned there, and deprived of his clothes and tools, and was impeded in obtaining employment.

The second count set forth an agreement similar to that in the first, and alleged as a breach that the deft. did not employ plt. according to the said agreement, but prevented the plt. from serving on board the said ship during part of the said voyage by sailing and departing with her from Rio de Janeiro aforesaid without the plt. The third count was for falsely representing the voyage on which the ship was about to sail, and thereby inducing plt. to enter into the agreement stated in the first count. The fourth and fifth counts were in trespass and trover for the taking away and conversion of the plt.'s clothes and tools.

The deft. pleaded first and secondly, to the first count, denying the promise and the breach. Thirdly, to the second count, denying the promise. Fourthly, to the second count, that he was always ready and willing to employ the plt. according to the said agreement, but the plt. absented himself from the said ship and did not at any time offer to perform his duties in the same employment, but wholly refused so to do, or to be employed as aforesaid. Fifthly, to the second count, that after the said contract and before the alleged breach, the plt. misconducted himself by remaining absent from the said ship for a longer period than that for which he received leave, and going on shore without leave, and neglecting his duties in the said ship, and failing to perform the same, whereupon the deft. discharged the plt. from his service in the said ship, which was the alleged breach. Sixthly, to the second count, that after the making of the said agreement and before any breach thereof, the plt. deserted the said ship, and thereupon the deft. rescinded the said agreement and discharged the plt. Seventhly, eighthly, and eleventhly, to the third, fourth, and fifth counts respectively, not guilty. Ninthly, to the fourth count, leave and licence. Tenthly and twelfthly, to the fourth and fifth counts, not possessed.

Upon these pleas issue was joined.

The trial took place on the 20th and 21st Feb. at Guildhall, before Kelly, C. B., when the facts appeared to be as follows:—The plt. was a mariner in the merchant service, and the deft. was the master of a steam-vessel called the *Thames*. The owners of the *Thames*, the British Colonial Steamship Company (Limited), by charter-party dated 20th Jan. 1866, agreed to let the ship to Messrs. Thomson, Bonar, and Co. for all lawful service and employment as per margin, such service not to exceed twelve calendar months; the charter provided (*inter alia*) that the said ship being properly equipped, &c., should proceed to such ports as might be directed by the charterers or their agent on board; and also that the said steamer being intended for the service of the Peruvian Government, if she should be burnt, captured, sunk, damaged, or driven on shore by any enemy of that Government, the charterers should pay the value of her (agreed to be £5,000/.) to the owners, or make good any such damages.

Upon the 25th Jan. the plt. was engaged by the deft. as one of the crew of the ship, and signed articles, the terms of which were those contained in the declaration.

The plt. went on board the ship in the Victoria-docks, and sailed in her to Rio de Janeiro, where he left her, refusing to proceed farther with her, on the ground that the further prosecution of the voyage had become illegal, and would expose him to extraordinary risks not contemplated by the agreement into which he had entered. The facts with reference to the voyage are so fully set out in the judgment of the court, that it is unnecessary to mention them here.

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The learned judge at the trial ruled that there was no defence to the action; that the voyage on which the deft. sought to employ the plt. had become, by the breaking out of war, if not illegal, at least a voyage of a different character from that on which the plt., by his articles, had contracted to serve, and that the deft. had therefore broken the contract into which he had entered with the plt. He therefore directed the jury to find for the plt., reserving leave to the deft. to move to enter a non-suit or a verdict for himself, on the ground that the facts did not show any breach of contract on the part of the deft.

The damages given by the jury included a sum for the clothes, &c., of which the fourth and fifth counts alleged a taking and conversion, and also consequential damage in respect of the plt.'s having been imprisoned, when left at Rio, by the Peruvian authorities as a deserter, and the leave reserved included leave to move to enter the verdict for the deft. on the counts above mentioned, on the ground that there was no evidence to support them; and also to reduce the verdict, on the ground that the consequential damages were too remote. The deft.'s counsel, when making the motion referred to below, also moved for and obtained a rule *nisi* upon these points; but the facts and arguments with respect to that part of the case are omitted as immaterial to the present report.

The *Solicitor-General* (with him *C. Pollock*, Q. C. and *Bompas*) now moved pursuant to the leave reserved, or for a new trial on the ground of misdirection.—This voyage was perfectly legal in its inception, for the war had not then broken out. The question then arises, whether upon the declaration of war it became illegal. A voyage for the purpose of carrying contraband of war to a port of one of the belligerents is perfectly legal; it no doubt subjects the ship to the possibility of seizure by the other belligerent in the exercise of his rights:

Ex parte Charasse, re Gruebrook, 34 L. J., N. S., 17, Bank.; 12 L. T. Rep. N. S. 249;
The Helen, L. Rep., 1 Adm. 1; 13 L. T. Rep. N. S. 305.

[*MARTIN, B.*—The *Thames* was here really acting as tender to these men-of-war engaged in hostilities. *KELLY, C. B.*—And sailing under the orders of a Peruvian officer.] I contend that there is nothing illegal in what was done; it only subjects the vessel to the chance of seizure. Surely, if it is lawful for a neutral to carry goods contraband of war, such as ammunition, to the port of a belligerent, to be thence supplied to that belligerent's vessels of war, it is lawful to do what this vessel did. The voyage was not illegal under the Foreign Enlistment Act (59 Geo. 3, c. 69). The 7th section of that Act makes the fitting out a vessel with intent or in order that such vessel shall be employed in the service of any foreign prince, state, or potentate, penal. Now, here the *Thames* was fitted out in time of peace, and the inception of the voyage was legal. [*BRAMWELL, B.*—Is the actual existence of a war necessary to the operation of sect. 7?] It is clear the section would not apply to the case of fitting out an armed vessel and selling it to a foreign prince in time of peace; it is quite clear that that is legal: (*Hobbs v. Hemming*, 17 C. B., N. S., 791; 12 L. T. Rep. N. S. 205.) [*KELLY, C. B.*—The question is not so much whether the voyage was legal or not, as whether the extraordinary risks incidental to such a voyage were such as the plt. under his contract was bound to undergo.] The direction to the jury was based upon the illegality of the voyage. If the objects of the voyage might possibly be legal even after the commencement of hostilities—and there was, I contend, nothing to show that they were necessarily illegal—the pre-

sumption ought to be in favour of their legality. It was at least a question for the jury whether the objects of the voyage were illegal. Then with respect to the increased risk, that affords no reason for the seaman's refusing to proceed, if the voyage continues legal. There is nothing illegal in chartering a vessel to the Peruvian Government to carry ammunition, even in time of war. There is no evidence to show conclusively that the vessel was to engage in hostilities in concert with the Peruvian men-of-war, and though she was acting under the direction of a Peruvian officer it cannot be presumed that his orders would be illegal. Even if the increased risk entitled the plt. to refuse to serve any longer, it cannot entitle him to treat the captain's proceeding with the voyage as a breach of contract. To treat it as such would be equivalent to saying that the captain was bound to proceed to some other port; but the coal on board was the property of the Peruvian Government, and the ship was chartered to that Government. The captain was bound to continue the voyage if its purposes were, as I contend, legal. The utmost effect of the declaration of war would be to dissolve the contract and entitle the seamen to leave the ship.

Cur. adv. vult.

May 11.—*KELLY, C. B.* now delivered the judgment of himself, *MARTIN*, and *PIGOTT, BB.*—A question of great public importance arises upon a motion made in this case by the *Solicitor-General* for a new trial, or to reduce the damages; and we have thought it right to consider the material facts with great attention, not by reason of any doubt entertained (at least on my part) as to the substantial merits of the case, but because it was thought possible that some question ought to have been left to the jury as to the real nature and character of the adventure, and the course actually adopted by the vessel in question as disclosed by the evidence in relation to the two steam-rans belonging to the Government, and engaged in hostilities against Spain. On Feb. 25, 1866, war was declared between Spain and Peru. On the 13th March there was a proclamation under the Foreign Enlistment Act to observe strict neutrality, and the declaration of war and the proclamation were both published in the *Gazette*. It is necessary that I should read the material portions of the evidence in order to make the case perfectly intelligible. The action was brought for a breach of contract in ceasing to employ the plt. as a mariner on board a ship on a voyage to any part of North or South America, or Australia, and, I think, some other parts of the world. The breach alleged was in substance that the deft. ceased to employ the plt. on any such voyage, but employed him upon another and different voyage, and that he sustained other damage. The evidence for the plt. was to this effect: "I am a mercantile mariner, and have been so since 1834. I went to the docks and saw the captain—I had sailed with him before. I asked him if he had engaged his hands. He said, 'No; he was then going about it.' I met him the next morning on board the *Thames*. He gave me a note to go to the shipping master and sign my articles. Nothing was said about the nature of the employment. He said probably the voyage would be about six months. On the 25th Jan. I went to the Sailors' Home in Well-street and signed articles. They were read to me. No one was with me. I went to the captain again, and he gave me a note for an advance. He gave me instructions to join the ship the next day on the 27th. On the 27th Jan. I went and joined at the Victoria-docks. She was taking in a cargo of coals and provisions. On the 31st Jan. the ship sailed and came to an anchor at Lobster Point below

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Gravesend. We took in 130 casks of ammunition marked, 'Six charges for 300lb. gun, 45lb. of powder and shell.' We left the river. Two launches were taken on board in the docks. One was a steam launch, one not. The name *Independanzia* was on the launches. On the 2nd Feb. we left the river and proceeded to the Downs. On the 3rd Feb. we left the Downs and went down Channel to Portland, thence to Torbay, and from Torbay we went to Brest. On the 10th Feb. we arrived at Brest. We did not go into the harbour, but in a wind-bound bay. I went ashore several times with the captain. He was absent from the ship three or four days. Custom-house officers and authorities came on board and asked the chief mate where we came from and other questions. There were then three of the men who refused to go on, and wished to speak to the consul. The men tried to paint out the names of the launches by order of the officers. The *Independanzia* came to Brest shortly after we did. She went up the port among the French men-of-war. On the 22nd Feb. we left Brest. When we got under way a French man-of-war followed us. We lost sight of her at one p.m. When the French vessel was lost sight of we altered our course and made sail for Madeira. On the 27th Feb. we arrived at Madeira. The harbour-master came and spoke to the deft. and asked where we came from. We said, 'From London, in twenty-eight days.' He then asked what we had come here for. The captain said he came here for orders. He asked, 'Have you any sick on board?' We had a quarantine flag flying. They said they must put us three days in quarantine. On the 4th March the *Huasca* and the *Independanzia* arrived. We put 150 tons of coal on board the *Independanzia*. She lost her anchor. On the 7th March we finished coaling about twelve o'clock, and then got under way with the two rams altogether. Rockets for signals were put on board the rams. We heard of the declaration of war between Peru and Spain for the first time." I should observe here that, though that is the evidence of the plt., the mariner, the captain, who was afterwards called, said he had not actually heard of the declaration of war until after he had arrived at Rio. The declaration did in fact take place on the 25th Feb. 1866, and it formed the subject of a communication between the two departments of these Governments, and it afterwards, within a day or two, appeared in the *Gazette*. The evidence then goes on: "On the 12th March we arrived at St. Vincent. As we went signals passed between the rams. There were Peruvian officers on board. Borrás, a Peruvian, gave orders. These were about the rate of sailing. The Peruvian officers were said to be passengers. We found out afterwards that they were acting under the Peruvian Government. The *Thames* had a bright light at the peak, and I never saw such a light before. We discharged one boat and put it on board the *Independanzia*. We put the other launch over the ship's side to the *Independanzia*. We took on board two boats belonging to the *Huasca*. We went to Pedro Bay, twelve miles south-west of St. Vincent. The two rams arrived there soon after us. In Pedro Bay we put on board the ram 130 cases of ammunition. On the 31st March we arrived at Rio. On the 1st April the rams arrived at Rio. On the 3rd April a Spanish brig was brought in by one of the rams, and was afterwards taken out of the harbour by the Peruvian launch, and as we heard was burnt. The deft. said they might have given him some of the cordage before they burned her. On the 6th April when I saw all this I went away from the ship to an island four and a half miles from Rio with two of the crew. From there I went to Rio. I went to the British consul and made a complaint to him. I told him I thought I had got upon an illegal voyage. He said, 'Where are your articles?'

I said they contained nothing about supplying Peruvian rams with ammunition and stores. I asked him for a certificate that the voyage was legal, and I offered to pay him for a stamp. He said he was not going to be bothered with me. I asked him what protection I had if I went outside the harbour and was taken by a Spanish cruiser. He said, 'Come to me when the Spaniard takes you.' I said it would be too late then. Allen and Keefe were with me. I then applied to Captain Dunne, of the *Megara*, and told him what I had told the consul. He told us to go on board our ship and we should hear from him. I then returned to the *Thames*. Captain Dunne came on board. The captain was ashore. He spoke to the chief mate. Captain Dunne asked us if we had not seen the British consul since he had seen us? I said 'No.' He said to the chief mate, 'How came you not to allow them to go to the British consul?' Captain Dunne said we should have to go in the ship, but we should have justice sooner or later. On the 20th April I went again to the British consul, because on the 19th April the captain called us aft—the whole of the crew. He told the crew he was going to clear out at Callao on a private enterprise, and he would give give us 1*l.* per month addition to our pay. If we refused the offer that day we should not get it the next. We did refuse; we were called out again in the evening. The captain said it was little use going ashore to the consul, for he would tell us, as he had told us, that it was a legal voyage, and we were bound to go on. On the 20th April I got leave with all hands to go ashore. I went to the consul again, and also to the English minister's. I repeated the complaint. The consul told me we were bound by the articles. At the British minister's we saw the secretary, and told him the nature of the voyage. He was of opinion that the voyage was legal, and turned us over to the consul. On the 21st April I was arrested by the Brazilian police. They took and locked us up, five of us at night. On the 28th April others of our ship were brought there and imprisoned. We remained imprisoned until the 2nd May. We wished to refer to the British minister, but were not permitted. We sent a note to the consul, and then we were released. A gentleman came from the consul, certifying that we were British subjects. We were told we might join the Brazilian army or navy, but we were to be released. On the 2nd May, when we were released, we went to look after the *Thames*, and she was gone. I remained at Rio till the 21st, and went to the consul, saying I was destitute, and got a certificate from the consul saying that I might embark in any ship. On the 21st May I got a passage to New York, working my way in the *Gertrude*. On the 7th June I went from New York to London in the *William Penn*, on wages." Therefore he got a passage from New York, by which he earned wages, and he reached London on the 23rd July. Then an estimate was made of 9*l.* 1*s.* for wages. He claimed 20*l.*, or something of the kind, for clothes which he left on board the *Thames*; and that concluded his evidence. Then he is cross-examined, and he says: "I have been thirty-two years a sailor. The last ship was the *Virago*, from June till October. I came from Nassau to Liverpool in the *Caroline*. I had a dispute with the owner of the *Virago*, on the ground of the voyage being illegal. Allen was with me in the *Thames*. He said the voyage was illegal; not till after we had been at Madeira. I never heard him called 'Lawyer Allen.' I signed articles the 25th, and not the 29th Jan. I saw the launches taken on board." Some attempt was made to show the plt. knew the illegal nature of the voyage. I then put to the counsel for the deft. whether he meant to say that the plt. had distinct notice of the

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nature of the adventure upon which this ship was to be engaged, because, if that was so, it might have the effect of making the contract altogether illegal, and then it might be held that the action was not maintainable; but the answer was (and there is no doubt that it was a true answer), that at the time when the plt. was engaged on board this ship, and the cargo was shipped in the Thames or in the dock, there having been no declaration of war before the voyage itself, any contract relating to that voyage was *prima facie* perfectly legal, and therefore I thought it immaterial to inquire what suspicion there might be if sooner or later this voyage which was legal in its inception became illegal. Then the evidence goes on thus: "I saw the launches taken on board. I did not make inquiries. I had no notion what sort of voyage I was going on. From the 23rd to the 29th it was not talked of—the kind of voyage we were going on—I did not talk about this at all. When at Brest I did not hear the captain had been charged with a breach of quarantine. I went ashore at Rio on the 5th, because I had to make complaint about the illegality of the voyage. I did not ask for leave. The chief mate told me I had been absent without leave. The 20th was a liberty day. I went ashore to look for redress. The deft. did not tell me after I had seen the consul that I had better go back to the ship. I saw the consul; then, the next morning, the 20th, the minister's secretary; never went to the Spanish consul or minister. Some of the men told me that the Spanish minister had told them, if they would leave the ship, he would take care of them and board them. I was taken up on the 21st and not liberated till the 2nd May. The consul did not tell me that I had deserted. On the 30th April I was taken before the magistrates, and they talked Portuguese, but I heard no charge. I never signed this letter, but Keefe wrote it and put my name to it." Then he is re-examined, and he says, "When the *Thames* sailed from London I had no knowledge of any ammunition or warlike stores being on board her, or of the purpose of the voyage." Then several of the crew were called, who more or less confirmed him, but on any point on which the evidence might be open to doubt I have made no report, because the ground upon which I pronounce the judgment in this case may be defined by the evidence given by the deft. Capt. Pinkerton. For the defence Capt. Pinkerton, the deft., was called, and he said: "I am captain of the *Thames*, which belongs to the British Colonial Steamship Company. It ordinarily trades to Canada. On the 20th Jan. it was chartered for this voyage, 'for all lawful services and employments as per margin, twelve months.' The steamer was intended for the Peruvian Government, and if damaged or burnt by enemy of war they valued it at £5,000, to be paid by the charterers to the company. Burton, the plt., came to me and asked for a voyage, or rather I met him in the docks. On the 24th Jan. he signed his articles. On the 23rd Jan. he was on board in the Victoria-docks. On the 27th Jan. he was working on board. On the 31st we sailed. During the whole time they were taking coals and provisions on board. The gun carriage was taken on board about the 29th or 30th; the two launches on the 31st. At Gravesend we took on board 130 cases of powder and ammunition. Several joined at Gravesend; all the rest at the docks. When we went to Brest I went ashore to telegraph our arrival to the owners. I got into trouble about quarantine. There was no complaint of anything else. The *Independanza* left London three or four days before the *Thames*. I made a communication to some of the crew. Allen and Fuller were there. From Brest we went to Madeira, and thence to St. Vincent and Rio. The rams went with us from Madeira. On the 31st March we

arrived at Rio. On the 5th April, ten a.m., hands came aft and wished to go ashore and see the consul, saying that the voyage was illegal. Permission was given to two, Allen and Keefe. The plt. went without leave. On the 5th and 6th April the plt. and others had leave to go to the consul. The *Thames* was lying at Coal Island, four miles from Rio. On the 14th April they again asked to go ashore. All wanted to go and see the consul and speak for themselves. All went and were told to go back to the ship. Thomas Hollocomb was acting consul. We met at the consul's; the consul asked, 'What do you want now?' They said the voyage was illegal, and they wished him to look into the matter. I said my crew had come aft and wished to see him as to the illegality of the voyage. They said the ship had carried ammunition and had transhipped it to a Peruvian man-of-war, and that she had also arrived. The launch and the provisions were supplied to the Peruvian man-of-war, and that in their opinion that was a breach of neutrality, and made the voyage illegal. I told the consul my destination was Callao, and told him I did not know what I was to do at Callao, but I was acting under the order of the charterer's agent on board, Borras, the supercargo. He was a Peruvian: I did make him understand that I was to act in all respects under the direction of the rams belonging to the Peruvian Government. I had heard that a Spanish brig had been taken by the Peruvians, and was a prize. It was taken by one of the rams from the Spaniards; this might be about the 6th. This was the talk of the town, and the consul must have known it, but I did not tell him. I told the men I was going to Callao, and did not say anything about a private enterprise. They knew, and everybody knew, I was acting under orders from the rams. I told the men I would raise their wages if it was wages they wanted, but I did not say anything about 17. per month. The 20th April was a liberty day for all to go ashore; all hands went; Burton amongst the others; Burton never came back; I saw him and others that day; I tried to persuade him to come on board. On the 21st all were absent without leave, and were so for several days afterwards. On the 25th I went to the consul and complained that the men were absent without leave. On the 25th there is an entry in the log that the plt. and others had deserted. The consul indorsed that the men were charged with desertion, and that he had made inquiries, and as far as he could learn the charge was true. On the 25th April the consul told me that the plt. and others were at St. Christopher, and were paid by the Spanish Government. The consul certified that he certified an engagement with new men, twelve or thirteen. I sailed on the 28th, and then had coals on board, but no munitions of war. Borras ordered me to proceed to Maldonado Bay, in the river Plata, and there to await the arrival of the rams. In pursuance of that I sailed, and arrived at Maldonado Bay and waited till the rams arrived, four or five days afterwards. Then we went in company towards the Straits of Magellan. We knew before we left Rio that our destination was Callao. We stopped in Possession Bay. Then the rams took the coals from us. We went 100 miles farther, and then they ordered us not to proceed to the Pacific, but to go home." Then, in answer to some questions put by me, he says: "When at Brest and afterwards I knew that war was imminent between Spain and Peru. I did not learn that war had actually been declared until I had left Rio." Thus it appears upon the evidence, alike of the plt. and of the deft., that the ship took in a cargo of coals and provisions, together with 130 casks of ammunition and two launches, one of them a steam-launch, before proceeding out of the river.

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After touching at some places on the English coast, she came into the harbour of Brest, and was there joined by the *Independanza*, one of the two rams belonging to the Peruvian Government. She then went to Madeira, where she was joined by the *Independanza* and the other ram, called the *Huasca*, and there put 150 tons of coal on board the *Independanza*. They then left Madeira in company with the two rams, and rockets for signals were put on board the rams. They next reached St. Vincent, signals passing between the rams and the *Thames*. At St. Vincent the second launch was put over the ship's side into the *Independanza*, and two boats belonging to the *Huasca* were taken on board the *Thames*. From thence they went to Pedro Bay, twelve miles south-west of St. Vincent, the two rams arriving shortly after the *Thames*, and there the *Thames* put on board one of the rams the 130 cases of ammunition. Thence they proceeded to Rio, where they arrived on the 31st March, the two rams arriving there the following day. Two days afterwards one of the rams sailed out of Rio and captured and brought in as a prize a Spanish brig, which they afterwards took out again and burned, upon which the deft. observed that they might have given him some of the cordage. This evidence was uncontradicted on the part of the deft., the master or commander of the *Thames*, who was himself examined as a witness, and who further gave in evidence the charter-party of the ship, from which it appeared that she was chartered for all lawful services and employments for twelve months; that she was intended for the Peruvian Government; and that if she should be damaged or burnt by any enemy of war, she was to be valued at 45,000*l.* to be paid by the charterers to the company. He further proved that the *Independanza* had left London three or four days before the *Thames*. He admitted that the plt. and the other seamen, after their arrival at Rio, insisted that the voyage had become illegal, and desired to go on shore; that he himself (Capt. Pinkerton) had told the consul that his destination was Callao, and that he was acting under orders of Borras, the supercargo and agent of the Peruvian Government on board, and that it was understood that he was to act in all respects under the direction of the rams belonging to the Peruvian Government. He admitted that he knew of the capture of the Spanish brig by the Peruvians, and that it was the talk of the town and generally known. He also admitted that he had told the men he was going to Callao, and that he would raise their wages if they would go with him, though he denied that he had specified the advance of 1*l.* per month. I thought upon this evidence that the contract with the plt. was to employ him for twelve months on board this vessel free from any other charges than such as were incidental to a voyage for ordinary commercial purposes, and that war having broken out between Peru and Spain, two states in amity with this country, it was a breach of that contract to place the vessel under the orders of a Peruvian, who was directing and causing her to act in concert with two ships of war belonging to Peru, and engaged in actual hostilities against Spain, and so exposing the crew to the danger at any moment of the loss of their liberty or of their lives. It is possible that Borras might have given no orders which would have put the ship in peril, but his orders might have been such as to expose her to an attack from a Spanish ship of war within an hour after she should have left the port of Rio, when she might have been fired into and sunk or captured, and the crew made prisoners of war. The plt. could not foresee what these orders or their consequences might be, but he might fairly infer from the mode in which the ship had been employed in aid of, and in concert with,

the rams from the time when she had quitted Brest, that she would still be directed to accompany and to supply munitions of war; in fact, to be as she had been, a store ship to the two belligerent vessels. It is enough, in my opinion, that Borras had power so to employ her. If this evidence raised any question of fact, it should have been left to the jury, but it appeared to me, and I am still of opinion, that the placing of the vessel at the disposal of and under the command of Borras was in itself a breach of the contract. It is unnecessary to determine whether the employment of the vessel in the way thus proved was a violation of the 59 Geo. 3. c. 69. It is certainly against the spirit and intent of that Act of Parliament which recites that, "the engagement of His Majesty's subjects to serve in war in foreign service without His Majesty's licence (and the fitting out of vessels, &c.), may be prejudicial to and tend to endanger the peace and welfare of this kingdom." Then, by sect. 2, it is expressly enacted that, "if any natural-born subject of His Majesty shall, without such leave and licence, serve in and on board any ship or vessel used or intended to be used for any warlike purpose in the service of, or for, or under, or in aid of any foreign state, &c., or if any natural-born subject shall without such leave agree to go or shall go to any place beyond the seas with intent to serve in any warlike operation whatever, in the service of or under, or in aid of any foreign state, &c., as an officer, sailor, or mariner in any such ship or vessel, it shall be a misdemeanor; and, by sect. 9, offences committed out of the United Kingdom may be tried at Westminster. By the 7th section it is made an offence to fit out a ship to be used in aid of a belligerent as a store ship, but the offence must be committed within the British dominions. This ship was so fitted out in London, but before the declaration of war, and therefore the offence was incomplete. But it was actually used as a store ship after the declaration of war, and continued to be so used under the orders of Borras after the plt. had quitted the ship and the ship had quitted Rio. If then it were necessary to decide the question I should hold that to serve on board a vessel used as a store ship in aid of a belligerent ship, the fitting out of which to be so used is an offence within the 7th section, is a serving on board a vessel for a warlike purpose in aid of a foreign state within the 2nd section. But if this were doubtful, I am of opinion that so to employ this vessel was a breach of that which I hold to be the contract with the plt., namely, to employ him and the rest of the crew for a specified period on board this vessel upon an ordinary commercial voyage. It is impossible not to see that by adventures like these this country has been brought to the very verge of war, first with the United States and then latterly with Spain; and I think that we ought not to permit a doubt to be entertained whether to encourage and employ the crew of a British ship in such an adventure is within the terms of a lawful contract like that which has been entered into between the deft. and the plt. I am therefore of opinion that there should be no rule in this case except as before intimated to the Solicitor-General, to reduce the damages in respect of the loss of clothes and the imprisonment of the plt.

BRAMWELL, B.—I confess I am not of that opinion. For I think the rule ought to have been granted. Not that I am prepared to say that I think the Lord Chief Baron was wrong at the trial, but I am not satisfied that he was right, and I have sufficient doubt about it to make me think that, instead of its being discussed without a rule being granted, it would have been better if it had been discussed after a rule had been granted. The

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difficulty I feel about it is this: I quite agree that if this vessel was intended to go on what they call a warlike voyage, that is, as a tender to, or consort of the rams, the men were entitled to say, "We engaged to go on a voyage of peace, and not to go on a voyage of war in the course of which we might be subject to be fired into and shot;" but the doubt I entertain is this, if all she was going to do was to carry contraband of war from port to port, and possibly have to run a blockade, I am not so clear that the plt. was entitled to say, "That is not a voyage I have undertaken to go, and unless you take me on some other, I am entitled to say you have discharged me." That is the doubt I have. I do not say that even then the plt. would not have been entitled to recover. He may have been, but I should like to have had it discussed. Now, as I understand, the direction to the jury was, "whichever view is correct, the plt. is entitled to your verdict." I say for that reason I am in doubt, because a jury ought not to be told to find a verdict for the plt., unless on any view of the admitted facts he is entitled to it. So I think there ought to have been a rule. I do not differ from any law that was laid down, but I want to be more advised upon it before I express an opinion. I am sure that no man can be more ready than I am to do anything to discourage this sort of business, which in my opinion has as little to do with legitimate commerce as smuggling has. But, for the reasons I have given, I should have been glad if a rule had been granted.

Rule refused.

Attorneys for the defts., Bischoff, Cox, and Bonpas.

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister-at-Law.

Tuesday, Feb. 19, 1867.

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Mortgage—24 Vict. c. 10, s. 11—25 & 26 Vict. c. 63, s. 8.

Where a suit has been brought to enforce a mortgage under the 24 Vict. c. 10, s. 11, and the ship has been arrested, the Court will, where no prejudice to third parties can arise, enforce the equities against the mortgagees, under the Merchant Shipping Act Amendment Act 1862.

C. was the registered owner of a ship subject to two mortgages, the first, dated Feb. 1, and made payable May 3, 1866, to the M. C. Company; the second to R., the deft. To enable C. to discharge the debt of the M. C. Company, W. and S., the plts., advanced a sum of money, the deft. R. acting in the transaction as C.'s agent. The plts. W. and S. took as security a transfer of the first mortgage, and, as a supplemental security, made an indenture with C., which was executed on April 19, immediately after the execution of the transfer of the first mortgage; it had been further agreed that the deft. R.'s mortgage should be cancelled to give priority to this indenture of April 19, a re-mortgage to be made to him subsequently. R.'s mortgage was cancelled; but, instead of a re-mortgage, C. gave the deft. R. a bill of sale, thus constituting him the owner of the vessel. Plts. alleged this to be without their knowledge; but it appeared that they had sufficient opportunity of knowing it, and there was no fraudulent concealment of the fact. Under the indenture of April 19, 1866 the first payment was to be made to the plts. W. and S. on the 19th Oct. 1866, except in respect of a small sum to be advanced on a port mortgage; to secure this the ship's register was given up to W. and S. By a subsequent agreement, the plts. W. and S. procured a charter for the

ship to take a cargo of iron from Middlesborough to Alexandria; plts. W. and S. then gave up the ship's register, as under this agreement, dated 8th June 1866, plts. W. and S. were in the first instance to receive the freight, out of which the port mortgage and disbursements were to be paid. C. entered into this charter as owner. The vessel was taken to Middlesborough. The plts. W. and S. claimed control over the vessel, and desired the master to take his orders from them, cautioning him against the deft. R. The deft. R. went down, took command of the vessel, and on the master demurring to obey an order of his dismissed him and appointed another. The plt. S. then went down and went on board with the late master. Eventually all parties went before a magistrate, who decided in favour of the deft. R., who proved himself to be the registered owner, to the alleged surprise of plts. A suit was brought in this court on the 25th June, plts. having on that day arrested the ship:

Held, that the court, having regard to the equities between the parties, would read the mortgage of which plts. were transferees, and the agreements as a whole, and though the mortgage money was payable under the original mortgage on May 3, yet, as under the indenture of April 19, the first payment was not to be made till Oct. 19, the plts. had no right to arrest the vessel under that mortgage; nor had they a right to arrest the vessel for disbursements, as under the agreement of June 8 the plts. were to pay themselves out of the freight when received; the suit therefore should be dismissed with costs.

And, as the plts. were in full possession of the facts, and must be held liable for the legal effect of their own acts, after giving due weight to the decision in the *Evangelismos*, Swab. 378, this was a case where damages should be awarded to the defts., the damages to be assessed in the usual way by the registrar and merchants.

This case, which occupied part of several days, concluded on the 2nd Feb. It was a suit brought under the Admiralty Court Act of 1861, to enforce a mortgage for 2090*l*. The facts are set out at length in the following judgment, delivered Feb. 19.

Brett, Q. C. and Pritchard for plts.

Cohen for defts.

Dr. LUSHINGTON.—The plts. are Messrs. Wulff and Smith, shipbrokers, in the city of London. The deft. Alex. Robinson describes himself as a ship-owner. The deft. became the owner of this vessel, the *Cathcart*, in the month of Aug. 1865, by a bill of sale from a Mr. Rennie of Aberdeen; the purchase-money was 2250*l*. Half of this, according to the deft.'s account, was paid in cash, for the other half he gave his acceptance, to fall due on the 16th March 1866. As a security for the payment of the acceptance he gave to Mr. Rennie a mortgage on the ship, dated the 18th Sept. On the 1st Feb. 1866 the deft. paid off Mr. Rennie, by cash received from the Maritime Credit Company (Limited), and Mr. Rennie's mortgage was cancelled. The arrangement between the deft. and the Maritime Credit Company was this: the deft. gave them his acceptance of a bill of exchange for 1650*l*. to fall due on the 3rd May, whilst the company advanced to him that same sum (1650*l*.) less deductions for commission and interest to accrue up to the 3rd May, amounting together to 14*l*. 13*s*. 8*d*. The deft. also gave them a mortgage, which was dated the 1st Feb. 1866. It was a mortgage of the vessel only, not of freights or policies; it purported to secure not only the payment of the bill of exchange, but also the repayment of any further advances that might be made to the deft. by the company. However, as a matter of fact, no further advances were made. In form also

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the mortgage was not a port mortgage, but it was so practically, for the company took possession of the register, without which the vessel could not be cleared outwards. This mortgage was registered on the 2nd Feb. The Maritime Credit Company were thus the first mortgagees of the vessel. On the 6th March the deft. by bill of sale transferred the vessel to Conte, a gentleman who, according to his own account, had been engaged in the Italian trade, subject of course to the mortgage of Feb. 1, and on the same day, March 6, Conte mortgaged his equity of redemption in the vessel to the deft. for 850*l*. On the 15th March this mortgage was registered. The result of these transactions was, that Conte was the registered owner subject to two mortgages, first, to the Maritime Credit Company for 1650*l*; secondly, to the deft. for 850*l*. In April the first dealings of Conte and the deft. with the plts. commenced. It appears that there was some prospect of procuring a charter from Messrs. Livingstone for the vessel to go to Rangoon and Moulmein, but there was a difficulty with the Maritime Credit Company, who refused to part with the register so as to let the vessel go until the 1650*l*. had been paid. The deft. offered to the brother of the plt. Smith 50*l*., if he would find some person to advance the money to pay off the Maritime Credit Company. Mr. Smith then introduced the deft. to the plts., who up to that time were perfect strangers to the deft. and Conte. The plts. required to see Conte's references, and finding them satisfactory, entered into negotiations with the deft., who, as the plts. were informed by Conte, had authority to act for him (Conte), and to arrange the details and the chartering of the vessel. After some unsuccessful overtures the plts. sent to Conte the letter of April 17, containing the following offer:

4, Railway-place, Fenchurch-street,
17th April 1866.

G. Conte, Esq., care of Messrs. Smith Brothers and Co.
Dear Sir,—We are willing to advance you 1500*l*. on a clean mortgage of the *Cathcart* on the following conditions, viz.:
That the balance of homeward freight due on ship's arrival in Great Britain be included in such mortgage.

That we insure the ship out and home for 3000*l*., and also the homeward freight, premiums on which are to be paid us in cash before the vessel sails, and the policies to remain in our hands.

That we have 2½ per cent. on the freights of this vessel until the mortgage be paid off, whether the charters be effected by us or not, and that she is to be reported by us or our agents. On her return to Great Britain, paying us ten guineas if from a long voyage, or five guineas if from a short one.

That we receive 10 per cent. interest per annum for the money lent in this mortgage, and an extra ¾ per cent. commission on 300*l*. of same.

That 750*l*. is to be paid back by you with all interest and commission thereon within six months from the date of mortgage and the balance within twelve months from same date.

That our solicitor draw up the mortgage at your expense, and that the same be executed and the money paid over in his presence.

150*l*. to be advanced on a port mortgage on demand, you paying us 2½ per cent. commission and interest at the rate of 10 per cent. per annum.—We are, dear Sir, yours truly,

WULFF and SMITH.

P. S.—It is agreed that the above-mentioned sum of 1650*l*. is to be employed in transferring the present mortgage of like amount and on the said ship *Cathcart* from the Maritime Credit to ourselves.

WULFF and SMITH.

I accept the above on behalf of the owner Mr. G. Conte, and for myself as second mortgagee. ALEXANDER ROBINSON.
17th April 1866.

I accept the above.

G. CONTE.

This letter of the plts. to Conte of the 17th April was the basis of all future arrangements, and it is important for the proper understanding of the subsequent course of events to consider its contents somewhat minutely. In the first place, it is clear that on this occasion both Conte and the deft. represented themselves to the plts. to be what they then actually were, namely, the one the registered owner of the vessel, the other the second mortgagee of the vessel, and acting as agent

for the registered owner. In the second place, to compare the position which the Maritime Credit Company were holding with that which the plts. were about to adopt, the position of the Maritime Credit Company under the mortgage was this, they held what was substantially a port mortgage, their security was the security of the vessel alone, and the thing secured to them was the payment of the deft.'s acceptance for 1650*l*., without interest (that having been already deducted), on May 3rd. But by the arrangement about to be made with the plts., the mortgage to the plts. was to be a free one, at least to the extent of 1500*l*., together with divers commissions, premiums, &c., and this money was to be repaid, half at the expiration of six months after the new mortgage, and the other half at the expiration of a year. In addition the plts. were, if required, to advance 150*l*. upon a port mortgage. The first idea may have been, that the mortgage to the Maritime Credit Company should be cancelled, and that the whole of the agreement between the plts. and Conte should be embodied in a single new mortgage to the plts. But, as would appear from the postscript to the letter of April 17, and from an item in Mr. Billing's bill of costs, the course preferred was for the plts. to take a single transfer of the first mortgage, and in addition to take a supplementary security in order to give effect to the rest of the arrangement. But at this time the deft. was second mortgagee, and as such would of course rank behind the transferee of the first mortgage, but before the holder of any mortgage dated subsequently to his own. In order therefore to secure for the plts. complete priority over the deft., the plts.' solicitors thought it necessary to stipulate that the new mortgage to the plts. should be a clean mortgage. And accordingly it was verbally arranged between the parties that before the security to the plt. was executed the deft. should cancel his mortgage, it being of course understood that after the plt. had been so secured, his mortgage should be renewed. In pursuance of this arrangement the first step taken was for the plts.' solicitor, Mr. Billing, to prepare a draft for the new security to the plts., the indenture of April 17. The contents of this were as follows:—"The parties were Conte as mortgagor, and the plts. as mortgagees. The draft indenture (being intended for execution immediately after the execution of the transfer to the plts. of the first mortgage) recites as follows: The mortgage to the Maritime Credit Company. The sale to Conte. That Conte was the registered owner subject to the mortgage. That the plts. had consented to take an assignment of the mortgage after having the said sum of 1650*l*. secured by a transfer of the said mortgage, and also by the indenture which I am now stating. That the transfer to the plts. of the mortgage had been executed by indorsement. That the transfer had been made to secure to the plts. the repayment of the said sum of 1650*l*. and interest thereon at the rate of 10 per cent. and other money and commissions thereafter mentioned. That the vessel was about to be chartered. That it had been agreed that the vessel on her return voyage should be addressed to the mortgagees, and reported by them." The draft then contained a grant by Conte, first, of all freights "except such as might in the usual course of business be advanced to Conte under any charter-party;" and, secondly, of all policies on ship and freights. This was the security of the mortgagees. Then followed a covenant by Conte to pay, first, 150*l*., with interest, commission, &c., before the vessel left England, or rather the port of London; secondly, 750*l*., with interest, commission, &c., on 19th Oct. 1866. or on the return of the vessel; thirdly, 750*l*., with interest, commission, &c., on the 19th April 1867; fourthly, the legal cost of preparing

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the deed; fifthly, further advances that might be made by the plts. on money for which the plts. should become liable in respect of the vessel from time to time, on notice in writing for that purpose to be given to or left at the last known place of residence in England of Conte or his assigns. In default of payment of the 1650*l.*, or interest, or commission, or of any other debt or sum of money, commission, or interest intended to be secured by the indenture, on the days or times thereinbefore appointed for the payment thereof respectively, there was given to the plts. power without any further authority from Conte to take possession and sell the ship, and to appropriate the freights and policies. Under no other circumstances is authority given by this instrument to take possession and sell the ship. The plts. were further authorised to insure the vessel and freights in whatever sum they thought proper, and to charge thereupon the premiums and interest; and Conte covenanted that the plts. should act as agents for the vessel, and that the vessel should be addressed to them. On the 19th April, in order to execute the arrangement, there was a meeting of all the parties in the office of the plt., viz., the two plts., the deft. Conte, and Mr. Billing, the solicitor to the plts. Conte executed the indenture (the substance of which I have stated), and gave it to Mr. Billing; the deft. indorsed satisfaction upon his mortgage of March 6, and gave that also to Mr. Billing. Then Conte executed in favour of deft. another document, which Mr. Billing, supposing it (as he swears he did) to be a re-mortgage from Conte to the deft. in lieu of the cancelled mortgage of March 6, asked for and took possession of, and at the same time announced his intention of forwarding the plts.' document (i. e. the transfer of the mortgage of Feb. 1 and the cancellation of the deft.'s mortgage of March 6) for registration to Aberdeen by the first post, and of forwarding deft.'s document—the one in question—by the succeeding post to the same place, likewise for registration. This document of the deft., however, was beyond all doubt not a mortgage, but a bill of sale to him from Conte. Before the meeting broke up Mr. Billing gave to the deft. the following receipt:

MEMORANDUM.

I have received from Mr. Robinson his bill of sale of the ship *Cathcart* to him to be registered as cancelled, and if the transaction be not carried out with Messrs. Wulff and Smith, then I undertake to redeliver the same to him.

JOHN BILLING.

3, Chapel-place, Poultry, 19th April 1866.

I confess the terms of this receipt are inexplicable to me. I am quite at a loss to say to which of the two documents that were given to Mr. Billing by the deft. at this interview this receipt of "bill of sale to deft. to be registered as cancelled" refers, whether to the mortgage of March 6, which certainly was to be registered as cancelled, or to the bill of sale from Conte, which was certainly was not to be registered as cancelled. But it is difficult to avoid the inference that the words "bill of sale" found their way into the receipt from the unquestionable fact that a bill of sale had been received by Mr. Billing on that occasion. This interview over, all those present, except plt. Smith, went on at once to the office of the Maritime Credit Company to complete the transaction there; Mr. Wulff paid to the secretary the 1650*l.*; the secretary executed the transfer to the plt. of the mortgage of the 1st Feb., delivered to the plt. Wulff the register of the vessel for the plt. to keep in right of his port mortgage for 150*l.*, and then, with the consent of the plt. Wulff and Mr. Billing, delivered back to the deft. his acceptance for 1650*l.* about to fall due. On May 3, Mr. Billing duly sent to Aberdeen for registration both the plts.' documents, viz., the transfer dated April 19 of the mortgage of Feb. 1, and also the cancellation of the mortgage of

March 6, the registration of which was effected on April 21. Mr. Billing, however, did not send for registration the other documents which he had received from the deft.; I mean the bill of sale. He kept it in his possession for five days. On the 24th the deft. called upon him, and finding it not registered, said he would get it registered himself if Mr. Billing would give it up to him. Mr. Billing thereupon did give it up to him, and attested the execution of it by Conte, which execution by Conte, as I have already stated, had taken place on April 19, in Mr. Billing's presence. The deft. had the bill of sale duly registered on the next day, the 25th, and thereupon, whether the fact was known to the plts. and Mr. Billing or not, became registered owner of the *Cathcart*, subject of course to the mortgage to the plts. Conte, according to the documents already mentioned, ceased to have any legal interest in the vessel, but it seems that there was between himself and the deft. some private understanding to the contrary. What that understanding exactly was the court cannot say; it is not very material to the purposes of this suit. So far as I can conjecture from the evidence of the deft. and Conte, it was that, as between them, their position should be substantially the same as before the transactions of April 19, viz., Conte should be the real owner, and the deft. should be mortgagee for 850*l.* Why, if this was to be so, Conte should have on the 19th April executed the bill of sale making the deft. registered owner, and depriving himself of all ostensible interest in the vessel, I cannot form any opinion. The only explanation that Conte and the deft. offer for this matter is, that it was verbally agreed between them that the deft. should transfer the vessel to Conte upon Conte paying to him an instalment (howsoever small is not specified) of the 850*l.*, and should have a mortgage for the residue of the 850*l.* remaining unpaid. Nothing can be more vague and unsatisfactory than this, and looking to the respective positions of the parties, how that Conte was not in the ship-owning trade, and that the deft. was an uncertificated bankrupt without any place of business, and experiencing great difficulty in getting persons to enter into a charter-party with him, and looking to their subsequent dealings as brought to light by his suit, I cannot resist the conclusion that the deft. found it convenient from time to time to put Conte forward as the owner of the vessel, he himself negotiating arrangements as Conte's agent, and of course allowing Conte for the use of his name some interest in the vessel and its earnings. Pending the negotiations of April 19th, between the plt. and deft. and Conte, this contemplated charter-party with Mr. Livingstone for Rangoon went off. In the month of May the deft. entered into a charter-party through Messrs. Gellatley for the vessel to go to Antwerp, and thence to Havannah. A copy of the charter-party is produced; it is made by deft. (and not Conte) as owner of the vessel. On May 9 the deft. called upon the plts.; they deposed that he only informed them generally of a charter-party provisionally entered into with Messrs. Gellatley; but he swears that he showed them a copy of the original, by which, of course, they would see that he had made the charter as owner of the vessel. However this may be, on the strength of this charter-party the deft. asked the plts. for the register. The plts. at first refused, but a day or two after, on the deft. lodging with them scrip for the Egyptian loan for 200*l.*, fully paid up, as a security for the payment of the 150*l.*, the plts. gave up to the deft. the register of the vessel. However, in the course of a few days, Messrs. Gellatley failed, and the proposed charter-party with them fell through. On the 6th June the plts., being dissatisfied with the vessel not being char-

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tered, and generally with the conduct of the deft., whom they allege they thought to be Conte's agent, served upon Conte (not on the deft.) the following notice:

5, Vine-street, Regent-street, 6th June 1866.

Dear Sir,—We beg to hand you an account of moneys paid on your account, in respect of the ship *Catheart*, up to this date, amounting to twenty-two pounds, fourteen shillings, and fourpence (say, 22l. 14s. 4d.), exclusive of other moneys due to us, and request that such sum be paid to us within twenty-four hours from this time, and in default we shall exercise the powers over the ship vested in us by the securities we hold.—

We are, dear Sir, yours truly,

G. Conte, Esq.

WULFF and SMITH.

The account sent with this letter purported to be an account between the plts. and Conte, not between the plts. and deft. The items were disbursements made for the ship, and also an item of 9l. for the law costs of the arrangements of April 19. On the next day, according to the deft.'s account, the deft. called upon the plts. and tendered them 100l. note, out of which they were to pay themselves their account, less, however, the sum of 9l. the deft. insisting on the right of having the costs taxed before they were paid. This offer the plts. declined. The next day, the 7th June, the deft. called again, and, according to his own account, tendered the plts. the same 100l. note in payment of the whole account, law costs and all, without reservation, and the plts. thereupon said, "It is not money we want, but a charter for the vessel," and offered to procure him a charter and cargo of iron at Middlesborough, and proceed to Alexandria. This account is denied by the plts., but it is certainly true that on the same day the following agreement was made through the deft. between the plts. and Conte, which made special provision for the payment of disbursements:

Wulff and Smith, 4, Railway-place, Fenchurch-street, London, E.C., 8th June 1866.

G. Conte, Vine-street, Regent-street.

Sir,—It is this day agreed between us that the *Catheart* shall be chartered to Alexandria under the following conditions:—We are to receive the whole freight as per charter, out of which we are to pay necessary disbursements, as well as 150l. and interest at 10 per cent. per annum and 2l. commission on same, and also 2l. per cent. on 300l. to ourselves. Insurance on the ship for 3000l. from London to Middlesborough, and thence to Alexandria, and balance of freight to be paid on ship having sailed from Middlesborough. The ship is to be consigned to our agents at Middlesborough. You shall appoint the captain, but his references must be satisfactory to us.—

Yours truly,

WULFF and SMITH.

I agree to the above.—G. CONTE.

It is worth observing that this letter as it was originally framed directed that the balance of freight should be paid to the deft., and the deft.'s receipt should be a sufficient acknowledgment, but Conte, in signing it, altered it to the form as I have stated it. On the same day, in pursuance of the agreement, the charter-party was completed. It was made between Conte as owner of the vessel, and Messrs. Oppenheim, Conte undertaking that the vessel should proceed to port of lading within three weeks, and be prepared to load in July; that the ship being tight, staunch, and in every way fitted for the voyage should, with all convenient speed, proceed to any usual and safe lading place at Middlesborough-on-Tees, and there load a full cargo for Alexandria; Messrs. Oppenheim undertaking to pay freight at 31s. 6d. per ton, which, assuming a full cargo to be about 650 tons, would amount to about 1100l., this freight was to be paid in cash less 7 per cent. upon presentation of bills of lading, and to be paid to the plts. A commission of 5 per cent. was to be due from the ship to the plts., and the vessel was to be entered and cleared at the custom-house at port of lading by their agents. The execution of this charter-party by Conte was attested by the deft. On June 11, the deft. appointed to be captain of the vessel a person, a stranger to himself, but who had been recommended to him by a clerk in the plts.' office, a Capt. Seaton, and the plts. examined and approved

his references. The deft. gave to Capt. Seaton instructions as to loading at Middlesborough. On the 13th the vessel sailed from London. On the day after the plts. returned to deft. his Egyptian bonds, which had been deposited to secure the payment of the 150l., and commission that by the new agreement of June 8 was to be paid out of the freight which the plts. were to receive upon presentation of bills of lading. The vessel reached Middlesborough on Tuesday, June 19, and was there consigned to Messrs. Muller, the plts.' agent. It appears that before the vessel had arrived at Middlesborough the plts. had become dissatisfied with, and suspicious of, the deft.; they had instructed Muller, their agent at Middlesborough, to pay all the bills for the ship direct and not through the deft. They had also sent a letter to the captain to await his arrival at Middlesborough, warning him against the deft., and bidding him (the captain) to look to them for orders, and not the deft., and giving directions as to the repairs of the vessel. The master having omitted (in accordance with his instructions from the deft.) to announce to deft. by telegraph his arrival at Middlesborough, the deft. goes down, goes on board, and takes command as owner, or representing the owner. The captain keeps the plts. apprised of the conduct of the deft., and tells the deft. of his orders from the plts. Angry correspondence thereupon ensues between the plts. on the one hand and the deft. and Conte on the other, each party accusing the other of interference, the plts. evidently assuming that as mortgagees they are entitled to the control of the vessel. The captain sides with the plts., and demurs to an order of the deft. to take the vessel out of the dock to a wharf in the river, there to remove 100 tons of ballast and replace them by an equal weight of iron cargo; the deft. thereupon dismisses him on Thursday, the 21st, and appoints a Captain Tate in his stead. On the 22nd the plt. Smith comes down and goes on board with Capt. Seaton, the deft. orders them out of the vessel, and on their refusal summons them before the magistrate. The deft. there produced the necessary documents to show that he was the registered owner, to the great surprise of the plts., who depose that up to that time they had thought him only second mortgagee, and agent only for the owner. The magistrate decided in favour of the deft., ordered the plts. to leave the deft. in possession of the vessel, and bound them over to keep the peace. On Monday, the 25th, the plts.' solicitor drew up the following notice:

To Graziano Conte and Alexander Robinson.

We hereby give notice, and require you to pay to us forthwith the sum of 440l., which we have paid on account of you, or one of you, on account of the ship *Catheart*. If the same be not paid, we shall proceed to sell the said ship, in pursuance of the said powers and authorities vested in us for such purpose. Dated this 25th day of June 1866.—Yours, &c.,

WULFF and SMITH,
Railway-place, Fenchurch-street.

And sent a copy to Mr. Conte, to his address in London, and to the deft. to what they erroneously thought to be his address, and forthwith, on the same day, instituted this suit by causing the vessel to be arrested. The notice was not actually served upon the deft. till the 5th July. The object of this suit is to invoke the jurisdiction conferred recently upon the court (by the 11th section of the Admiralty Court Act 1861), to assist the plts. in enforcing their claims as mortgagees. The affidavit to lead the warrant simply referred to the mortgage of Feb. 1, and stated the plts. were the registered transferees of that mortgage, and that under that mortgage the sum of 1650l. and commission and interest was made payable on the 3rd May, and most incorrectly that they had no other security. The petition alleges that under the circumstances set forth the sum of 1650l., and also the sum of 440l., making up the sum of 2090l., together

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with commission and interest, are due to them, and prays the court to pronounce for the mortgage, and that the said sum of 2090*l.*, together with commission and interest thereon, is due to the *plts.* The first question then for the court is, whether any default has been made in payment of the moneys secured by mortgage at the time agreed upon between the parties. To take first the mortgage of Feb. 1, transferred to the *plts.* on April 19. This mortgage was to secure the payment of the debt's acceptance of May 3. In June that time had, of course, long passed, and the *plts.* contend that the money was then due to them as transferees of that mortgage, and that default had been made, fortifying them in invoking the jurisdiction of the court to enforce the mortgage. But I must consider the equities between the *plts.* and the debt., for here there are no third parties concerned. The statute (Merchant Shipping Act Amendment Act 1862, sect. 3) prescribes that without prejudice to the powers of disposition to third parties therein mentioned, concerning which no question arises in this case, "equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced in respect of any other personal property." In my opinion, the transfer of the mortgage of Feb. 1 cannot be considered separately from the indenture of April 19. The two were executed concurrently as parts of the same transaction. There was only one sum of 1650*l.* borrowed and to be repaid. This clearly appears from the whole tenor of the indenture of April 19, the recital that the *plts.* had consented to take an assignment of the mortgage of Feb. 1 upon having the said sum of 1650*l.* secured by a transfer of that mortgage, and also by the indenture of April 19, the recital that the transfer was made to secure to the *plts.* the said sum of 1650*l.* and interest thereon at 10 per cent., and other the moneys and commissions thereafter mentioned, the elaborate provisions for the repayment of the moneys by instalments, the final provisions that in default of payment the *plts.* were to take, not only the freights and policies (which alone were granted by the indenture), but also the ship (which had been granted not by that indenture, but by the mortgage of Feb. 1). Lastly, look to the significant fact that at the time of the transfer the debt's acceptance, the payment of which the mortgage of Feb. 1 had been given to secure, was returned to him. With these considerations before me, I am satisfied that the intention of the parties was that the two deeds, the mortgage of Feb. 1 transferred on April 19th, and the indenture of April 19, were to be read as one deed. The combined effect would be that on the one hand the *plts.* would have for their security not only the vessel but also freights and policies, and the money secured would have been not only 1650*l.*, but that sum, together with very high commissions and interest; but on the other hand the moneys were to be repaid not on the 3rd May as specified in the mortgage of Feb. 1, but at the times and in the manner prescribed by the indenture of April 19. Then, under the indenture of April 19, was any money due to the *plts.* at the date of the arrest of the vessel? There again a similar question arises to be dealt with in the same way. The indenture of April 19 must be read in connection with the new agreement of June 8, and be modified accordingly. Under the indenture of April 19 the *plts.* were authorised to receive only the balance of homeward freight. Conte being entitled to the advance freights, the first instalment of 750*l.* was not due to the *plts.* till the 19th Oct. 1866, on the return of the vessel; but 150*l.* with commission, &c., was payable before the vessel left London, and disbursements were made payable on presentation of notice. Into these

particulars the new agreement of June 8 introduced changes; the *plts.* were thereby empowered to receive the whole of the freights, about 1100*l.*, and that freight was payable entirely in advance upon presentation of bills of lading; out of the freights the *plts.* were to repay themselves disbursements, and also 150*l.* and interest. It seems to me then quite clear that until the freights had been paid no default had been made by the mortgagor in respect of repaying disbursements, and consequently that the *plts.* as mortgagees were not entitled to arrest the vessel or otherwise to interfere with its management, and that their conduct at Middlesbrough was an unlawful intrusion. I have dealt with the only case which I considered is presented to the court by the pleadings. But at the hearing several collateral issues were raised by the *plts.* with a view to show that a decree should be made in their favour. I cannot pass by these issues altogether without consideration. It is said that the debt. fraudulently concealed from the *plts.* that he was registered owner of the vessel. I confess that a most unsatisfactory mystery rests upon this part of the case. Why the debt., if his purpose was that Conte should appear the owner of the vessel, had his own name put upon the register; whether Conte at the time of executing the bill of sale of April 19th to the debt. knew that it was a bill of sale; what are the existing relations between debt. and Conte, except that Conte does not complain of them; in what manner they carry on the business of shipowners without office, without papers, and as far as I can see, without capital—all this is left in mystery, and I may say in suspicion. Nevertheless, it seems impossible to impute to the debt. fraudulent concealment of the bill of sale. No fraudulent object is shown to be gained by such concealment from the *plts.* There was no apparent attempt to conceal the bill of sale when it was executed. The debt. caused Conte to execute it in the presence of the *plts.* and their solicitor Mr. Billing, and Mr. Billing himself attested its execution, and the debt. gave it to Mr. Billing to get it registered. Mr. Billing kept it in his possession for several days and might of course have examined it, and if he had registered it he would of course have ascertained its contents. After this, especially as the result of the transaction stood recorded in the public register, the debt. may not unfairly have presumed the *plts.* to be aware of his being the owner. This is the only excuse for the debt. being privy to the *plt.* negotiating with Messrs. Oppenheim a charter-party with Conte who was not the owner; but under the circumstances I cannot say that the *plts.* can charge this as fraud against themselves, and this is the only act of the debt. which appears incompatible with his being the owner; his other acts are equally compatible with his being the owner, or the agent of the owner. At the same time, it is not necessary to discredit the statement of the *plts.* and Mr. Billing, that they throughout believed Conte to be the owner. Again, I do not see how the *plts.* were damaged as mortgagees; they were not deceived in the matter of the mortgage. The transfer to them of the mortgage of Feb. 18 was made by the person (Conte) who was then really the registered owner. There is no ground for saying that the *plts.* stipulated as part of the contract that Conte should execute a re-mortgage to the debt., though they doubtless anticipated that such would be the case; all that interested them was, that the old mortgage of March 6 should be taken off the register—not that a new one should be put on. It is equally groundless to say that it was a breach of the contract for the debt. to take a bill of sale from Conte. The indenture of April 19, so far from prohibiting Conte from alienation, on the contrary conten-

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THE STELLA.

[ADM.]

plated it as possible, it being specified therein "that the word mortgagor (Conte) should be taken to apply also to the assigns of the mortgagor." Conte could have assigned to the deft. or any other person when he thought proper, and was under no obligation to give notice to the plts. of such alienation. In fact, the alienation could not affect the plts.' rights as mortgagees; their rights were secure, whoever was owner of the vessel—who stood on the register was the concern not of the plts. but of Conte and the deft. and any merchants to whom the vessel might be chartered. Further, neither the ignorance of the plts. as to who was the registered owner, nor the discovery of the truth, seems to me to have misled the plts. into bringing this action, for the case of the plts. was, that they thought the deft. represented the owner was his agent. In fact, they proceeded as mortgagees to realise their security, and, as alleged, in fear that the deft., as representing the owner, was going to send the vessel to sea in an unseaworthy state. Another point raised by the plts. is, that the deft., for fraudulent purposes of his own, was about to send the vessel to sea in an unseaworthy condition. This is a very grave charge; but, in my opinion, it is not proven. No adequate ground is shown for the commission of the crime. It may be that the amount of the insurance—4000*l.* (policies for 3000*l.* effected by the plts., and one for 1000*l.* by deft.)—was greater than the gross value of the vessel which, on the occasion of the transfer of the vessel from the deft. to Conte in March 1866, appears to have been taken at 2500*l.* But the deft. declares that he made his policy of 1000*l.* only because he distrusted the solvency of the company from whom the plts. had obtained their policies, and after remonstrating with plts. and calling upon them to cancel their policies; and he is borne out by the result, for the company with which the plts. effected their insurance for 3000*l.* has since failed. Still less proven is the evidence to show that the vessel was unseaworthy, or that the deft. wished to send her to sea in an unfit condition. The vessel had been re-classed in 1862 at Lloyd's as A 1, and had been no voyage since, had only lain in St. Katherine's Dock waiting for a charter; and, in my opinion, the evidence adduced by the deft., especially that of Capt. Carr, far outweighs that for the plts., and proves that the vessel was strong and substantially seaworthy, at least for a voyage to Alexandria, and that what deficiencies there were, deficiencies in resuming gear, boats, and caulking, might very well have been supplied at Middlesborough while the vessel was being loaded, and as well after as before the 100 tons of iron cargo had been substituted for the same weight of ballast. Nor do I see any reason to think that the deft. was disinclined to have had these necessary repairs made good, or that the wharf at which the deft. was about to load the cargo was otherwise than a proper one for a ship like the *Cathart*; so that, if he had any design not fairly to carry out the charter, of course he had a motive which the plts., as mortgagees, had not, to keep down the expenses of the ship. But, in my opinion, the charge of fraud falls altogether to the ground. It is hardly worth while to mention the other minor charges made at the hearing against the deft., as, for instance, that he had misappropriated the money furnished by the plts. for the supplies of the vessel, or that, contrary to the agreement of June 8, he took the vessel out of the hands of the plts.' agent at Middlesborough. Of these I find no proof whatever. Then as to the charge that the deft., even if he had a right to dismiss Capt. Seaton from the command, had none to appoint Capt. Tate unless the plts. had first approved of the references, and that, in so doing, he committed a breach of the agreement of June 8; even if this charge were proved, it would by no means

follow that such a breach of the agreement would accelerate the time when the plts.' mortgage money was payable, or would justify the plts. in arresting the vessel. The sum of the case then seems to be this: the plts. arrested this vessel—to use their own words—partly because they "thought they had a right to the possession in the first instance under the transfer of the mortgage of Feb. 1, the payment of which was due on May 3, and also because they thought the deft. wanted to get the ship away in an unsatisfactory condition, and the plts. would not allow it, having given their word to the underwriters that the ship should be repaired." It turns out that in both these respects the plts. were mistaken in their opinion; neither had they right to possession under the transfer of the mortgage of Feb. 1, nor was there ground for supposing that the deft. did mean to send the ship away in an unseaworthy condition. In a word, the plts. arrested the vessel without cause. Under these circumstances, I have to consider what should be the decree of the court. I have paid full regard to the conduct of the deft., and I have also given due weight to the case of the *Evangelismos* (Swab. 378), in which the Judicial Committee declined to award damages to a deft. who had innocently suffered much from the arrest of his vessel by the plt. under a mistake. Their Lordships declined because the plts. had acted *bonâ fide* with probable cause and without *crassa negligentia*, having had reason to suspect that the deft.'s vessel was one which had run his own vessel down, and got away in the night. The present case is different: the plts. had full knowledge of the facts, and must be held to the legal effect of their own engagements. If they had regarded the terms of those engagements, they would have known they had no right to arrest the vessel. Add to this the arrest of the vessel by the plts. was made on the eve of commencing a profitable voyage, and after a decision of the magistrate adverse to their claim; and the plts. have attempted to support the proceeding by making charges of fraud against the deft. which they have quite failed to prove. I think this is a case for damages; I therefore order the release of this vessel, and condemn the plts. in costs and damages, the amount of the damages to be estimated in the usual way by the registrar and merchants.

March 19 and April 16, 1867.

THE STELLA.

Salvage—25 § 26 Vict. c. 63, s. 49—*Objection to the jurisdiction.*

*In a salvage suit where the defts. object to the jurisdiction under the 25 § 26 Vict. c. 63, the onus of proof that the value of the property saved is under 1000*l.* lies on them, and the statute, when prescribing the value which determines the jurisdiction, must be held to refer to the value of the property saved when first brought into a place of safety, and not at any subsequent period.*

This was a motion on the part of the defts. in a salvage suit for its dismissal, on the ground of a want of jurisdiction in the court. The facts will be found sufficiently detailed in the following arguments and judgment.

Dr. Deane, Q. C.—This is a question of the jurisdiction of the court over a salvage suit, where the value of the property is considerably under 1000*l.* (see Merchant Shipping Amendment Act 1862, 25 & 26 Vict. c. 63, s. 49). The case, however, of the other side is, that though the value is now less than 1000*l.*, yet that at the time the ship was saved, the ship, freight, and cargo were worth more. It is possible that two or three months ago

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the property was worth more than afterwards. The salvors, however, might, under the 50th section of the Merchant Shipping Amendment Act 1862, have ascertained the value at once, and before any deterioration, as alleged, by the improper beaching of the vessel had taken place. But though the vessel was in the salvors' hands, no such valuation took place. This, therefore, is such laches on their part that they cannot come here now to show the then value of the property. Again, the evidence of their affidavits is most unsatisfactory as to that point. On these grounds, therefore, I ask the court to dismiss the owners of the *Stella* from the suit, the court having no jurisdiction. I also ask for costs, for the practice in such cases is now well understood.

Clarkson contra.—This is a cause of salvage, over which this court has always had jurisdiction. On the other side, therefore, the defts., lies the burden of showing that the court has none. This has not been done. Again, with reference to the valuation under sect. 50 of the Amendment Act 1862, that might have been set on foot by either of the parties; and it is easy to see why it was not—viz., because neither plts. nor defts. had any doubt at the time of the institution of the cause that the property was worth more than 1000*l*. The vessel was only on the sand for half an hour, and her cargo consisted chiefly of deals, and was therefore imperishable, its value at the port of shipment was 560*l*., and the freight was over 200*l*., and the ship had been hailed for 1500*l*. The values in the petition were 1700*l*. Again, there is a total failure of evidence on the part of the other side to show the value to be under the requisite amount. The court, therefore, cannot say that it is satisfied it has no jurisdiction.

Dr. Deane replied.

The Court took time to consider.

April 16.—*Dr. LUSHINGTON.*—This is a motion by the defts. in a salvage cause for dismissal of suit on the ground that the value of the property saved is under 1000*l*., and therefore that under the 49th section of the Merchant Shipping Act Amendment Act the court has no jurisdiction. The sole question, therefore, is as to the value of the property saved. The *Stella* is a Norwegian vessel of 276 tons burthen, and was bound for the port of London laden with a cargo of timber. On the 21st Nov. she struck on the Sunk Sand and was assisted by the plts. in the cause into Harwich harbour. On the same day, under the directions of Mr. Groom, the Norwegian vice-consul at Harwich, she was berthed on the beach. Possession was taken of the ship and cargo by Mr. Groom's firm, who acted as the ship's agents. Neither party availed themselves of the power given by the 50th section of the Merchant Shipping Act Amendment Act to have the property valued by the receiver of the wreck. On the 26th Nov. the defts.' proctor wrote to the attorney of the plts. informing them that they had given bail for ship, cargo, and freight. In point of fact, the suit at that time had not been instituted. It was not instituted until two days afterwards, the 28th Nov. On the next day, the 29th Nov., an appearance—an absolute appearance—was entered on behalf of the defts., the owners of the ship's cargo. The vessel still lying on the beach, the cargo was discharged into barges and brought round into London, and there sold on the 22nd Feb. The defts. insist that the value of the property saved is under 1000*l*., and would prove it in the following manner: The gross freight was 286*l*. 13*s*., but this was reduced to 134*l*. 9*s*. 8*d*. in consequence of the expenses of discharging the cargo and conveying it to London. The cargo when sold in London on the 23rd Feb. produced in the gross 508*l*. 6*s*. 2*d*.,

but the net proceeds amounted only to 27*l*. 15*s*. 4*d*., and lastly Mr. Vaux, a shipbuilder of Harwich, valued the vessel on the 28th Feb. at 1500*l*. This would make the total of ship, freight, and cargo under 320*l*. On the other hand, the plts. contend that the vessel, cargo, and freight upon the arrival of the vessel at Harwich were worth more than 1000*l*., and if now they are worth less this depreciation is due to the subsequent mismanagement and delay of the defts. The plts. call attention to the fact that the vessel was insured in the sum of 1500*l*., and they would make use of the preliminary offer of bail by the defts. as an admission by them that the case fell within the jurisdiction of the court, and therefore that the value of the property saved amounted to 1000*l*. Their principal witness was Mr. Wates, a shipowner of Harwich, who was the contractor for conveying the cargo to London. He deposes: "That there was great and unnecessary delay in getting the cargo out of the vessel. That the vessel was most improperly berthed, and I verily believe, sustained considerable damage whilst lying at Harwich. That at the time the vessel was brought into Harwich harbour, I have no hesitation in saying that with her cargo and stores she was worth at least 1000*l*., and that I would most readily have given that sum for her. That had the vessel been laid where she would have floated at spring tides she might have been taken alongside the quay, or near thereto, at Harwich and discharged the cargo, or have been towed to London for 50*l*. or less. That had the said cargo being discharged when first brought in and sold at Harwich it would have realised a considerable sum over and above 508*l*. 6*s*. 2*d*." This evidence is corroborated by John Vaux, the shipbuilder (who had surveyed the vessel on the beach at Harwich, on the 28th Feb., and estimated her to be worth 1500*l*.), to the extent that the vessel must have received considerable damage by lying so long on the beach, and that a great saving might have been effected if she had been laid alongside the shipyard and repaired. It is also corroborated by Joseph Mealhen, who was employed with his vessel in conveying the cargo to London, and by Thomas Adams, a smack-owner, who deposes that he surveyed the vessel when she came into Harwich in November, and again in February, and found on the second occasion that she had suffered much injury in the interval. He also says that when she was first brought into Harwich she was worth at least 600*l*. The clerk to the plt.'s attorney also deposes that he was in November informed by the ship's agents in Harwich that the value of the cargo when shipped at Drammen was 500*l*. It may be difficult to balance this conflicting evidence: but, on the whole, I am of opinion, first, that the burden of proof is upon the defts., who undertake to show that the court has not jurisdiction in this case; and, secondly, that, upon a review of their evidence, the defts. have failed to establish that the value of the property saved did not exceed the sum of 1000*l*. It is obvious that the statute, in appointing the value of the property saved to be the condition determining the court's jurisdiction, means the value of the property when first brought into safety by the salvors, and not at any subsequent period. In the present case that date was the 21st Nov., and, looking to that date and to what then took place, I think that both the parties treated the value of the property as clearly over 1000*l*. I should, therefore, be wrong in considering that the value was then less than that sum, especially as explanation was offered of subsequent depreciation. The motion must be dismissed with costs.

Proctor for plts., *Skipwith*.

Proctors for defts., *Deane, Son, and Rogers*.

ADM.]

THE EDWARD OLIVER.

[ADM.]

Tuesday, June 11, 1867.

THE EDWARD OLIVER.

Bottomry bond—Master's claim—Priority—Marshalling of assets.

A bottomry bond, in which the master binds himself, is entitled to priority of payment before the master's claim for wages and disbursements; but this rule is not to be pushed beyond the exigency of the case, and will not be acted on to the master's prejudice where the bondholder is secure.

Where a master gave bonds on ship, freight, and cargo, binding himself, and the bonds would exhaust ship and freight, thus defeating the master's claim:

Held, that the master's claim should have priority over those of the bondholders, in effect, marshalling the assets between them.

Against this vessel four causes had been instituted; one by the master, for wages and disbursements; two by bottomry bondholders, the bonds in each case being upon ship, freight, and cargo, and stating the master to be personally liable; and the fourth for towage. The owners of the ship had not appeared, the owners of the cargo had appeared, and given bail for the payment of the bottomry bonds. Freight had been paid into court, and the vessel had been sold. The court, reserving all questions of priorities, had pronounced in favour of the master's claim, and with respect to the bonds, had pronounced for their validity, and had condemned the proceeds of the vessel and freight in the amount, and in costs, and had condemned the owner of the cargo and their bail in the balance, if any, due, on the bonds, after the proceeds of ship and freight had been exhausted, and in costs, the amount of the claims was made up as follows:—

	£	s.	d.
The master's claim.....	1,281	9	4
One bottomry bond	1,162	6	2
The other bottomry bond	3,486	18	6

There remained besides, the towage claim, exclusive of costs in each cause. To meet these charges there were the following funds:—

	£	s.	d.
Vessel, gross proceeds	2,310	0	0
Freight paid into court.....	350	0	0
	2,660	0	0
Deduct Marshal's fees	207	13	4

Balance in registry £2,452 6 8

It thus appeared that the amount of proceeds of ship and freight was insufficient not only to pay both the master's claim and the bonds, but even the bonds alone. The bondholders, however, were secure, because they had the bail of the owners of cargo to fall back upon, but the master's lien for wages and disbursements extended only to ship and freight.

A motion was now made for the payment of the master's claim out of the proceeds in the registry in priority to the bottomry bonds.

Lushington in support of the motion.—The real question is, whether the owners of cargo can come here and insist that the bonds must be first of all paid out of ship and freight. The bondholders have no interest in insisting on the clause in the bond, that the master is not to seek relief. The master has a right in rem for his wages. The Merchant Shipping Act of 1854 gives him the same lien as a seaman. This court has since not only given him that, but also a right of priority with the seamen. No doubt, it is laid down in the *Jonathan Goodhue*, Sw. 524, that the bondholder has priority in a case

where the master binds himself; but that was a case in which there were not funds to satisfy both. In the *Selatia*, Lush. 545, the master had not personally bound himself, but had covenanted that the barque, cargo, and freight should be at all times liable after the voyage to the payment of the money. In that case the prior claim of the master before the bondholder was confirmed, and the tendency of that decision goes far to limit the *Jonathan Goodhue*. The claim for disbursements is on the same footing. In the *Mary Anne*, L. Rep., 1 Adm. 8, a claim for disbursements was given priority over a mortgage. In the case of the *Union*, Lush. 128, there was a bottomry bond, and a claim for seaman's wages. The owners of the cargo intervened to resist the mariner's claim, but the court eventually pronounced for its priority over that of the bondholder. In the case of the *Priscilla*, Lush. 1, which may be quoted to prove that the last bondholder is entitled to absolute priority, that point as appears by the reporter's note (p. 5) was not there decided; consequently, if the bondholder is secure, he is not necessarily to be first paid. It is not equitable for the owners of cargo to oust the master's claim, they have ratified his act, its purpose was for their benefit; the ship itself has perished, or rather been given away for the benefit of the owners of the cargo. Some of the expenses incurred at Mauritius are such as properly fall on the owners of the cargo. They ask to be put in the position of the bondholders, and to be enabled to exercise a privilege of the bondholders against the master, there is no privity between them. The owners of cargo are not the assignees of the holders of the bond; they try to insist on a legal right which belongs to the bondholders alone; no one has a right to insist on this but the bondholders themselves: (The *Annapolis*, Lush. 355.) I ask that the master's claim be paid in priority to those of the bondholders; but in reality it is a question which does not affect their interest at all.

Bruce for the owners of cargo.—The practical effect of this motion is to make cargo liable for wages. The rule on this point is clear. Where the master chooses to render himself liable on a bottomry bond, he does an act which makes it inequitable that he should seek payment of his own claim as long as that debt remains undischarged; assets will not be marshalled where the doing so can interfere with any rule laid down by this court, which is entitled to preferential regard. The question of hardship cannot be entertained by the court; if that argument were available the decisions in the *Priscilla* and *Jonathan Goodhue* could not be sustained.

Clarkson for the bondholders.—This is an attempt to marshal assets. The court will not marshal assets so as to prejudice the rights of third parties (*Aldrich v. Cooper*, 2 W. & Tu. L. Cas. Eq. 71.) If in this case the court marshal the assets it will throw the payment of the master's wages on parties not at all liable. The cargo cannot be resorted to till ship and freight is exhausted. It is a condition precedent to the master's acting as agent for the owner of the cargo, that it be only in case of necessity he should so act, and there is an implied contract that he will allow nothing prejudicial to the cargo till ship and freight has been exhausted.

Lushington in reply noticed the case of
Benson v. Duncan, 3 Ex. 644.

June 20.—Dr. LUSHINGTON.—The motion to the court is to pronounce the master entitled to priority of payment out of the proceeds of ship and freight now in the registry. If this motion is refused the

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ship and freight will be exhausted in payment of the bonds (and, indeed, will have to be supplemented by the cargo), and the master, who has no claim against the cargo will lose his remedy *in rem* altogether. If, on the other hand, it is granted, the result will be that the master will first be paid out of ship and freight, then the remainder of the proceeds of ship and freight will be exhausted in part payment of the bonds, and the balance will be paid by the owners of cargo. This balance, as compared with the balance in the other alternative, will of course be greater by the exact sum paid out of the proceeds of ship and freight to the master. In either case the bonds would be paid in full. The contention is solely between the master and owners of cargo. The owners of the cargo contend that the rule of the court—established in the case of the *Jonathan Goodhue*, Sw. 520—that the holder of a bottomry bond, upon which the master has made himself personally liable, is paid out of the proceeds of ship and freight, before the master, is an absolute rule. In support of this contention reference was made to the case of the *Priscilla*, Lush. 1. In that case there were two bonds, one upon ship and freight only, and the other of posterior date on ship, freight, and cargo; and the rule that a posterior bond takes precedence over an earlier bond was enforced, although the enforcement of the rule was not necessary for the protection of the posterior bond, and resulted in the earlier bond being left unpaid. For the effect of precedence being given to the posterior bond, coupled with the rule that ship and freight must be exhausted before cargo is resorted to, in payment of bottomry bonds, was, that the whole of the proceeds of ship and freight were exhausted in payment of the posterior bond, and nothing was left to satisfy the earlier bond. Whereas if the earlier bond had been paid out of proceeds of ship and freight, the remainder, supplemented by the cargo, would have been enough to discharge the second bond in full. The point, however, as to whether the rule gave an absolute priority does not seem to have been raised in argument. Mr. Clarkson further directed the attention of the court to a well-known rule of equity that no marshalling is permitted to the prejudice of third parties. In the present instance it was alleged that marshalling of assets between the master, who has ship and freight as his only securities, and the bondholders, who have ship, freight, and cargo, would work to the injury of the owners of cargo, who would thus become charged with a larger sum than they would otherwise be liable to; and further, that this additional charge would be improperly saddled upon the cargo, because, though nominally due under a bond affecting cargo, it would really represent a burden to which cargo is not liable, viz., wages and disbursements of master. On the other hand, it is argued for the master that the master's lien on ship and freight for wages and disbursements in general, takes precedence of a bottomry bond, and though this lien is liable to be postponed to a bottomry bond, for which the master has made himself personally liable, there is no absolute rule to this effect; that it is a rule only made for the protection of the bondholder, and consequently does not obtain where the bottomry bondholder does not need such protection; that in this instance the bottomry bonds will certainly be paid in full out of cargo if not out of ship and freight; that the holders therefore have no interest in claiming to be paid out of ship and freight before the master, and that the owners of cargo have no equity to insist upon the holders of the bonds pressing their claim. This is the first time the point has been raised. The general principle is clear. If a master by the terms of the bottomry bond has bound himself as well as ship and freight

for the payment of the bond, it would be manifestly wrong that in defeasance of his own contract he should not only not pay the bond himself, but obtain out of the proceeds of the ship and freight payment of his own claims against the owners, leaving the bottomry bondholders unpaid. Hence the rule by which the master's claim is liable under these circumstances to be postponed. But this rule frequently operates with great severity against the master, depriving him of his real remedy for recovering his wages and disbursements, and certainly ought not to be carried beyond the exigency of the case, that is, ought not to be extended to circumstances where the bottomry bondholder would not be prejudiced by the master being paid before him. I see no reason why the owners of the cargo should be benefited at the expense of the master. For the master, though he may have bound himself for the payment of the bond to the holders thereof, has made no such contract with the owners of cargo, and they are not entitled to invoke a rule made only for the protection of the bondholder. The Court will therefore pronounce the proceeds of the ship and freight to be first applied in payment of the master's claim for wages and disbursements.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs.
Barristers-at-Law.

March 16 and 18, 1867.

THE LIVERPOOL MARINE CREDIT COMPANY (LIMITED) v. HUNTER.

Law of foreign state—Demurrer to bill to restrain proceedings—Law of Louisiana as to transfer of ships and other chattels.

A British ship was transferred by the registered owner in England to the plts. by mortgage duly registered. The ship sailed to New Orleans, in Louisiana. By the law of that state transfers of chattels without delivery of possession are not recognised. The defts. (who were British subjects with a branch firm at New Orleans, and were aware of the mortgage) commenced actions against the owner for moneys due, and obtained a writ of attachment under which the ship was seized. The mortgages intervened, and gave bonds to the defts., who thereupon released the ship.

To a bill praying that the defts. might be restrained from taking proceedings on the bonds, a demurrer was allowed.

Simpson v. Fogo, 1 J. & H. 18; 8 L. T. Rep. N. S. 6. distinguished.

This was a demurrer.

The statements in the bill were as follows:—

In and previously to Nov. 1865, the defts. Messrs. Fernie carried on business as merchants at Liverpool under the style of "Ferne Brothers and Co." and the defts. F. Boulton, T. English, T. Brandon, and W. Hunter carried on business as merchants at Liverpool under the style of "Boulton, English, and Brandon," and all the said defts., together with the deft. C. Askew, also carried on business as merchants in New Orleans, in the state of Louisiana, in America, under the style of "Hunter, Askew, and Co." The firm of Hunter, Askew, and Co. acted as the agents at New Orleans of the firms of Fernie, Brothers, and Co., and Boulton, English, and Brandon, both of which firms acted as the Liverpool agents of Hunter, Askew, and Co. All the defts. were British subjects, and, except W. Hunter and C. Askew (who resided temporarily at New Orleans), were resident at Liverpool. In the

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spring of 1866 W. Hunter came to Liverpool, where he was residing when the suit commenced.

Henry Lafone, a merchant of Liverpool, was the duly registered owner of the British screw steamship the *Pacific*.

By an indenture dated the 23rd Dec. 1865, and made between Lafone of the one part, and the plts. of the other, the *Pacific* was mortgaged by Lafone to the plts. for 1800*l.* and interest at 10 per cent. per annum. The mortgage was duly registered at Liverpool on the same day.

In Oct. 1866 Lafone employed the firm of Boulton, English, and Brandon, of Liverpool, as his brokers with respect to the steamship *Pacific*, and she was consigned by them, with the concurrence of Lafone, to the debts' firm of Hunter, Askew, and Co., at New Orleans, upon the assurance and undertaking of the firm of Boulton, English, and Brandon, and the personal assurance and undertaking of the debt. W. Hunter, on behalf of the said firm of Hunter, Askew, and Co., that the said firm would not attempt to take any proceedings against the said ship abroad, but would remit the freight to her mortgagees as an independent transaction: and in pursuance of such assurance and undertaking the debt. W. Hunter wrote to Hunter, Askew, and Co., at New Orleans, and instructed them, if the *Pacific* came consigned to them, to leave the balance of her account on its own merits, and to account for the freight independently of all other transactions.

At that time Boulton, Brandon, and Co. were in monetary difficulties, and therefore the consignment was changed, whereupon the undertaking was withdrawn, and upon the arrival of the *Pacific* at New Orleans, Hunter, Askew, and Co. commenced actions at New Orleans for debts alleged to be due to them from Lafone on other accounts, and obtained writs of attachment under which the ship was seized.

Paragraph 18 of the bill was as follows:

By the law of Louisiana transfers of property in chattels, without delivery of possession, are not recognised, and the title of the plts. as first mortgagees of the said steamship would have been wholly disregarded by the courts at New Orleans, if the plts. had attempted to assert the same in the said courts, and the said ship would have been sold by order of the said courts as the property of the said Henry Lafone the debt in the said actions, and the proceeds of such sale would have been applied in or towards payment of the debts for the recovery of which the said actions were brought, without any regard whatever to the rights of the plts. as mortgagees of the said ship. Under the circumstances aforesaid, the only means by which the plts. could prevent the sale in manner aforesaid of the said ship and recover possession of her, was by giving bonds to the plts. in the said actions as security for the payment of the amounts which might be recovered therein, and the costs thereof, and the plts. accordingly intervened in the said actions and by their agents Messrs. Graham and Co., of New Orleans, gave to the debts. two bonds both dated the day of 1866, for the sum of *and* as security for the payment by the plts. in this suit to them the debts. in this suit of the amounts to be recovered in the said actions against the said Henry Lafone and the costs thereof, and upon the execution and delivery of the said bonds the said steamship, the *Pacific*, was released on the 6th Dec. 1866 by the sheriff of New Orleans, and sailed three days afterwards for Liverpool, where she subsequently arrived.

The bill prayed that the debts. might be restrained from taking or continuing any proceedings at law or in equity at New Orleans or elsewhere against the plts. or their agents, Messrs. Graham and Co., for the purpose of enforcing the said bonds, or the payment of any money under them, or under any judgment recovered or to be recovered by the debts. in any action or suit founded on the bonds; that the bonds might be delivered up to be cancelled; and that if the debts. should proceed at New Orleans or elsewhere upon the bonds, and oblige the plts. to pay any money under the said bonds, then that the debts. might be declared personally liable to the plts. for the amounts of such money, together with interest; and for other consequential relief.

To this bill the debts. Boulton, English, and Brandon demurred.

G. M. Giffard, Q.C. and Robinson, for the demurrer, contended that there was no case for relief disclosed by the bill. *Simpson v. Fogo* (8 L. T. Rep. N. S. 61, 1 John. & H. 18) was altogether a different case from the present.

E. E. Kay, Q.C. and Fischer, for the bill, cited

Simpson v. Fogo (ubi sup.);

Bushby v. Munday, 5 Mad. 297;

The Carron Company v. MacLaren, 5 H. of L. Cas. 416; 3 W. R. 597;

Lord Portarlington v. Southby, 3 My. & K. 104;

Hope v. Carnegie, 18 L. T. Rep. N. S. 624;

Pennell v. Roy, 3 De G. M. & G. 126;

Tulleyrand v. Boulanger, 3 Ves. 447;

Wright v. Simpson, 6 Ves. 714.

THE VICE-CHANCELLOR.—I do not think this case comes within *Simpson v. Fogo* (ubi sup.) The conclusion at which I arrived in that case was simply this, that although it is part of the law of nations to recognise the tribunals of all countries as administering justice between their subjects pursuant to natural equity and natural justice, and to give credit in that respect to their course of procedure, yet that there are exceptions to that rule. If, for example, in examining a judgment of a foreign court (which you are at liberty to do as to anything that appears on the face of it) you find that a course of proceeding has been adopted which is at variance with the principles of natural justice, then the court will not give weight to that decision and authority, and will not recognise the foreign court as having acted pursuant to these just principles, in pursuance of which it would of course be willing to believe it had acted in the absence of any demonstration to the contrary. In some foreign courts they proceed to judgment in the absence of the party against whom the proceedings may be brought by some course of procedure which, in particular cases—for example, in *Buchanan v. Rucher*, 1 Camp. 65—has appeared to the courts of this country to be unjust. In the case mentioned notice was given in an imperfect manner, and the judgment was against the party, as it were, by default, although, as it appeared to the courts of this country, he had not sufficient notice of the proceedings. In such a case this court would not enforce or recognise a judgment so obtained. It was on this principle that, in the case of *Simpson v. Fogo*, where a judgment had been given by a court of Louisiana, which dealt with a ship as being the property and assets of the debtor, against whom proceedings had been taken, and utterly disregarded a mortgage which was a perfectly good and valid charge at the time the court was taking it into consideration, though it had not been perfected in a manner which these courts chose to recognise, and by some proceedings peculiar to themselves and not sanctioned or recognised by the general law of nations, it appeared to me that if they chose so utterly to disregard the rights of the mortgagees, then, if the ship came here, this court was at liberty to say the law of this country prevailed as to that ship, and to disregard the decision of the court of Louisiana. In one case I remember to have seen at common law, since my decision in *Simpson v. Fogo*, I think I was misunderstood in one respect, because, in that subsequent case it was supposed that I had acted in *Simpson v. Fogo* on a sort of *lex talionis*, namely, that if they would not recognise our law we would not recognise theirs. It was nothing of the sort, but it was simply this: finding that the other court would not recognise the title of the mortgagees to the ship, which was property in this country, and with which

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I had to deal, I said I could not hold that right to be displaced by a judgment which says. "We will not recognise the existence of this title, because it is not a title which exists according to our notions of what law ought to be." In that case I was particularly desirous of drawing the distinction between the municipal and statute law of the country. Every country has a right to make its own statutory laws, which would be binding on whoever may come to live in it, however harsh such laws may be. The state of Louisiana has not made any statutory law which declares that a person coming into the state with a ship is to be considered the owner of the ship. But the judges have said, "We think that such and such is the way in which a title ought to be manifested, and accordingly we held that such a title cannot be manifested in any other way. It is, therefore, a decision of the judicature contrary to the principles established by the courts of every other country in the world, as has been well remarked by one of their most able jurists, Mr. Justice Story. That being so, I should certainly, if the ship were here, disregard any title those courts might have recognised with regard to the ship, while totally ignoring the title of the mortgagees. But I am asked to go a step farther, and to say that, this being the state of the law of Louisiana, if British subjects trade there, and a debtor of theirs comes there with a ship which he has mortgaged to another, but which the courts of Louisiana choose to treat as his own chattel, it is contrary to equity and justice that a British subject should sue that man at all, and should take the ship in execution, knowing that if he so took it in execution the rights of the mortgagee would be disregarded. If I were to lay down that doctrine the consequences would be these. I ought then to restrain the British merchant living in this country from proceeding by his agent abroad to take proceedings against the ship according to the law of Louisiana. I should in effect be saying to every British subject to whom a debt is owing from another British subject, "You shall not have the same remedies against your debtor that everybody living in Louisiana has." Any American may proceed to sell the ship, disregarding the British law, but a British subject is not to have the right. He is to stand by and see the whole of his debtor's property taken and disposed of by the Louisiana creditors of his debtor, and he must stand by and not touch it, because this court would hold it inequitable that he should concur in any proceedings which should enable him to be paid *pari passu* with the creditors. I suppose it would go to this length, that if a dividend was declared, every dividend coming to the British subject must be stopped, and he must be held not entitled to it. Surely that would be pushing the doctrine to an extreme length, which I hope nothing that I decided in *Simpson v. Fogo* can be supposed to authorise. But if you could not restrain him from exercising his ordinary remedies against the debtor, the whole case falls to the ground. Because, if I could not have restrained them from suing, it is not inequitable to sue, and then it is not inequitable that they should take the bond. But this case is lower than the case of restraining the debtors, suing, because the bond is given. What would be the consequence of my saying, on this further step being taken, that this species of equity exists? Why, the courts of Louisiana would take good care that no ship should ever be released on a bond given by any English subject. They would say: "The bond is worth nothing, because the moment you give the bond, the Court of Ch. in England will set it aside. For the ship of any other state in the world you may give a bond and deliver the ship; but we will take care not to

let any Englishman give a bond to recover the ship." The case stands thus with reference to the point which I put about the injunction. The plt. is in this dilemma, either I could interfere to restrain, not the action against Lafone, but the taking out execution against the ship without giving credit to the mortgagee—either I could restrain that execution or I could not. I do not think I could. But suppose I could, then I apprehend the plts. should have come here before giving the bond, and not by giving the bond have voluntarily placed themselves in a worse situation. *Talleyrand's case*, 3 Ves. 447, was a different one. What the court there decided was, that the creditor had no right to put in force remedies in this country which were not remedies that he could have enforced on the original contract. On the facts disclosed upon the bill there is simply this equity, and no other: "You can by law attach as the property of the debtor a ship which he is in possession of, disregarding a mortgage which you know to exist upon it, and you have exercised that right which every other creditor could exercise, foreigners as well as others. We have found ourselves obliged to give bonds to prevent your exercising that right, and now we come and ask this court to restrain you from enforcing this law of Louisiana against the ship, and upon the bond which we have given to obviate your inequitably enforcing that law." I put my decision on three grounds. In the first place, I think I should not have restrained the person from taking out execution, because I could not put him in the same position as all the other creditors were, and I should be giving an advantage to all the American creditors, which I have no reason to think is the course I ought to take. In the second place, if I could have restrained him from taking out execution, then the plts. should have come here before giving the bonds. And in the third place, if I was to set aside these bonds it would result in this, that with reference to all bonds of this description I should be placing subjects of this country in a position in which it would be impossible for them to release their ships. For these reasons I hold I have no jurisdiction to interfere upon the case alleged in the present bill. [His Honour then noticed the special ground on which the case had been put by Mr. Kay, namely the former agreement that the debts would not take proceedings in Louisiana against the ship, and after remarking that the mortgagees were no party to this arrangement, and that at the most it could only be considered as notice of the mortgage, he continued:] The case is reduced to the simple question whether it is so inequitable that creditors who are British merchants, and now domiciled here, should avail themselves of the remedies given them in common with the American subjects and everyone else in Louisiana, that I should restrain them from proceeding with their action. I think clearly not. I must therefore allow the demurrer.

Solicitors: for the plts., *Chester and Urquhart*, agents for *Luce, Banner, Gill, Newton, and Bushby*, of Liverpool.

For the debts.: *Field, Roscoe and Francis*; *Gregory, Rowcliffe, Rowcliffe, and Raule*.

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because the moment you give the bond, the Court of Ch. in England will set it aside. For the ship of any other state in the world you may give a bond and deliver the ship; but we will take care not to

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BERNDTSON V. STRANG AND OTHERS.

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June 27, 28, and July 2, 1867.

BERNDTSON V. STRANG AND OTHERS.

Vendor and purchaser—Stoppage in transitu—Shipment of goods—Time when shipper loses dominion over such goods.

A contract was entered into by timber merchants in London for the purchase of a cargo of Swedish timber, the property of the plt. in Sweden. The contract was in the usual form. The vendor was to provide the ship on board which the timber was to be conveyed to the port of London; but this was subsequently varied, and the purchasers chartered a ship for that purpose. The timber was to be paid for by a bill of exchange at six months. The bill of lading was in the usual form. The vendor endorsed this bill of lading in blank, and it was handed over by the vendor's agent to the purchasers in exchange for the stipulated bill of exchange. Before the arrival of the timber in London, the purchasers had stopped payment, and the vendor gave notice to the captain, who was obliged to put into Copenhagen, not to deliver the timber to the purchasers in London:

Held, that the vendor still possessed his right of stoppage in transitu, the goods not having been completely delivered, and that the ship, although chartered by the purchasers, was only an instrument of conveyance, and the captain a common carrier.

This was a bill filed originally against Messrs. Churchill and Sim, timber brokers, of London, and also against the other defts., the consignees in London, of a shipment of timber under the following circumstances:—

The plt. Mr. Berndtson was a timber merchant at Gefle in Sweden, and a Mr. Von Kock was his agent in Paris. Previously to Feb. 1863 and thenceforward until they stopped payment, Messrs. Langton and Robinson were timber merchants in London. On the 12th Feb. 1863 Messrs. Langtons contracted with Von Kock, as plt.'s agent, for a cargo of timber. The contract was as follows:

Bought of Mr. Von Kock, 7, Rue de St. Lazare, Paris, as agent for Mr. F. B. Berndtson, of Gefle, about
 300 Petersburg standard mixed deals 3 x 9: Prices per
 100 do. do. 4 x 9 standard at
 20 to 25 do. do. 4 x 11 6l. 15s.
 60 to 70 do. do. 2½ x 9 at 6l. 10s.
 600 do. third quality 3 x 9
 200 do. do. 4 x 9 at 5l. 15s.
 40 to 50 do. do. 4 x 11:
 80 to 100 do. do. 2½ x 9 at 5l. 10s.
 1500 to 1445 Petersburg standard red deals average length
 17 feet, and the said pieces franco on board payable by buyers' acceptance of sellers' drafts, at six months from date of bills of lading, shipment in London.

The goods are warranted of equal quality to the Karsnii's Company's stock.

The mixed to be marked K I H or F M B.

The thirds K I I H or F B.

Sellers to provide ships to a freight not exceeding 531 in full per Petersburg standard, with two or three guineas of gratification per 100 Petersburg stand. in case of need. If ships cannot be chartered within the limit the contract to be void.
 London, the 12th Feb. 1863. LANGTON and ROBINSON.

It was subsequently agreed that instead of Berndtson providing a ship for the conveyance of the timber, Messrs. Langton and Robinson should themselves charter a vessel to convey the timber from Gefle to London.

They accordingly chartered a ship called the *Maastron*, which proceeded to Gefle for the timber.

In Oct. 1863 the plt. shipped the timber, the price according to the terms of the contract, being 1589l. 12s. 6d. He also advanced to the captain of said ship 153l. 8s. 2d. for the freight, which sums, with interest for three months, made a total of 1744l. 19s.

On the 22nd Oct. plt. drew a bill of exchange for this amount on Messrs. Langton and Robinson, payable at six months after date.

At the same time (as it was alleged) in order to preserve his control over the timber, the plt. caused a bill of lading thereof to be drawn in his name as the shipper, making it deliverable to his order or assignment.

The bill of lading was as follows:

Shipped in good order and well conditioned by F. M. Berndtson, in and upon the good ship called *Maastron*, whereof is master for this present voyage Alsing, and now riding at anchor in this port, and bound for London,

1179 ½ dozen of deals,

being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of London (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation of whatever nature and kind soever excepted) unto order or assigns, he or they paying freight for said goods, and other conditions as per charter-party, primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which three bills being accomplished the others to stand void.

Given in Gefle, 22nd Oct. 1863. The cargo delivered without delay, two deals in dispute, clear of all damage.

FREDERICK ALSING.

Received as anticipation on the freight, R m b.

R3700 17 66.....	£153 8 2
Insurance, 3 per cent	4 12 1

£158 0 3
 F. ALSING.

For loading have been used twenty-four days.

The plt. F. M. Berndtson, endorsed the above bill of lading in blank, and ordered it to be handed over, to Messrs. Langton and Robinson, in exchange for their acceptance of the bill of exchange for 1744l. 19s.

Langton and Robinson deposited the bill of lading and a policy of insurance with Churchill and Sim, the brokers, for advances made by them to a large amount. After the commencement of the suit, Messrs. Churchill and Sim were paid a proportionate sum in respect of their advance on the cargo of timber, and the bill was subsequently dismissed as against them.

The *Maastron* sailed from Gefle with the timber in Oct. 1863, bound for London. She, however, put into Copenhagen in distress, and whilst there, the plt. having heard of the insolvency of Langton and Robinson, caused a notice, dated the 26th March 1864, to be served on the captain, stopping the cargo *in transitu*, on account of the insolvency of Langton and Robinson, and requiring the timber to be delivered to the plt. on his order.

On the arrival of the ship in the Thames, on the 26th April 1864, notices to the same effect were served on the captain, the brokers, and the superintendent of the Surrey Canal Company, where the timber was to be discharged.

By an indenture dated the 19th Sept. 1864, Messrs. Langton and Co. assigned to trustees all their assets for the benefit of their creditors.

The net proceeds of the timber (1570l.) had been paid into court.

The trustees of Langton and Co., the purchasers, claimed these proceeds, and had commenced an action at law against the brokers for the amount.

On the 25th April 1864, the bill of exchange for 1744l. 19s. was returned dishonoured.

The plt.'s bill, as amended, prayed that the then plt.s. (as representing the original plt. Berndtson) were entitled in equity to a valid and subsisting charge on the proceeds of the timber with interest and costs, and for an injunction to restrain the action at law.

The cause now came on for a hearing, and the question was whether Berndtson had a right to stop the cargo *in transitu*.

Gifford, Q. C. and E. F. Kay, Q. C. for the plt.s., contended that the dominion over the cargo of timber remained with Berndtson, and that inasmuch as the purchasers had stopped payment and the

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PROUDFOOT v. MONTEFIORE.

[Q. B.]

price of the timber was not paid, he had a right to stop the cargo *in transitu*. They cited

Bollinger v. Inglis, 3 East, 380;
Turner v. Trustees of Liverpool Docks, 6 Ex. Rep. 543;
Schotsmans v. Lancaster and Yorkshire Railway Company, Law Rep., 1 Ch. 349; 13 L. T. Rep. N. S. 733; on appeal. L. Rep., 2, 332;
Smith's Merc. Law, 555;
Gurney v. Brown, 3 El. B. 622;
Cosens v. Thompson, 5 Moo. P. C. 165.

Druce, Q. C., and *Freeling* for the defts., contended that the question of property vesting did not depend on whether the ship was a general ship or not. There was a distinction between the cases where the ship was sent expressly by the buyer to receive the goods, and where there was a shipment by the vendor without any communication with the purchaser. That a ship chartered by the purchaser was equivalent to its being his own ship, but in either case the delivery was qualified by the terms of the bill of lading, which in both formed the contract between the parties. In the present case the ship was by agreement sent by the buyer to receive the goods, and the shipment was on account and at the risk of the buyer. The sale was one on credit for six months by a bill of exchange at that date. This was drawn and accepted by the buyer, and the moment it was delivered to the plaintiff or his agent, the bill of lading belonged to the buyer. The bill of exchange was accepted by the vendor as a payment. What had been stipulated by the buyer was completed by him, and from that time the property vested in him, and the right of stoppage had ceased. In support of their view of the case, they relied also on

Cosens v. Thompson, 5 Moo. P. C. 165;
Bollinger v. Inglis, 3 East 381.

And cited

Brown v. Hure, 4 Ex. 173;
Blizam v. Saunders, 4 B. & C. 360;
Van Casteel v. Booker, 2 Ex. Rep. 691;
Green v. Sechell, 7 C. B. Rep. 747.

G. Giffard, in reply, referred to

18 & 19 Vict. c. 111, Bills of Lading;
Smith's L. Cas. 4th edit. 643;
Thompson v. Treatwell, 6 B. & C. 36.

The VICE-CHANCELLOR, before stating the facts of the case, referred to a case of *Spalding v. Ruding*, argued before Lord Langdale when M. R., and on appeal before Lord Lyndhurst when L. C., and affirmed, in which he, the V. C., was counsel, and he cited it from his manuscript notes. That case was, he believed, the first case in which the strict right of stopping *in transitu* was mitigated in favour of a mortgagee. The V. C. then entered fully into the facts of the present case, and commented upon the various authorities which had been cited in argument. As regarded the original contract there did not appear to him to have been any intention on the part of the plt. to abandon his right of stoppage *in transitu* until the goods were actually paid for. Nor did it so appear by anything in the terms of the bill of lading. Although that bill of lading was endorsed by the vendor in blank, and handed over to the purchaser in exchange for the accepted bill of exchange, that did not complete the delivery of the goods, or take out of the vendor his right of stoppage *in transitu*. There was no substantial difference between this and the cases of *Bollinger v. Inglis*, and *Spalding v. Ruding*. First, was there a *transitus*? and if so, was it terminated by a complete delivery of the goods? Had the goods been delivered on board the purchaser's own ship the *transitus* would have been at an end, the same as it would have been if the goods had been delivered to the purchaser's

carter had the conveyance been a cart. But there an intermediate person (the captain of the ship) intervened, and the delivery to him was only as to a common carrier, the ship only the instrument of conveyance; and as if the captain had been the vendor's agent. Delivery of the goods to him was not a complete delivery to the purchaser. He should therefore adopt the case of *Spalding v. Ruding*, and declare that the vendor had a right to a stoppage *in transitu*. Minutes to be prepared and signed by counsel.

Solicitors for plts., *Thomas and Hollums*.

Solicitors for defts., *Linklaters and Co*.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and C. W. LOVEST, Esqrs.,
 Barristers-at-Law.

May 7 and June 13, 1867.

PROUDFOOT v. MONTEFIORE.

Marine Insurance—Concealment of material fact by agent of insurer—Means of communication by agent to principal.

Where an agent whose duty it is to communicate information to his principal as to the state of a ship, or cargo omits to discharge such duty, and the owner, in the absence of information as to any facts material to be communicated to the underwriter, effects an insurance, such insurance will be void. The insurer is entitled to assume as the basis of the contract between him and the assured that the latter will communicate to him every material fact of which the assured had, or in the ordinary course of business ought to have, knowledge, and that the latter will take the necessary measures, by the employment of a competent and honest agent, to obtain all due information.

Fitzherbert v. Mather, 1 T. R. 12, and *Gladstone v. King*, 1 Mau. & S. 35, approved.

Where, in addition to the ordinary postal service, the means exist of communicating such information by telegraph, it is the duty of the agent to employ the latter mode of communication.

This was a case stated for the opinion of the court in an action upon a policy of marine insurance, which had been twice tried, on the first occasion before Crompton, J., and on the second before Mellor, J.

The facts and arguments sufficiently appear in the judgment.

T. Jones, Q. C. for the plt.

Cohen for the deft.

The following authorities were cited:

Ruggles v. The General Interest Insurance Company, 74;
Fitzherbert v. Mather, 1 T. R. 12;
Gladstone v. King, 1 Mau. & S. 35;
Stewart v. Dunlop, 4 Brown's Cas. in Par. 483;
 1 Phillips on Insurance, 298;
 2 Duer on Marine Insurance, 418, 427;
 Arnould on Marine Insurance (3rd edit., by Mac-lachlan), 502;
Friere v. Woodhouse, Holt, N. P. 572;
The North British Insurance Company v. Lloyd, 10 Ex. 528;
Moens v. Heynforth (judgment of Parke, B.), 10 M. & W. 167;
Lee v. Jones, 84 L. J. 131 C. P.; 12 L. T. Rep. N. S. 122;
Wharleton v. Hardisty, 8 E. & B. 232;
Randall v. Wickham, 28 L. J. 188 Ch.;
 8 Kent Com. 358, 8th edit.

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PROUDFOOT v. MONTEFIORE.

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The judgment of the Court was now (June 15) delivered by

COCKBURN, C. J.—This was an action against the deft. as chairman of the Alliance Marine Insurance Company, for the recovery of damages from the company in respect of the company not having delivered to the plt. a policy of insurance on certain goods shipped on board a vessel called the *Ann Duncan*, pursuant to an agreement alleged by the plt. to have been entered into between him and the company, and in respect of the company not having paid the sum of money which the plt. alleges would have become due on such policy if the same had been so delivered. The agreement was for insurance on a cargo of madder lost or not lost, shipped at Smyrna on a voyage from Smyrna to Liverpool, on board the ship *Ann Duncan*, for and on account of the plt., and consigned to him by one T. B. Rees, of Smyrna. The plt. dealing largely in madders in the Smyrna market. Rees, who resides at Smyrna, was employed by him at a salary of 800*l.* a year to make purchases of madder on his account, and to ship and consign the cargoes to him. The cargo in question was purchased by Rees in the course of his employment as such agent. The ship, with the cargo on board, sailed from Smyrna on the 21st Jan. 1861, but again brought up in the Gulf of Smyrna on the same day. She set sail again on the 23rd, but was stranded in the course of that day, and became a wreck. Intelligence of the stranding of the ship was communicated to Rees on the morning of the 24th. On the 26th, which was the first post day, he communicated by letter to the plt. the loss of the vessel, and the fact that though the cargo had been got out, yet as the vessel had had twelve feet of water in the hold, the greater part of the cargo would be seriously damaged. Having communicated this information, the letter proceeds thus: "I hope to goodness you are fully insured. On the 12th inst. I forwarded you invoice and weights of the shipment by her, which gave you plenty of time to effect insurance. Lloyd's agents have telegraphed the disaster, which will reach London before my letter of the 19th inst., inclosing bill of lading. I did not dare telegraph to you, for when once you had the intelligence in hand you were prevented from insuring." On the 31st Jan. the plt., after receipt of the letters from Rees of the 12th and 19th Jan., but prior to the receipt of that of the 26th, gave instructions to effect the policy, and the slip was signed on that day. There was therefore no fraud or undue concealment by the plt. of a material fact within his personal knowledge. On the other hand, it is clear that the loss of the vessel and damage to the cargo might have been communicated to him by Rees, by means of the telegraph, but was purposely kept back by the agent for the fraudulent purpose of enabling the plt. to insure. We think it clear, looking to the position of Rees as agent to purchase and ship this cargo for the plt., that it was his duty to communicate to his principal the disaster which had happened to the cargo; and, looking to the now general use of the electric telegraph in matters of mercantile interest between agents and their employers, we think it was the duty of the agent to communicate with his employer by this speedier means of communication. From the letter of the agent it appears that but from the fraudulent motive for his silence he would in the ordinary course of his duty have conveyed the intelligence of the loss to his employer, and would have availed himself of the telegraph for that purpose. Upon these facts, the question arises whether the plt., the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo as that the fraud thus committed on the

underwriter through the intentional concealment of the agent, though innocently committed so far as the plt. was concerned, will afford a defence to the underwriter on a claim to enforce the policy. Two cases decided in this court, one in the time of Lord Mansfield, the other in that of Lord Ellenborough, establish the affirmative of this proposition. In the case of *Fitzherbert v. Mather*, 1 T. R. 12, where an agent of the assured was employed to ship a cargo of oats, and to communicate the shipment to another agent who was employed to effect an insurance, an omission on the part of the former who had written to announce the sailing of the ship, on the ship having afterwards got on shore, to communicate that fact, which he might have done by the same post, was held fatal to the insurance. Ashurst, J. observes: "On general principles of policy, the act of the agent ought to bind the principal, because it must be taken for granted that the principal knows whatever the agent knows, and there is no hardship on the plt., for if the fact had been known the policy could not have been effected." Bullar, J. says: "Though the plt. be innocent, yet if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit. Here it appears that the plt. trusted Thomas, and he must therefore take the consequences." In the case of *Gladstone v. King*, 1 M. & S. 35, which was an action on a policy on a ship "lost or not lost," the master had omitted to communicate, when writing to his owners, the fact of the ship having been driven on a rock, a fact as to which on arriving at the port of discharge he made a protest detailing the accident, and stating that the ship's bottom must have been chafed, and the owners in ignorance of the accident had effected an insurance. On these facts it was held that the captain was bound to communicate the fact, and that, for the want of such communication, antecedent damage was an implied exception from the insurance, and the plt. could not, therefore, recover the loss arising from the repairs rendered necessary from the accident. "If," says Lord Ellenborough, "the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in all such cases instruct their captain to remain silent, by which means the underwriter at the time of subscribing the policy would insure a certainty of being liable for an antecedent loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principal, and that the captain knew and might have actually communicated to the plt. the cause of damage, so as to have apprised them of it before the time of effecting the policy, I think that no mischief will ensue from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience, and there being no fraud imputed to the captain in the concealment will not alter the case. An eminent authority, the late Mr. Justice Story, has, however, declined to be bound by these decisions. In a case tried before him on a policy of insurance effected after a total loss, where the master had omitted to give intelligence of the loss to his owner, with the fraudulent design of enabling him to make an insurance, and the insurance had been effected by the owner in ignorance of loss, that learned judge held that as the owner at the time of procuring the insurance had no knowledge of the loss, but acted with an entire good faith, he was not precluded from recovering, and that the policy was not rendered void by the omission of the master to communicate intelligence of the loss, although such omission was

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wilful and fraudulent. On the case being taken to a court of error, the latter upheld the decision, not, indeed, on the grounds taken by Story, J., but on the very unsatisfactory, and as we think untenable ground, that by the total loss of the vessel the master had wholly ceased to be the agent of the owner, and had become the agent of the underwriters. From the language of the judgment it may be inferred that if the court had considered that the relation of the master to his owners had not been interrupted by the loss of the vessel, they would not have upheld the decision appealed from. The ruling of Story, J. has been discussed by Mr. Duer in his admirable work on insurance, and we think the reasoning of the learned writer fully establishes his conclusion as to the ruling having been erroneous. Notwithstanding the dissent of so eminent a jurist as Story, J., we are of opinion that the cases of *Fitzherbert v. Mather*, and *Gladstone v. King*, were well decided; and that if an agent, whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any facts material to be communicated to the underwriter, effects an insurance, such an insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured had, or in the ordinary course of business ought to have had, knowledge, and that the latter will take the necessary measures, by the employment of a competent and honest agent, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject matter of insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and, through such ignorance, fails to disclose it. It has been said, indeed, that a party desiring to insure is entitled, on paying a corresponding premium, to insure on the terms of receiving compensation in the event of the subject matter of the insurance being lost at the time of the insurance, and that he ought not to be deprived of the advantage which he has paid to secure by the misconduct of his agent. But to this there are two answers: first, that, as we have already pointed out, the implied condition on which the underwriter undertakes to insure, not only that every material fact which is, but also that every fact which ought to be in the knowledge of the assured, shall be made known to him, is not fulfilled. Secondly, as was said by the Court in *Fitzherbert v. Mather*, where a loss must fall on one of two innocent parties through the fraud or negligence of a third, that ought to be borne by the party by whom the person guilty of the fraud or negligence has been trusted or employed. By thus holding we shall prevent the tendency to fraudulent concealment on the part of masters of vessels and agents at a distance in matters on which they ought to communicate information to their principals; as also any tendency on the part of insurers to encourage their servants or agents so to act. For these reasons our judgment must be for the defendant.

Judgment for the deft.

Attorneys for plt., Slater and Donmett.

Attorneys for the deft., Pearce, Phillips, and Pearce.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law

Wednesday, June 5, 1867.

REDWAY v. SWEETING.

Marine policy—Mutual Marine Insurance Association—Liability of individual member.

The plt. insured a ship and goods with an association for mutual marine insurance. By the policy of insurance with which the rules of the association were incorporated, but which in other respects was like an ordinary policy on ship and goods, it was expressed that the assurers did thereby promise and bind themselves each for his own part, their heirs, executors, and goods, to the assured, his executors, administrators, and assigns, for the true performance of the terms of the policy. The 1st, 5th, and 6th rules provided respectively, that the members of the association should severally and respectively, not jointly nor in partnership, nor the one for the other of them, but each only in his own name, insure each other's ships or shares of ships for certain specified terms; that in order more readily to provide for the payment of claims as they might become due, the managers of the association should be entitled to levy contributions of one-fourth part of the fixed annual premiums, which should be drawn for at two months date from the 1st March, June, Sept. and Dec. in every year, such premiums to form a fund for that purpose, provided that if the gross amount of losses and expenses during the year should happen to exceed the amount of premiums so realised, the deficiency should be made good by an additional percentage, which the members during the year should be respectively bound to contribute and pay to the managers; and that the managers' draft on the members of the association for their proportion of the annual fixed premiums and for any additional percentage should be duly accepted and punctually paid.

The members of the association, of whom the deft. was one, subscribed the policy by their agents the managers. The plt.'s ship was lost, and he sued the deft. upon the policy for a proportionate part of the sum insured.

The deft. pleaded that the gross amount of the losses and expenses during the year exceeded the amount of all the premiums realised as mentioned in the fifth rule by the whole amount of the sum insured by the plt., of which the plt. before suit had notice, and that thereupon the managers called upon the deft. as a member of the association to contribute and pay to them such additional percentage, as in the said rule mentioned, making good the deficiency, and that the deft. did in pursuance thereof contribute and pay the said additional percentage in accordance with the said rules:

Held, that the contract entered into by the deft. and the other members was not a contract that each should pay to the plt. his proportionate part of the sum insured, but that each should accept and pay the bills drawn by the managers in accordance with the fifth and sixth rules, and therefore that it appeared upon the pleadings that there had been no breach of contract on the part of the deft.

The declaration stated,

That the plt., on the 26th day of April 1865, caused to be made a certain policy of insurance purporting thereby and containing therein that the plt. as well in his own name as in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, did make assurance, and cause himself and them and every of them to be insured, lost or not lost, at and from the meridian of the day of sailing from Newport, in the county of Monmouth, to and with the meridian of the 29th day of Feb. 1866, upon any kind of goods and merchandise, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the Orion, beginning the adventure upon the said goods and merchandise from the loading thereof on board the said ship, upon the said ship, &c., and so should continue and

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endure during their abode there upon the said ship, &c., and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandise whatsoever, should be arrived as above upon the said ship, &c., until she had moored at anchor twenty-four hours in good safety, and upon the said goods and merchandise until the same be there discharged and safely landed; and it was by the said policy declared that the said ship, &c., goods and merchandise, &c. (for so much as concerned the assured), by agreement between the assured and the assurers in the said policy, were and should be valued at 1800*l.*; and that touching the adventures and perils which the said assurers were contented to bear and take upon them in the said voyage, they were of the seas, men-of-war, fire . . . and all other perils, losses, and misfortunes that had or should come to the detriment and damage of the said goods, merchandise, and ship, or any part thereof. . . . And so the assurers were contented, and did thereby promise and bind themselves, each for his own part, their heirs, executors, and goods, to the assured, his executors, administrators, and assigns, for the true performance of the premises. . . . And it was by the said policy also mutually agreed that certain rules, conditions, and regulations annexed thereto should form part of the said policy, and the said rules, conditions, and regulations were, so far as material to be set forth, as follows:

The Temperance and General Marine Insurance Association.
Rules, Conditions, and Regulations.

1. That the members of this association shall severally and respectively, not jointly nor in partnership, nor the one for the other of them, but each only in his own name, insure each other's ships or shares of ships from noon on the 20th Feb. 1865, or from the date of entry of each vessel respectively, until noon of the 20th Feb. then next, and from that time until noon of the 20th Feb. in the next succeeding year, and so on from year to year, unless notice to the contrary be given as hereinafter mentioned, against all losses, perils, and damages of whatsoever nature and kind soever which may be sustained or received by their respective ships, or caused or done by them to other ships or craft, except when on the voyages, in the trades, or under the circumstances hereinafter particularly mentioned.

2. That in order more readily to provide for the payment of claims as they may become due, the managers shall be entitled and are hereby empowered to levy contributions of one fourth part of the fixed annual premiums, which shall be drawn for at two months date from the 1st March, June, September, and December in each year, such premiums of insurance to form a fund for that purpose. Members entering their ships after the 20th Feb. shall only be charged premiums from the date of entry. Provided always, that if the gross amount of losses and expenses during the year shall happen to exceed the amount of premium so realised, the deficiency shall be made good by an additional percentage, which the members during the year shall respectively be bound to contribute and pay to the managers, but should the premium so realised exceed the losses and expenses incurred, that the surplus shall be returned in proportion to the amount of premiums respectively contributed by them.

3. That the managers' drafts on the members of the association for the proportion of the annual fixed premium, and for any additional percentage, shall be duly accepted and punctually paid when due, and if any member shall neglect or refuse to accept any such drafts, or to pay his contributions thereto, on receiving notice from the managers, his respective ship or ships shall immediately cease to be insured in or by this association, and he shall thereupon forfeit all claim for or in respect of any loss or average under his policy or policies effected therein, but he shall remain liable to contribute to all losses and averages which may occur during the period for which any such policy was originally granted, and the amount due from any defaulting member shall be considered a debt due to the managers, and be recoverable by them at law.

And the several members of the said association had notice of the premises, and therefore in consideration of a premium at the rate aforesaid (one of the rules, which it is not necessary to set out at length, provided for the rate of premiums according to the class of ships insured), for such insurance then paid by the plt., the said members severally and respectively by H. and J. Gray, their agents, subscribed the said policy, and became and were insured to the plt. of the sum of 500*l.* upon the premises in the said policy mentioned every member of the association bearing his equal proportion according to the sums mutually insured therein; and the deft. before and at the time of the making of the said policy was and from thence continually has been and still is one of the members of the said club or association, and the said ship or vessel was, from the day of the date of the said policy, admitted into and entered in the said association; and the said A. and J. Gray subscribed the said policy as agents for the deft. among others, and the equal proportion of the said sum of 500*l.* so insured as aforesaid to be borne by the deft. according to the sums mutually insured in the said club or association, was a sum of 50*l.*; and the plt. was at the time of the commencement of the said risk and of the making of the said policy, and thence continually and until and at the time of the loss next hereinafter mentioned has been interested in the subject-matter of the said insurance to the value and amount of all the moneys ever insured therein, and the said insurance was made for the benefit and use, and on the account of the plt. and after the commencement of the said risk insured against and during

the continuance thereof, and whilst the said policy was in force the said ship was by divers of the perils insured against in the said policy totally lost, of all which the deft. had before action brought due notice.

Averment of the performance of all conditions precedent to the right of the plt. to be paid by the deft. the sum of 50*l.*, being his equal proportion as aforesaid. Breach, nonpayment of the same.

First plea:

That the gross amount of the losses and expenses during the year in the declaration mentioned did exceed the amount of all premiums realised as mentioned in the rule No. 3, by the whole amount of the sum insured by the plt. in and by the policy therein mentioned, of which the plt. before suit had notice, and thereupon the managers called upon the deft. as and being such member as in rule 5 mentioned, to contribute and pay to them such additional percentage as in the said rule mentioned, making good the deficiency, and the deft. has, in pursuance thereof, contributed and paid the said additional percentage to the said manager, in accordance with the said rules.

Second plea repeated the averments of the first, except the averment that the deft. had contributed the said additional percentage, and instead thereof stated that

This action was commenced before the said drafts of the said managers mentioned in rule 6 had become due or payable in accordance with the said rule.

Demurrer to the declaration.

Cross-demurrers to the pleas.

Plt.'s points:—1. That deft. having by his authorised agent underwritten the policy on the plt.'s ship, is liable to pay to the plt. the amount due upon the policy. 2. That contribution and payment by the deft. to the managers of the percentage in the first plea mentioned is no bar to the plt.'s action. 3. That the plt. was entitled to commence his action before the manager's drafts had become due. 4. That the declaration discloses a good cause of action, the deft. being there shown to have become an insurer to the plt. in the terms of the policy, and that there is nothing in the rules set out to qualify the liability of the deft. to be sued in respect of that cause of action; but, on the contrary, deft.'s liability as an insurer is recognised and confirmed by the said rule: (see especially rule 1.)

Deft.'s points:—1. That it appears by the said rules that the plt. has no claim against the deft. personally, and that the payment of the loss can only be enforced in the manner prescribed in the rules. 2. That the payment by the deft. to the managers of the percentage called for by them, relieves the deft. from any liability to contribute personally or further towards the alleged loss of the plt. 3. That upon the true construction of the rules by which the plt. is bound equally with the deft., the plt.'s only remedy is against the managers, or that the action is brought too soon, because there is no liability to pay any part of the loss at a shorter date than the managers' drafts would have to run in pursuance of the rules.

Mellish, Q. C. (with him Beresford), for the deft., contended that upon the true construction of the policy and the rules of the association, the plt. had no right of action on the policy against the individual members of the association for the amount of the sums insured.

Brown, Q. C. (with him F. M. White) for the plt.—Each member is responsible to the amount of his own share for the default of the managers in paying the amount of the acceptances received over to the plt. If it be said that the only contract entered into by the deft. is to pay the lawful drafts of the managers, then if the managers become insolvent or embezzle the amount, the plt. must suffer the loss. That cannot surely be intended. The only legal contract to be found in the policy and the rules incorporated, is one between the plt. and the different members of the association. There is none between

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the managers and the plt. [KELLY, C. B.—Is not the contract to pay the drafts of the managers in accordance with the rules?] The fifth rule is only ancillary to the contract: it merely provides a fund for the more readily paying the claims that may arise in respect of losses, and under it the managers may draw on account of premiums before any loss is sustained. The deft.'s engagement is, that the managers shall pay over the sum collected to the deft., not merely that he will pay the managers. [BRAMWELL, B.—If the deft. is to be liable to pay the managers' drafts, and to pay the plt., he may have to pay the amount of the loss twice over.] The only remedy against the managers would be in a court of equity, and it cannot be intended that the assured should be obliged to resort to that court in order to recover on the policy. The cases of

Lees v. Smith, 7 T. R. 388;
Dowell v. Moon, 4 Camp. 167;
Dawson v. Wrench, 3 Ex. 359;
Reid v. Allan, 4 Ex. 326;
Hallett v. Dordull, 18 Q. B. 2,

clearly show that the contract in such a case as this is between the assured and the other members to pay the amount assured. [BRAMWELL, B.—It does not appear that in those cases there was such a provision as that contained here by the rules.]

KELLY, C. B.—This case seems to me altogether plain and free from doubt. The plt. became a member of an association for mutual insurance by effecting the policy of insurance set forth in the declaration. The deft. was also a member, and so they have entered into a contract, the terms of which are contained in the policy, and the rules of the association incorporated therewith. To determine, therefore, whether this action is maintainable, we must look to what that contract is. We find set out in the policy certain rules, conditions, and regulations, of which the following is the first:—"The members of this association shall severally and respectively, not jointly or in partnership, nor the one for the other of them, but each only in his own name, insure each other's ships." The next question, therefore, is how, in what form, and to what extent, does the deft., as a party to this contract, insure the ship in question? This appears from the subsequent rules. He insures the ship in this way: he undertakes to accept bills to be drawn by the managers at certain periods on account of annual premiums, to provide for the aggregate amount of loss to be collected, and to pay such bills, and then if it turns out at the end of the year the whole of the premiums collected by acceptances are insufficient to meet the losses, the several members, the deft. among the rest, are to be liable to accept bills for their proportion of the aggregate amount of the losses remaining unmet, and to pay those acceptances. Those acceptances are to be paid to managers, who are to collect the necessary money for defraying those losses by means of them. Now, from the declaration alone it does not appear whether the amount of the loss in this case was collected, but it does appear that the deft. is liable to accept and pay bills drawn in respect of it by the managers, and if he has not done so he is liable for a breach of his contract; if, however, we look to the plea we find that the deft. has actually accepted and paid acceptances satisfying all his liability. There appears, therefore, to have been no breach of contract whatever. It is suggested on the part of the plt. that the contract is to make good the insurance, that is to say, to pay the money due on the policy to the plt., notwithstanding the payment of the bills drawn in respect thereof to the managers if they fail to pay over the money so paid to the party insured, as in the hypothetical cases put of embezzlement or insolvency. If such an event

should take place or has taken place, the deft. has nevertheless made good his contract, having paid his acceptances, and the loss will probably be the general loss of all the association, just as if the banker of the association had failed with a large sum of money in his hands. It may be that in such a case the loss must be made good by general contribution, but no question of this sort arises here. This is the simple case of an action on a policy by which the deft. incurred a certain liability, but has satisfied that liability in the manner expressly provided by the rules of the association. He is bound to give his acceptance for the contributions to be levied by the managers on account of the annual premiums, and if it become necessary, to give a further acceptance in case of a deficiency. There is no allegation that he has failed to give or having given to pay either of those acceptances, and it therefore appears to me that no breach of the contract is shown.

MARTIN, B.—I am of the same opinion. It seems to me quite clear that the meaning of the rules incorporated in this contract was that each of the members of this association should not have a right of action in respect of any loss against the other individual members. The fifth rule shows the plainest intention that losses should be met by the formation of a general fund to be placed in the managers' hands, and it would be quite contrary to the spirit as well as to the words of the regulations, and productive of the most absurd multiplicity of actions, that each member should have a right of action against the others.

BRAMWELL, B.—I am also of opinion that upon these pleadings the deft. is entitled to judgment. Assuming that the statement in the declaration amounts to an allegation that the sum due on the policy of insurance was not paid according to the tenor of the policy, and that everything happened entitling the plt. to have the said sum so paid, in answer to this the deft. says, "With whomsoever I may have contracted I have performed my contract. I have accepted the bills drawn under the contract, and have paid them;" and that seems to me a perfectly good answer. Whether the managers could maintain an action against the members for not accepting their drafts, or whether in some event some form of action might be maintained by the plt. against the deft., such as, for example, an action for not contributing his quota to any deficiency arising through the default of the managers, I do not know, and it is unnecessary now to decide, but I think these pleading disclose no cause of action against the deft.

CHANNELL, B.—I agree with my learned brethren, and it is unnecessary for me to add anything to what they have said. I think the deft. is entitled to our judgment upon the demurrer to the declaration, and if I had any doubt of that, I should be clearly of opinion that he is entitled to judgment upon the demurrer to the first plea.

Judgment for the deft.

Attorney for plts., *Baker*.

Attorneys for defts., *Elnsie, Forsyth, and Sedgwick*.

EX.] NIXON v. ALBION MARINE INSURANCE CO.—CARR v. WALLACHIAN PETROLEUM CO. [EX. CH.]

Wednesday, June 12, 1867.

NIXON AND OTHERS v. THE ALBION MARINE INSURANCE COMPANY.

Contract of Insurance—Special Case—Covering note—Want of stamp.

Where a special case had been stated without pleadings for the opinion of the court, raising the question whether the plts. were entitled to recover from the defts. a sum of money claimed upon a contract of insurance; and it appeared from the case that the defts. had given the plts. a "covering note," by which the defts. agreed to hold the plt. covered to the extent of a certain sum upon cotton to arrive by a certain ship, but that no policy had ever been executed, in pursuance of the covering note, and that the said note was not stamped:

Held that, although by the terms of the case it was to be taken as if the defts. had executed a valid policy to the plts., in accordance with the covering note, the court were bound to take notice of the fact that the stamp laws had not been complied with, and refuse to hear the case argued.

This was an action in which a case had been stated by order of Pigott, B., and pursuant to the C. L. P. A. 1852, without pleadings. The question for the opinion of the court was, whether the plts. were entitled to recover, under the circumstances detailed in the case, a certain sum of money upon a contract of insurance, alleged by the plts. to have been entered into by the defts. It appeared from the case that upon the 24th May 1865 the plts. offered part of the risk on certain cotton to arrive by a ship, named the *Ellora*, from Bombay to the Manchester agent of the defts., company, who, in a letter addressed by him to the plts., gave them the following covering note for 10,000*l.* on cotton, per the said ship:

Dear Sirs,—This company agrees to hold you covered to the extent of 10,000*l.* on cotton, with the usual average, per *Ellora*, from Bombay to Liverpool, at 50*z.* per cent., and waits your declaration of the amount to enable the company to substitute a stamp policy for the same.—Yours respectfully,

C. J. TOWLER, Agent.

Warranted free from capture, seizure, and detention, and the consequences of any attempt thereto, and the consequences of all hostilities.

It appeared from the case that no policy was ever executed, nor was the covering-note above mentioned ever stamped, but it was stated that for the purposes of the case it was to be taken as if the defts. had executed a valid policy to the plts. in a certain form accompanying the case, and in accordance with the covering-note of the defts. above-mentioned.

Cohen (with him Mellish, Q. C. and Nixon) appeared to argue for the plts.

Honyman, Q. C. (with him Littler) for the defts.—[MARTIN, B.—It appears from the case that no stamped policy was ever executed.] It is precisely the same as if the declaration was upon a policy, and the deft. had not pleaded *non assumpsit*. The parties might in any case agree not to raise the stamp objection by not denying the existence of the policy, but the revenue is sufficiently protected, because it is always in either party's power, in case of dispute, by pleading in denial of the making of the policy, to take advantage of the instrument's not being stamped, and then it will not be admissible in evidence. The court will not travel out of the case in order to take this objection. [MARTIN, B.—This is not a mere technical objection. It does not depend upon the form of the pleadings. If we can see that the provisions of the statutes relating to the stamping of policies and contracts of insurance have been violated, we are bound by our oaths as judges to protect the revenue by refusing to let

that be made available which the Legislature has expressly said shall not be available.]

The COURT being of opinion that they ought not to hear the argument in this case, it was ordered to be struck out (a)

To be struck out.

Attorneys: Field, Roscoe, and Co.; Simpson and Cullingford.

EXCHEQUER CHAMBER.

Reported by W. GRAHAM and E. LUMLEY, Esqrs.,
Barristers-at-Law.

ERRORS FROM THE COMMON PLEAS.

Thursday, May 16, 1867.

CARR AND ANOTHER v. THE WALLACHIAN PETROLEUM COMPANY (LIMITED).

Charter-party—Substituted contract—Freight—Guarantee.

The plts. chartered a ship to the defts. to proceed to I.. and take in a cargo for London. On the arrival of the ship at I., the defts. were unable to provide a cargo, and the plts. agreed to cancel the charter on the defts. guaranteeing them "900*l.* gross freight home," the vessel to be placed on the most profitable trade procurable, and to carry 300 tons, a proportionate reduction of the guarantee to be made for any lesser quantity of cargo. The vessel shipped 300 tons, the freight for which would have been 556*l.* 14*s.* and was totally lost on her voyage to London. In an action to recover the difference between 556*l.* 14*s.* and the 900*l.* guaranteed:

Held (affirming the judgment of the Court of C. P.) that the liability of the defts. arose at the port of loading, and was not affected by the subsequent loss of the vessel.

This was an appeal from a judgment of the Court of C. P., discharging a rule to reduce the damages by the sum of 343*l.* 6*s.*

The report of the case in the court below will be found in the 14 L. T. Rep. N. S. 354, where the facts are fully set out.

The action was brought to recover the sum of 686*l.* 12*s.* under the following circumstances:—The plts. chartered two vessels to the defts. to proceed to Ibraila and load a cargo of petroleum oil for London. On the arrival of the vessels at Ibraila, the defts. were unable to supply a cargo, and after some negotiations an agreement was come to of which the following minute was entered in the books of the company:

It was proposed by the directors that the company should guarantee the above-named vessels a sum of 900*l.* each gross freight home on the following understanding: that Messrs. Carr and Co. place the vessels named at once on the most profitable charter or trade procurable; the vessels will carry 300 tons each of whatever cargo they may take on board; or, should they not take 300 tons each, that a proportionate reduction of the guarantee should be made for any less quantity of cargo they may take; that the charter-parties dated

(a) The 35 Geo. 3, c. 63, s. 14, provides that no insurance in respect of which duty is made payable by the Act, nor any contract or agreement for any such insurance, shall be given in evidence in any court, or be available in law or equity, unless the paper, &c., on which it is printed, &c., shall be duly stamped, and it absolutely prohibits the stamping, under any pretence whatsoever, of any such paper, &c., at any time after any such insurance as aforesaid, or contract for such insurance, shall be engrossed, printed, or written thereon. See also the 54 Geo. 3, c. 144. The enactment above-mentioned amounts to an absolute prohibition under any circumstances, except certain special circumstances since provided for by the 28 & 29 Vict. c. 94, to fix a stamp on a policy after it has been underwritten. This state of the law is not affected by the C. L. P. A. 1851. See Arnold on Marine Insurance, 3rd edn., vol. 1, p. 244.

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the 8th and 10th Aug. last respectively for the vessels named be cancelled.

The plts., on receipt of a copy of this minute, cancelled the charter-parties, and the vessels loaded 300 tons of barley each, and proceeded on their voyage to London, in the course of which one of them was totally lost. Had both vessels arrived in London they would each have earned 556*l.* 14*s.* freight for the barley, and a verdict having been entered for the plt. for 686*l.* 12*s.*, the difference between the 556*l.* 14*s.* and the 900*l.* guaranteed to each, a rule was obtained to reduce the damages by 343*l.* 6*s.*, on the ground that the defts. were not liable to pay that sum in respect of the vessel that was lost.

The Court below discharged this rule on the ground that the defts.' liability arose at the port of lading, and was not affected by the subsequent loss of the ship. Against this the defts. now appealed.

E. James, Q. C. (W. Williams with him) for the defts.—The agreement is substituted for the charter-party, and the effect of it is that if there is any deficiency in the freight on arrival in London, the defts. will make it good. There can be no loss till the vessel arrives, as the owners would be entitled to insure their freight. The guarantee may be taken as a charter-party by which it is agreed to pay 900*l.* freight. The agreement is that the plts. should take a cargo from some one else, and the defts. would give a lump sum for freight. [MARTIN, B.—This contract means either what the Court of C. P. said it meant, or that the vessel should earn 900*l.* at the journey's end.] That is, if she arrives. [MARTIN, B.—No, it does not say that.] It is substituted for the original charter-party, and you must look at the charter-party to construe it. The case of *Yeames v. Lindsay*, 3 L. T. Rep. N. S. 865, was cited in the court below, but it is not in point, as there the contract was that if the plt. did not get his freight the deft. would meet his drafts, and the only question was whether the plt. was entitled to recover when his own agent had loaded the cargo. Here there is a likelihood of loss by the original charter, and all the defts. do is to provide against that loss.

Field, Q. C., for the plts., was not called upon.

MARTIN, B.—I am of opinion that the judgment of the court below is right. It seems to me that the true meaning of this agreement is, that at the port of lading there should be loaded a cargo which should produce 900*l.* freight, and if that is not the construction I think that it would be a guarantee that the ship should earn 900*l.*

BRAMWELL, B.—I am of the same opinion, and I will only add one word. They say, "or should they not take 300 tons each, that a proportionate reduction of the guarantee should be made for any less quantity of cargo they may take." That shows that the calculation was to be made at the time of taking the cargo on board.

BLACKBURN, SHEP, and LUSH, JJ. concurred.

Judgment affirmed.

Attorneys for the plts., *Thomas and Hollams.*

Attorney for the deft., *A. E. Tower.*

Thursday, June 20, 1867.

MEYERSTEIN v. BARBER.

Bill of lading—Effect of delivery of after goods landed on sufferance wharf.

The consignor of goods in India deposited the bill of lading with the C. bank to secure advances. After the goods had been entered at the custom-house in London in the name of A. and Co., the consignee, and landed on a sufferance wharf with a stop upon them for freight, A. and Co. paid the bank and got the bill of lading. A. and Co. then obtained advances from the plt., who was not aware that the goods were landed and indorsed, and delivered to him two parts of the bill of lading. A. and Co. subsequently obtained advances from the deft. on the third part of the bill of lading, and the deft. obtained possession of the goods and sold them.

In an action by the plt. against the deft. in trover for the goods, and for money had and received, to recover the proceeds of the sale:

Held (affirming the judgment of the Court of C. P., that the delivery of the bill of lading passed the property to the plt., and that he was entitled to recover.

This was an appeal from a judgment of the Court of C. P., discharging a rule to enter the verdict for the defts.

The facts, which are fully set out in the report of the case in the court below, 15 L. T. Rep. N. S. 355, were shortly as follows:

De Souza, Commiade and Co., of Madras, consigned to Azemar and Co., of London, 277 bales of cotton, and deposited the bill of lading, drawn in three parts, with the Chartered Mercantile Bank of India, to secure advances. The cotton, on arrival in London, was entered at the Custom-house in the name of Abraham and Co., who had taken the business of Azemar and Co., and was landed on a sufferance wharf, and a stop was put upon it by the master of the ship for his freight. After the landing of the goods Abraham and Co. gave a cheque for the advances made by the Chartered Mercantile Bank, and obtained the bill of lading from their London agents. On the same day that Abraham and Co. got the bill of lading they obtained from the plt. an advance of 2500*l.*, and deposited with him two parts of the bill of lading, and two days afterwards the deft., who knew nothing of the deposit of the two parts of the bill of lading with the plt., advanced 1500*l.* on the third part of the bill of lading, and on the following day, Abraham and Co. having in the mean time paid the freight and got the stop taken off, he advanced 300*l.* more. The deft. then lodged his part of the bill of lading at the wharf, and received warrants for the cotton, which he sold. The plt., who then for the first time learnt that the cotton had arrived in England, commenced this action in trover for the cotton, and for money had and received, to recover the proceeds of the sale.

A verdict having been entered for the plt. for 2019*l.* and interest, a rule was obtained calling on the plt. to show cause why the verdict should not be entered for the deft., or reduced, on the ground that as against the deft. the plt. was not entitled to the goods or their proceeds; that there was no valid prior indorsement of any bill of lading to the plt.; that the bills of lading ceased to have effect as negotiable bills of lading on the landing and warehousing of the goods in Abraham's name; that the property in the goods never was in the plt.; that neither the plt. nor any other person had any right to or lien on the goods as against the deft.; that it never was agreed between Abraham and the plt. that the property in the goods, or any lien on the

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goods, should pass to the plt.; that the property in the goods passed to the deft. on the transfer of the goods into his name by the wharfinger, the depository; that the deft. was a pledgee with possession and power of sale, and that the plt.'s rights, if any, were mere equities invalid against the deft., or were for breach of contract against Abraham.

The Court of C. P. discharged this rule on the ground that at the time the bill of lading was indorsed to the plt., there had been no complete delivery of the goods to any person claiming under it, and that a delivery of the bill of lading was therefore equivalent to an actual delivery of the goods. Against this judgment the deft now appealed.

Brown, Q. C. (Brett, Q. C. with him) for the deft.—When the goods were landed at the Sufferance-wharf, and entered in the name of Abraham and Co., the consignees, that was equivalent to delivery to the consignees. The object of the 11 Vict. c. 18, which regulates these sufferance wharves, was to make provision for the custody of the goods when the importer was not ready to receive them, and it is only when he refuses to receive them that they are, while in the hands of the wharfinger, to be considered in the custody of the master of the ship. Here they were entered by the importer. [BLACKBURN J.—You assume that Abraham was the importer; were not the goods always held subject to the bill of lading as if they had been at sea? MARTIN, B.—It is clear that the Legislature intended that, until the lien for freight was removed, the bill of lading should represent the goods, and after that the warrant. People cannot carry such goods about in their pockets, and the Legislature has provided that certain documents shall represent them—first the bill of lading, and then the warrant.] In *Galliffe v. Bourne*, 4 Bing. N. C. 314, the question of what constituted a complete delivery by the master of a ship was considered, and on delivery of the goods the bill of lading is at an end. [LUSH, J.—It could not be a delivery to Abraham under the bill of lading when the goods were put on the wharf, as at that time the Chartered Mercantile Bank held the bill of lading.] As soon as Abraham got the bill of lading the master's duty was done, and the bill of lading was at an end. When the goods are in the warehouse of the consignee the bill of lading cannot pass the property:

Blackburn on the Contract of Sale, 297-298;
Lickbarrow v. Mason, 1 Sim. L. Cas. 699;
Story on Bailments, s. 297.

If Abraham had paid the freight, and the wharfinger had refused to deliver up the goods, Abraham could not have sued the master of the ship, and that can only be on the ground that the wharfinger was the wharfinger of Abraham. There having been, therefore, a delivery to Abraham, the bill of lading was at an end and could not pass the property to the plt.

E. James, Q. C. and Sir G. Honyman, Q. C., for the plt., were not called upon.

MARTIN, B.—I believe we are all of opinion that the judgment of the court below was right; and to my mind it is perfectly transparent. After stating the facts, his Lordship said, the 11 Vict. c. 18, s. 5, provides that till the lien for freight is disposed of the wharfinger shall not give up the goods. There are two symbols of the goods, the bill of lading and the wharfinger's certificate, and until the certificate is given the bill of lading gives the goods as far as they can be given, and anyone who had the bill of lading indorsed to him would be entitled to hold the goods against any person claiming under Abraham. I think that the judgment of the Court of C. P. was perfectly right.

BLACKBURN, SHEE, and LUSH, JJ., and CHANNELL and BRAMWELL, BB. concurred.

Judgment affirmed.

Attorneys for the plt., *Thomas and Hollams.*

Attorney for the deft., *W. A. Crump.*

APPEAL FROM THE EXCHEQUER.

Saturday, June 22, 1867.

BUCKLE v. KNOOP AND ANOTHER.

Charter-party—Construction—Calculation of freight—Measurement of cargo at port of shipment or discharge—Custom.

By the terms of a charter-party the plt.'s ship was to load a full and complete cargo of cotton at Bombay, and proceed with and deliver the same at Liverpool "on being paid freight as follows, viz., 75s. per ton of 50 cubic feet delivered." The ship took on board at Bombay a full and complete cargo of bales of cotton which, in accordance with the usual custom, were immediately before shipment subjected to powerful hydraulic pressure, and thereby compressed into the smallest possible space. When unloaded at Liverpool the bales expanded, and the measurement of them after such expansion, exceeded by about 174 tons of 50 cubic feet, the entire capacity of the ship. The plt. claimed under the charter-party to be paid freight calculated upon the measurement of the cotton after delivery at the port of discharge:

Held (affirming the decision of the Court of Ex.), that the plt. was only entitled to freight upon a full and complete cargo as ascertained at the port of shipment, and that the freight must therefore be calculated upon the measurement of the cargo there.

Gibson v. Sturge, 10 Ex. 626, followed.

This was an appeal from the decision of the Court of Ex., reported *supra*, p. 231. The facts of the case are fully set forth in the report of that decision.

J. A. Russell (with him E. James Q.C.) for the app. (the plt. below.)

Potter (with him Mellish, Q.C.), for the resps.

BOVILL, C. J.—We are all of opinion that the judgment of the court below must be affirmed. This charter-party must be construed with reference to the character of the trade to which it relates. Now cotton is by the custom of the trade shipped in bales, compressed as tightly as possible, and it would be doubtful whether the owner of a ship would be bound to take a cargo of cotton on board which had not been so dealt with. The question is, what would be a full and complete cargo of cotton? Clearly not a cargo of loose cotton. What was shipped here was a cargo of bales of cotton compressed in the usual manner, and a full and complete cargo was loaded. It follows, therefore, that freight can only be claimed upon the full and complete cargo so loaded. The plt. in reality claims to be entitled to recover for 174 tons more than the ship would hold. The proper rule of measurement is, I think, that laid down by Alderson, B. in the case of *Gibson v. Sturge*, 10 Ex. 626, and it is impossible to distinguish that case from the present. Our decision would be in favour of the defts. on the grounds both of principle and convenience, even without looking to the custom of the trade, which seems to have been fully proved.

BLACKBURN, J.—I am of the same opinion. The rule in *Gibson v. Sturge*, if applied to this case, shows that what constitutes a full and complete cargo must be ascertained at the time of shipment; it is what the

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ship can reasonably carry. Freight is only payable upon what was carried and delivered, and, according to the regular rule, if any part is not delivered it cannot be claimed for. If the plt. meant to make a contract contrary to the usual one, he should have employed more express terms.

MELLOR, SHEE, and M. SMITH, JJ. concurred.

Judgment affirmed.

Attorneys for plt. Clarke, Woodcock, and Ryland, for C. Tuddy.

Attorneys for defts., Upton, Johnson, and Uptons, for Lowndes and Co.

COURT OF BANKRUPTCY AND INSOLVENCY (IRELAND).

Reported by JOHN LEVY, Esq., Barrister-at-Law.

IN BANKRUPTCY.

May 1867.

(Before MILLER, J.)

Re AN ARRANGING TRADER. (a)

Ship's Registry Act—Incomplete contract—Interest in ship supplied with necessities, for which an apparent owner of a part is sought to be made liable.

Where a party is in treaty for the purchase of a part in a ship, which ends in his becoming an apparent owner of a fourth in that ship, but never has any beneficial interest in it, such party will not be held liable for necessities supplied to that ship before he became part owner. To make a contract complete there must be mutuality, and both parties must distinctly agree upon the terms which are to be the foundation of that contract.

This case came before the court upon charge and discharge. The chargeants were the Messrs. Spriggs, merchants in Liverpool, who supplied the ship *Fanny* with necessities. The liability was disputed on the ground that at the time the goods were supplied the dischargeant had no beneficial interest in the vessel.

Kernan, Q. C. appeared in support of the charge.

Heron, C. C. and Daniel were in support of the discharge.

The facts appear in the judgment of Miller, J.

MILLER, J.—My desire in this case would be to go as far as the facts and law could possibly admit in enabling the chargeants to recover the full amount in value of the goods honestly supplied for the benefit of the vessel in question, as against the owners of it whoever they might be. While, if I looked alone to the case of either Stewart, who was an undoubted owner of a part (if not the whole) of the vessel, or the arranging trader, the alleged owner of a part of that vessel as spread upon the record before me, where I find, on the one hand, Stewart resorting to the expedient of antedating the bill of sale in the face of a correspondence which must have made the clumsiness of it transparent to any person; and on the other hand, the arranging trader (with equal recklessness in the face of the same correspondence, fully placed before him upon the charge) alleging upon his oath that the bill for 237l. 14s. 3d. was given for the accommodation of Stewart, which he must have known to have been untrue, there is much that is calculated to throw suspicion upon the case presented by either Stewart or the arranging trader.

(a) From the *Irish Law Times*.

But, notwithstanding, I fortunately have in this case documentary evidence, including a written correspondence (although not, perhaps, the whole of it) which will afford to me some security that I shall not be much misled by the allegations of either as regards the rights of third parties. After the most careful consideration which I can give to it, the whole question in this case appears to me to be concluded, on the record before me, by the right understanding of the contract as evidenced upon the documents. Nothing is more important as regards all mercantile interests than that, before legal liabilities should be attached to contracts, such contracts should be unambiguous and complete. You may spell out a contract from many documents, or from many shreds of many documents; but from whatever evidence the contract may be collected, such contract, when taken as a whole, should comprise within it all the elements which go to form a valid contract, and for that purpose be complete in itself. The foundation of the claim of the chargeants rests mainly upon the fact whether there was such a contract between Stewart and the arranging trader as to vest a beneficial owner ship in the vessel, for which the goods were supplied, in the arranging trader; and, if so, whether the arranging trader acquired any such beneficial ownership in that vessel prior to these goods being supplied by the chargeant, for which he claims a right to prove in this matter. The treaty between Stewart and the arranging trader about the vessel commenced upon the 8th Sept. 1865, when Stewart wrote to the arranging trader, stating: "If you wish I will go half with you in her purchase if the vessel can be obtained on reasonable terms." In a further portion of the same letter, after stating that she would be got for 900l., he writes: "I believe that I can get the payment—part cash and part bill—so that about 250l. would be the cash each would want for the present." That letter was followed by another from Stewart, dated Sept. 15, in which he states: "I have bought the *Fanny* to-day for 950l., the lowest that would be taken;" (and further) "I shall be glad to hear from you as soon as possible, as I shall require to know my arrangements for cash matters. I can manage about 200l. for you here, so if you do not care to provide more in money you could take a fourth share, and I can do this for you without asking any cash until the vessel earns it." Thus far there was nothing but a proposal on the part of Stewart that the arranging trader should take either a half share upon specified terms, namely, one half of the purchase-money to be paid in cash, and the other half by the acceptance of the arranging trader, or to take a fourth share, without the advance of any cash in the brig *Fanny*, which Stewart stated that he had already purchased. The next letter which appears upon the evidence is a letter from the arranging trader to Stewart, dated the 18th Sept. 1865, in which he says: "If you think well of it I will be able to take one half of the brig *Fanny*, same as the *Royal William*, and let both their earnings go together." In that letter nothing is said as to the requirements, on the part of Stewart, that in the event of the arranging trader taking one half share in the vessel he (the trader) must pay one half in cash, but contented himself with stating "that if Stewart thought well of it he would take one half share in the vessel." Stewart perceiving that omission of an important portion of his proposal, wrote a further letter on Sept. 29, stating: "I should have replied to your last letter sooner, until seeing what arrangement I should make in paying for the *Fanny*." In a further portion, "I shall be very happy for you to take one half in her, and as I shall require to pay for her here on Tuesday I will want you to send me 235l. in cash, and I inclose you my draft at three months for

Q. B.]

HUDSON v. EDE.

[Q. B.]

2877. 14s. 8d., which please return accepted. This makes a fourth bill and a fourth cash for you, which is as much as I can possibly manage. I have your bill, 200L., to pay here on Monday, and when paid I shall be out of cash on your account between 300L. and 400L., and which the balance of freight and last voyage of *Royal William* and advance of freight will not square." Thus far Stewart, as sole purchaser of the vessel, would not accede to the arrangement of the arranging trader becoming a purchaser in it, except upon very specific terms as to the payment or provision for the purchase-money for that one half, and assigning reasons for those specific terms.

MILLER, J. having gone minutely into all the facts of the case, said that there was evidence sufficient in the case to show that there had not been a completed contract, and that the arranging trader had not any beneficial or other interest in the brig *Fanny* at the date at which the goods were supplied, and consequently that Stewart could not have acted as ship's husband of that vessel by the authority or for the benefit of the arranging trader. I necessarily must disallow the claim of the Messrs. Spriggs, the chargeants; but inasmuch as the arranging trader has not made this case by his discharge, but has further, in order to get out of what he apprehended would have been held to have been his contract, alleged that his acceptance for 2877. 14s. 8d. was for the accommodation of Stewart, which he must have known to have been altogether untrue, upon which he naturally supposed much would depend, I shall not give him any costs in this matter. I have the satisfaction, however, of feeling that I am not doing much injury to the Messrs. Spriggs, as upon the evidence of one member of the firm they had never heard of the arranging trader in the transaction until the failure of Stewart in the month May 1866, and therefore could not have supplied the goods upon the personal security of the trader.

Charge disallowed without costs.

Solicitor for the arranging trader. *Daniel*,

Solicitor for Messrs. Spriggs, *Dewie*.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and C. W. LOVEST, Esqrs.,
Barristers-at-Law.

May 17 and June 29, 1867.

HUDSON v. EDE.

*Ship—Charter-party—Laying days—Demurrage—
Detention by ice.*

By a charter-party it was stipulated that the vessel "should proceed to S., and there load a complete cargo of grain, &c. Thirty running days to be allowed the said merchant, if the ship be not sooner dispatched, for loading and unloading, and ten days on demurrage over and above the said laying days at 6L. per day. Detention by ice and quarantine not to be reckoned as laying days." There are no storehouses at S. for the deposit of grain which is stored at different places higher up the Danube, and brought thence in lighters down the river to ships waiting for cargo at S. The ship was delayed, not by ice at S., but by reason of the river above S. becoming frozen so as to prevent the transport of grain from the higher portion of the river to S.:

Held, that the clause as to "detention by ice," &c., was inserted for the protection of the merchant, and that it was immaterial whether the detention were caused by ice at or above S.

This was a special case stated without pleadings for the opinion of the court.

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The facts and arguments are embodied in the judgment.

Mellish, Q. C. (*Archibald* with him) argued for the plt.

Sir G. *Honyman*, Q. C. (*Gibson* with him) for the deft.

The following cases were cited:
Keaton v. Pearson, 7 H. & N. 586;
Barrett v. Dutton, 4 Camp. 333;
Pringle v. Mollett, 6 M. & W. 80.

JUNE 29.—BLACKBURN, J.—In this case the deft. chartered the plt.'s vessel, the *Tria*, by a charter-party, of which the material parts are, that the vessel should proceed "to Sulina, or outside if not sufficient depth of water to load the ship, or so near thereto as she may safely get, and there load from the agents of the merchant, a complete cargo of grain or seed, at shipper's option, sufficient grain or seed to ballast the vessel to be supplied, if required, before final discharge of outward cargo; time so occupied not to count as lay days; the cargo to be brought to and taken from alongside the ship at the port of loading and discharge at the charterer's expense and risk; thirty running days to be allowed the said merchants (if the ship be not sooner dispatched for loading and unloading), and ten days on demurrage, over and above the said laying days, at 6L. a-day, 'detention by ice and quarantine not to be reckoned as laying days.'" It is on the construction to be put on these latter words that the question depends; the other stipulations in the charter-party being material only so far as they explain the meaning of this provision. The ship was delayed, during the time as to which the dispute has arisen, not by ice in the port of Sulina rendering impossible the access to her of lighters from which cargo might, in the usual course of the Danube grain trade, have been transferred to her hold, but by the obstruction of the navigation between Sulina and ports higher up the Danube, by reason of the river becoming frozen over. It appears that at the port of Sulina itself there are no storehouses available to the merchants in which cargoes of grain may be kept for loading vessels; the grain is kept at ports higher up the river; and, according to the course of the grain trade of that river, cargoes are brought by steam-lighters down the river and over the bar at its mouth, to ships awaiting their loading at Sulina. Galatz one of those ports, is stated in the case to be situate about 105 miles from Sulina, the passage of the steam lighters between the two ports being a run of eighteen to twenty hours in fine weather, and of two to three days in bad weather. Ibrail, for the storehouse of which the captain of the *Tria* acting as agent for the deft., fixed on the 27th Nov. a cargo for that vessel, is higher up the river than Galatz. The *Tria* was at Sulina ready to receive her cargo on the 29th Nov., and the laying days commenced from that date. The cargo which it was intended to put on board, and which in fact was afterwards put on board, was at that time at Galatz. On the 5th Dec. (an unusually early date for the obstruction of the navigation by ice) the Danube became frozen over above Sulina, and so continued until the 8th Feb. of the ensuing year. It was well known to persons in the grain trade at London, Constantinople, and Sulina, before and at the time of effecting the charter-party, but not known to the plt. or his broker, that when there is ice in the Danube between Galatz or the other storing places at Sulina, the navigation becomes difficult for steam lighters, and when the river is frozen, impossible. Between the 29th Nov., when the *Tria* was ready to receive her cargo, and the 16th Dec., that is, for more than half the time allowed for loading and

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unloading, several vessels lying in the port of Sulina were loaded with grain, their cargoes having been brought down the river between the 29th Nov. and the 5th Dec. It may be inferred that in the usual course of shipment at Sulina the lighters were away there for some time for the convenience of the ships to be loaded from them. It was expressly agreed that sufficient grain used to ballast her should, if required, be supplied before the final discharge of her outward cargo. No cargo had been provided by the deft. even for this purpose, and the entire discharge of the outward cargo was thereby delayed until the 6th Dec., when other ballast was taken in by the captain. From the 16th to the 20th Dec. the port of Sulina was frozen, and all communication between the ships in it and the shore was cut off. Between the 24th and the 27th, the other vessels which have been referred to as having been loaded between the 29th Nov. and the 5th Dec., were unable to start on their respective voyages. It was not disputed that the days during which the port of Sulina was frozen over, so that all communication with the shore was cut off, were not to be reckoned as laying days; but the question is, whether the days during which the river above Sulina was frozen, though Sulina itself was free, are to be reckoned as lay days, in which case the plt. is entitled to recover; or are to be considered as "detention by ice," in which case the deft. has paid enough money into court, and is entitled to judgment. It was contended on behalf of the plt. that the words "detention by ice not to be reckoned as lay days" must be construed with reference to the object for which, in the preceding clause, the lay days are stated to be allowed—namely, for loading and unloading; and that no obstruction by ice is within the meaning of those words except an obstruction by ice in contact with, or near or about the ship, and interposing such a barrier against the access of lighters alongside of her as practically to prevent or interrupt the actual work of loading. For the deft. it was contended that, regard being had to the circumstances under which shipments take place at the mouth of the Danube, and particularly to the fact that the storehouses which supply grain to ships lying at Sulina are at a distance of 100 miles from that port, the words "detention by ice" must be taken to include, not only the prevention and interruption by ice of the actual work of loading—that is, of bringing alongside the ship in lighters, and transferring from them to the ship's hold cargo brought down to Sulina in fulfilment of the charter—but the delay of the ship's loading by reason of the detention by ice of lighters during any part of the time allowed for loading and unloading, and at any distance from Sulina. The solution of the question depends upon the inference of fact to be drawn from the statement as to the nature of the port of Sulina which have already been set forth. The merchant, by the charter-party, engages to bring down the cargo at the port of loading, and to receive it at the port of discharge within the laying days, and he is answerable for any detention arising from his failure to do so from whatever causes, unless he protects himself by a stipulation, and the stipulation "detention by ice and quarantine not to be reckoned as laying days" was clearly meant to protect the merchant. But for this stipulation, although the ice or quarantine prevented the merchant from bringing cargo alongside the ship according to his contract, the shipowner would be entitled to recover for the detention of his ship every day beyond the laying days. Moreover, to use the words of Lord Ellenborough, in *Brook v. Hodgson*, 4 M. & S. 267, "the merchant is the adventurer who chalks out the voyage which is to furnish the subject matter out of which the freight is to accrue." He is in most cases, as he certainly was in the present instance,

the party best acquainted with the trade for which the ship is taken up, and with the difficulties which may impede the performance by him of his contract. Words, therefore, in a charter-party, relaxing in his favour a clause by which an allowance to him for time of a specific object, in the interest of the ship, precisely limited, must be read as inserted for his requirement, and construed at least with this degree of strictness against him that they should not have put upon them any addition to their obvious meaning. Nevertheless, where that meaning is ambiguous, as it is in the present case, we think that it must be gathered from the surrounding circumstances to which the charter-party was intended to apply. Now, the stipulation that "detention by ice" should not be regarded as laying days must be taken to mean that those days in which ice made it impossible to bring cargo alongside, and to go on with the loading, should be excluded. But inasmuch as from the nature of the case the cargo had to be brought down the river after the arrival of the ship, the loading would be equally interrupted and detention equally ensue by reason of the navigation of the river becoming impeded by ice as it would be by the lighters being prevented from coming alongside of the vessel in the port. It was very properly admitted that those days in which the port was frozen so that there could be no communication with the shore were to be excluded, inasmuch as detention by ice would occur so soon as the lighters, by which the grain was to be conveyed to the ship, were prevented from getting access to her. But as we have seen, the cargo is to be brought to the ship, not from the port of Sulina, but from the storehouses at the ports up the river; and the lighters are as much prevented getting to the ship by reason of ice in the one case as in the other. It is true that though these facts were well known to persons in the grain trade at London, Constantinople, and Sulina, before and at the time of the effecting of the charter-party, they were not known to the plt. and his broker; but the ignorance of the plt. and his broker cannot effect the question as to what was the way in which in the port cargo could be brought alongside the vessel, or how detention in the loading of the vessel could arise. Now, I think, on the statement, the only way in which cargo could be brought was down the Danube, and, consequently, that the freezing up of the Danube immediately above Sulina, rendered it impracticable to bring any cargo alongside. If there had been the railway or any other practicable mode by which cargo might have been brought by land to Sulina, or if the lower part of the Danube had been left free, so that cargo might have been brought from some place in the Danube, though the ice blocked up the river below the place where the cargo was laying, we might have come to a different conclusion; but as it is we think the defendant is entitled to judgment. The fact that had the deft. used greater diligence he might have loaded the ship before the navigation was interrupted, does not much, therefore, affect the question. The deft. was entitled to the benefit of the whole of the laying days, and would have had full time to load his cargo but for the interruption to the navigation by ice. He is entitled to the advantage which the stipulation gives him, and the loss arising from the detention must fall on the shipowner who has agreed to these terms.

Judgment for the deft.

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COURT OF COMMON PLEAS.

Reported by W. GRAHAM and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Jan. 28, 29, and 30, and July 8, 1867.

WHITSTABLE FREE FISHERS v. FOREMAN.

Claim for anchorage dues—Immemorial payment—Ownership of the soil—Buoys, beacons, and lights—Evidence of existence of a port—Consideration to the public.

The plts., the owners in fee of the manor of Whitstable, which includes oyster fisheries and an anchorage ground, claimed a right to demand a toll from all ships anchoring upon their soil. In support of this claim evidence was adduced that the plts. and those under whom they enjoy possession had taken tolls from time immemorial; that the plts. now keep buoys, beacons, and lights to mark the bounds between their oyster-beds and the anchorage ground; that these buoys, beacons, and lights had been kept up at various times and at intervals during a long period, but there was no proof of their continued existence from the commencement of the custom to take tolls; that before and since the time of legal memory Whitstable had been mentioned in official and private documents as a port; that in ancient times there was a place within the manor for the unloading of merchandise; and that the right to take tolls had been expressed to be conveyed to the plts. with the possession of the ground:

Held, upon a special case in which this evidence was set out, that the maintenance of the buoys, beacons, and lights, and the advantages which the public derive therefrom, taken in connection with the ownership of the soil of the anchorage ground, are a sufficient consideration to support the legality of the plts.' claim; that the payment having been made from time immemorial, it ought to be referred to a legal origin if there be anything to support it; that very slight evidence is necessary in order to support a right which has been uninterruptedly enjoyed from time immemorial, the legality of which the court is almost bound to presume; and that, therefore, the circumstances of this case were sufficient to make this claim good, according to the rule laid down by the H. of L. in Gann v. The Free Fishers of Whitstable, 12 L. T. Rep. N. S. 150.

This was a special case, stated by consent for the opinion of the court. The following analysis will be sufficient to show the effect of the judgment:

Plts. are the Company of Free Fishers and Dredgers of Whitstable, in the county of Kent, incorporated by Act of Parliament, 33 Geo. 3, c. 42 (1793); they are the owners in fee of the ground situate within the sea limits of the manor of Whitstable, which is described as the anchorage ground.

Def't. is the owner of a vessel called the *Sancho Panza*, a collier trading to Whitstable.

The action is to recover 3s., being the anchorage tolls of 1s. each, claimed by the plts. as the tolls payable by the def't. for casting anchor within or near this anchorage ground upon three separate occasions, viz., Sept. 14, Oct. 31, and Nov. 27, 1860. The ground on which the vessel anchored on Sept. 14 and Oct. 31 was within the anchorage ground somewhat below ordinary low water mark. Where the vessel anchored on Nov. 27 was between high and low water mark, upon ground which had been conveyed to the South Eastern Railway Company in 1828, and upon which a harbour had been constructed, which is described as the railway company's harbour.

Paragraphs 4 & 5 describe the position and boundaries of the anchorage ground and the railway company's harbour.

The plts., and those under whom they claim, have

from time immemorial, continually down to the present time, taken the sum of 1s. from every vessel casting anchor within the limits of the anchorage ground now in their possession, whether the anchorage were voluntary or from necessity. Since 1828 the plts. have not demanded anchorage tolls from any vessels sailing into and anchoring within the railway harbour, unless such vessels have previously cast anchor on their anchorage ground.

Plts. are owners of oyster beds, which lie to the north and east of the anchorage ground. There are no buoys or beacons to indicate the anchoring ground, except those maintained by the plts. in order to mark the bounds of their oyster beds.

Plts. also keep two boats, which are called watch boats, and are moored on the boundary of the oyster bed and the anchorage ground. They are maintained for the protection of the plts.' oysters from thieves, and also to warn vessels from attempting to come to the anchorage ground, when from the state of the tides they would be likely to ground upon and injure the oysters. Since the year 1858 these watch boats have been provided with lights; the light on the outer boat is put out when there is less than thirteen feet of water where the boat is moored, and the light on the inner boat when there is less than seven feet of water at her moorings. These boats are compelled to leave their moorings in very rough weather.

Vessels sailing into the anchorage ground at night derive some aid from the lights in the watch boats, but are chiefly guided by a light on shore from the railway company's harbour. The ordinary course of navigation for vessels intending to make the anchorage at Whitstable is to sail along the "Ridge" (one of the boundaries of the anchorage) until the light in the harbour bears south, then to steer straight on. There is another mode of entering the anchorage ground through a channel called the "Eddy hole," which lies between the "Street" (another boundary) and "Ridge." The buoys which indicate the limits of the plts.' oyster beds also point out this channel. It is a safe channel for fishing boats and vessels of small draft of water, but it is unsafe and not ordinarily used for loading vessels.

The light exhibited on shore is maintained by the South Eastern Railway Company in the harbour constructed by them on the land purchased from the plts. in 1828. This light is always shown, and affords most valuable aid to vessels endeavouring to make the anchorage ground; the members of the plts.' company are forbidden by their bye-laws to dredge or work, and they do not, in fact, dredge or work, on their oyster beds after dark.

For some years before 1816, no light was exhibited from the shore at Whitstable, and in consequence the anchorage ground was frequently missed by vessels endeavouring to find it. In the year 1816, a man named Reeves, who filled the position of foreman to the plts.' company, exhibited a light from a mast erected on his premises. The expense of the light was borne by a contribution from the plts. and the shipowners of Whitstable. The company paid 10l. per annum, and the shipowners the sum of 5s. for each vessel. This contribution was made voluntarily, and was never demanded as a right by Reeves, or by the plts. The light was continued down to the year 1828, when, in consequence of the unsatisfactory manner in which the light was maintained by Reeves, the contribution ceased, and the light was for some time altogether discontinued.

In the year 1832, a man named Perkins, who was not in the employ of the plts., but was a sailmaker residing at Whitstable, exhibited a light from a window in his sail loft, and the expense was borne as before by contributions of the same amount.

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as those formerly paid by the plts. and the ship-owners.

In the year 1838, a man named Richards, who was not in the employ of the plts., succeeded Perkins in the management of the light; he removed it from its former position to a pole in front of his house; the expense continued to be borne as before by voluntary contribution, but the light ceased to be exhibited with regularity about the year 1845.

In the year 1848 a person named George Clay, who was then in the employment of the South-Eastern Railway Company as master of their harbour at Whitstable, proposed to plts. and to the shipowners at Whitstable, to exhibit a light from the railway company's harbour, upon being paid 6*l.* a year by the plts., and tonnage of 1*s.* 4*d.* a ton upon vessels using the said harbour; to this arrangement the plts. and the shipowners agreed. The plts. discontinued their payments after two years, but the tonnage dues had been regularly paid to the South-Eastern Railway Company, and the light has been constantly exhibited.

The only proof of any payment by the plts.' company towards maintaining a light prior to the year 1816 are the following entries made in the books of the company by a former treasurer:

1777. June 29 — Paid Mr. Matthew Brown for one year's use of the light	£3 3 0
1778. May 12. — Paid Matthew Brown for one year's use of the light	4 4 0

The buoys and beacons maintained by the plts. have been so maintained during living memory. The books kept by former treasurers of the plts. contain, among others certain entries of payments for the use and repairs of the buoys, and for advertisements. The dates of these entries are in the years 1773, 1774, 1775, and 1776.

The only advertisements relating to this matter inserted in the *Kentish Gazette* about the date of the above entries were two which appeared in the papers of Dec. 15 and Dec. 18, 1773, by which notice was given that the plts.' company had lately put and placed down buoys to mark out and distinguish the boundaries of the manor and royalty of Whitstable, and that every person who should thereafter trespass upon the company's free fishery and royalty by dredging for or taking any of the oysters, or do any damage to the said buoys belonging to the free fishers and dredgers, would be prosecuted for the same with the utmost rigour of the law.

The manor of Whitstable, anciently known as Northwood, was a subinfeudation of the barony of Chilham, and in the survey of Domesday is found in the possession of Odo, Bishop of Bayeux. In the reign of Henry III., by an inquisition taken at their death, Richard and Rosina de Dover were found to have held of the King in chief the said barony of Chilham, and amongst other of its members, the manor of Northwood, worth in all issues of 21*l.* 1*s.*

Subsequently, the manor came into possession of Alexander de Balliol, by courtesy, upon the death of his wife, Isabel, a descendant of Richard de Dover; and at the circuit of the justices-in-eyre for Kent, in the seventh Edw. I., assigned to hold the pleas of Quo Warranto, the said Alexander de Balliol, in right of his wife, claimed to have "without charter of old custom in his manor in the county certain liberties, to wit, at Whitstable, a free hundred court, &c., wreck of the sea, toll and warren; and that they and all the ancestors of the wife, from time whereof is not, &c., have fully used all these liberties." An inquisition being prayed, the knights chosen on the jury returned a verdict that the said Alexander, Isabel, and her ancestors, had

immemorially and fully used the liberties, and had usurped nothing upon the Crown.

Upon an information of Quo Warranto in the 21st Edward I., the said Alexander de Balliol was summoned to answer why he claimed certain privileges and liberties at Whitstable, amongst which were free warren, toll of the sea, and toll with merchandise at Le Craston, or Greystone (a landing place within the manor, the exact position of which is not now known); and the said Alexander also claimed that his wife's ancestors, from the time of which memory is not, have had the aforesaid liberties, and warren, wreck, and toll, without interruption.

The jurors said upon their oath, that the aforesaid Alexander and his wife's ancestors "had always, from time whereof memory is not, all the liberties aforesaid as they claimed to have the same, except Free-warren in certain newly-acquired lands; and that the said Alexander, as to the other liberties should go thereof without day saving the king's right, &c."

On the 3rd Jan., 19 Ed. 2, a commission was issued by the king, in which it was recited that certain treasonable letters had been landed from vessels along the coast of the Thames between Reculver, Greystone, and Whitstable. These places are alluded to throughout the commission as "the said ports and places."

In a proclamation, dated the 14th Aug., 20 Ed. 2, these places are also called "ports."

During the tenancy of the manor by a religious house called the College of Plescy, in Essex, in the year 4 Hen. 7, an award was made, by arbitrators appointed by the king, concerning a dispute as to the dredging of oysters at Whitstable. They found amongst other things that the oyster-ground was "parcel of the manor of Whitstable."

In a survey of the manor in 22 Hen. 8, among the holdings enumerated are divers fisheries called weirs, the localities of which are described as "the Strett, the Rigge, and the Beken." The two former are the banks which lie on the east and north of the anchorage ground.

In the 7th Elizabeth a special commission was directed out of the Court of Ex. to survey the port of Sandwich, and the number and condition of its creeks or members, and to certify which of them were the most frequented by merchants, and were fit to be continued for the receipt of customs. The certificate of the commissioners thereupon returned enumerates among the members and creeks of Sandwich, Whitstable, "ten miles distant from the said port towards the north." It proceeds to state the condition of the various members among which Dover and Faversham are declared to be in decay and "all the residue to be in good estate." The commissioners thus conclude: "All the creeks above-named, other than such as have officers attendant, do sometimes receive in and deliver out wares and merchandise, but [there are] none meet to have continuance, but only the said court of Sandwich, and the creeks of Dover, Faversham, Milton, and Rochester. Nevertheless, for the ease of the county, it is thought meet that the creeks aforesaid, as well within the Isle of Thanet as elsewhere, be maintained and used for the transporting of corn, wood, and other commodities, out of one part of the realm into another part, making their entries and certificates to the next port or creek adjoining, where the said officers are resident; and that the said several creeks, as to this transporting of merchandise to or from beyond the sea, be utterly damned."

Dover, mentioned in the said inquisition, is now, and from time immemorial has been, one of the Cinque ports; Faversham is, and from time immemorial has been, a port, and a limb of Dover.

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Lord Bolingbroke being then seized of the manor, did, on the 13th Nov. 1775, by deed of deputation, direct his water-bailiff to collect anchorage, &c., from vessels arriving and anchoring on the manor of Whitstable.

The special case also included the local Act of Parliament by which the p'ts. were incorporated (33 Geo. 3, c. 43), and also the various conveyances by which the p'ts. became possessed of their oyster fisheries and the manor of Whitstable. This Act and these conveyances formed the evidence upon which a previous case of *Gann v. The Free Fishers of Whitstable* was decided: (See 9 L. T. Rep. N. S. 263.)

The question for the opinion of the court was, whether the p'ts. were entitled to recover the said anchorage tolls, or any or which of them from the deft.

The p'ts.'s points for argument were: 1. That the p'ts. are entitled to the sums claimed by them for anchorage. 2. That the immemorial payment being found, no intendment that it was illegal can be made, and the facts stated in the case, coupled with its immemorial existence, are sufficient to support it, or, as all events, sufficient to throw upon the deft. the onus of proving that the payment was originally illegal, or without consideration, and ought no longer to be made. 3. That the case shows that the anchorage ground was the soil of the p'ts., and was within the precinct of a port, or harbour, or haven. 4. That the case shows that some service or aid in navigation was rendered to the public. 5. That the case shows that the payment for anchorage was due by right as a compensation for the injury to the brood of oysters by anchoring within the limits of the oyster fishery. 6. That the fact of the payment having been made from time immemorial, coupled with the contemporaneous existence of the oyster beds within the anchorage ground, is sufficient to support the inference that the payment was made as compensation for keeping up buoys and beacons to denote the position and limits of the oyster beds, and thus the better to enable persons coming to anchor within the limits of the oyster beds to avoid injuring the oysters. 7. That the payment may have been originally made for the maintenance of a light to assist persons seeking the harbour or anchorage ground, a supposition supported by the maintenance by the plaintiffs of a light within the time of memory. 8. That the facts stated in the case, coupled with the immemorial payment, are sufficient to negative the illegality of the claim, and that it was not founded on sufficient consideration. 9. That the onus of proving that this payment, made from time immemorial, is illegal, or without consideration, lies upon the defendant, and the facts found in the case do not prove its illegality, or that it was without consideration. 10. That no title founded on immemorial enjoyment would be secure if the onus of proving that it had a valid origin could be thrown upon its possessor by any one choosing to challenge it. 11. That it is more consistent with the facts found in the case that the claim is lawful than unlawful, because if unlawful it could and would have been successfully resisted when first set up, and its continued existence down to the present time proves either that it was never disputed, or disputed unsuccessfully.

The deft.'s points for argument were:—1. That the soil of the sea where the app's vessel was anchored on the 14th Sept. and 31st Oct. 1860 being below low water-mark was vested by law in the Crown, and the claim for anchorage was invalid. 2. That the Crown holds such soil of the sea as trustee for the public, and could only grant such soil to a subject subservient to the public rights. 3. That if any charter was ever granted by the Crown affecting to grant of take toll for anchoring

on the high seas, such charter would be void, and a grant of such charter cannot be presumed. 4. That the public have the right to navigate the high seas without any exaction or tolls being made or imposed upon them, and the Crown had no power to impose any toll on the public for passing or anchoring on the high seas without the authority of Parliament, unless the public have a *quid pro quo*. 5. That there is no consideration shown for the tolls claimed. 6. That the soil of the sea where the deft.'s vessel was anchored on the 27th Nov. 1860 was not the property of the p'ts., and was not within the limits of the anchorage-ground upon or in respect of which the p'ts. claim a right of toll. 7. That, for the like preceding reasons objected to the tolls claimed on the 14th Sept. and 31st Oct., the p'ts. are not entitled to claim the toll on the 27th Nov. 8. That the p'ts. have no right to any payment for anchorage as stated in the case, and the deft. or his vessel was not liable to the payment of any of the said tolls for the said anchorage. 9. That the p'ts. have failed to show any sufficient right or title at law to any claim for such anchorage as stated. 10. That the deft. is entitled to the judgment of the court upon the case as stated.

McKish, Q. C. (with him *Denman, Q. C.* and *Reynold*) for the p'ts. This question of the p'ts.' right to anchorage dues in the harbour of Whitstable has before been raised in the case of *Gann v. The Free Fishers of Whitstable*, which was decided against the p'ts. by the H. of L., 11 H. L. Can. 192; 20 C. B., N. S., 1; and 12 L. T. Rep. N. S. 150. See the case in Ex. Ch. reported 9 L. T. Rep. N. S. 263. The difference between that case and the present is that we then claimed the dues on the ground of our possession of the soil, which was held to be insufficient; we now base our claims upon immemorial usage, and in consideration for the benefits we have done to navigation. The points for the Court to decide are whether the consideration alleged is sufficient for our claim of tolls, and whether the evidence produced is sufficient to show this consideration. My argument is that before the time of legal memory the soil of the oyster ground, and also of the anchorage ground, was granted to the lord of the manor; that from time immemorial there was a port at Whitstable, and that the lord of the manor kept up buoys and lights between the oyster ground and anchorage ground; perhaps chiefly to protect the oysters, but also to assist the public in steering to the anchorage ground. The special case as it is now drawn up contains all that was said in the judgments of the H. of L. would be sufficient to substantiate the claims of the p'ts.

The Mayor and Burgesses of Lyme Regis v. Bentley,

1 Bing. N. C. 222;

Hale de Jure Maris, pp. 46, 72, 74;

The Mayor of Colchester v. Brooke, 7 Q. B. 800.

Prentice, Q. C. (with him *F. M. White*) for the deft.—It must be taken for granted since the decision of the H. of L., that the Crown has power to grant the soil of a port, subject to the rights of the people; but there is no case in which anchorage dues have been granted by the Crown. An anchorage cannot be claimed by prescription, because it is a public right; this was held in the case of the *Mayor and Burgesses of The Town of Nottingham v. Lambert*, Willes Reps. 111. As a matter of law, the considerations alleged on the other side are not sufficient to establish the p'ts.' right to these anchorage dues. The Crown holds the soil of the sea as trustee for the nation, and cannot grant tolls except in consideration for some public benefit:

Com. Dig. "Prerogative" D., and "Toll" C.;

Rale de Portibus Maris, c. 3, p. 74;

Warren v. Pridemore, 1 Mod. 106;

C. P.]

WHITSTABLE FREE FISHERS v. FOREMAN.

[C. P.]

Bac. Abr. "Customs," D.;
Vinkinstone v. Edden, Car. 857.

Mellish, in reply, cited

The Mayor of Exeter v. Warren, 5 Q. B. 773;
The Duke of Somerset v. Fogge, 5 B. & C. 875;
Morris v. Dimes, 8 Nev. & Man. 671;
Dimes v. Arden, 6 Nev. & Man. 494;
Lord Falmouth v. George, 5 Bing. 286.

Cur. adv. vult.

July 8.—The judgment of the court (composed of the Lord Chief Justice, Willes, Keating, and M. Smith, JJ.) was read by

BOVILL, C. J.—The right claimed by the plts. in this case is similar to that which was in question in the case of *The Free Fishers of Whitstable v. Gann*, namely, the right to have anchorage dues from all vessels casting anchor on land covered by the sea, called the Anchorage Ground, near to Whitstable. In the former case, the right was sought to be maintained by reason of the ownership of the plts. in the soil upon which the anchors were cast; it was supported upon that ground by this court, and again in error by the Ex. Ch. The H. of L. decided that the anchorage ground, not being shown to be within or belonging to a port, but being a part of the sea where all persons would have a right to navigate, and as incidental to such right to cast their anchors there, the right claimed by the plts. could not be supported in respect of the mere ownership of the soil, and they decided that such a right required some consideration or advantage by the public to support it. The plts.' case being on that occasion based upon their ownership of the soil, their evidence was directed to that point only, and no facts appeared from which their claim could be supported on any other ground; and the ultimate decision, upon the statement of that case, was adverse to the plts. The present case is brought before us in a different form, the claim not being now based upon the mere ownership of the soil; and we are called upon to decide whether, under the circumstances set forth in the special case, the plts. have established a right to this payment. No claim is made in respect of that part of the ground sold to the South-Eastern Railway Company, nor has any distinction been made between the part above and that below the ordinary low-water mark, and, indeed, no such distinction could properly be made. On the present statement of facts it appears that the payment of the anchorage due has been made and received from time immemorial, in respect of all vessels casting anchor within the limits of the anchorage-ground. That ground appears to have been parcel of the ancient manor of Whitstable, and there are oyster grounds on the outside of the anchorage ground belonging to the lord as part of the manor; and from the statement in the case, and the recital in the Act of Parliament in 1793, both are taken to have existed from time immemorial. There was also in ancient times, a place within the manor for the unloading of merchandise, and from a *quo warranto* in 21 Edw. 1, it appears that the lord of the manor of Whitstable was entitled to take toll at a place called Le Craston within the manor, and although the precise locality of that place is not known, yet from the commission and proclamation in 2 Edw. 1, referred to in the special case it seems to have been somewhere between Reculver and Whitstable. There is also a reference in the Act of 1793, to "customary payments usual and of right made to the lord of the manor for or on account of any ship or vessel in the landing of goods and merchandise within the said manor." From the commission in 7 Eliz. it further appears that at that time Whitstable was a port in the sense of being a creek of the port of Sandwich;

it had not any officers of customs, but was a place for landing and delivering wares and merchandise, and the Royal commissioners returned that it should be discontinued or utterly damaged as a place for transporting wares and merchandise beyond the seas, although they thought it meet that it should be maintained and used for transporting wares and merchandise from one part of the realm to another, making certificates to the next port or creek adjoining where the customs' officers were resident. There can be little doubt, therefore, that in very early times there was a port of Whitstable for loading and unloading of ships on the present anchorage ground; and it being protected from storms, would no doubt be frequented by vessels coming to the port as a safe and convenient place of anchorage. There is no evidence, however, to show that this anchorage ground was within or connected with the port, or that the franchise of the port was ever granted to any one by the Crown. The evidence seems satisfactorily to show that the lord was the owner of this landing-place, and took toll on merchandise thereto, and also the owner of the anchorage ground, and took dues as lord of the soil. The old anchorage, before the sale to the railway company, was protected on the north and east by banks partly grass, partly shingle and stone; those banks were known by the name of the Ridge and the Strett, and extended on either side to the sea beach and the main land, and the part thus protected afforded a comparatively safe anchorage for ships. There appear to have been fisheries belonging to the manor as far back as the 22 Hen. 8., and the oyster beds belonged to the plts. The plts. also maintained poles, buoys, and beacons, to mark the boundaries of the oyster fishery, and to prevent vessels anchoring and grounding upon the oyster beds; and the buoys and beacons also marked the position of the banks and the limits of the anchorage ground. They indicate the channel for entering at a place called the Eddy-hole, and enabled vessels to avoid the shoal banks by which the anchorage ground is protected, and point out the channel for vessels of a light draught of water. Some stress was laid by the deft. upon the fact of the free fishers having maintained the buoys before they became entitled to the fishery and the anchorage ground. But little weight is attached to that, because, according to the Act of Parliament, they carried on the fishery as tenants under the lord long before they became purchasers of the fee. The public, navigating the sea and coming to Whitstable, had, therefore, the use of the soil belonging to the plts. for the purpose of casting anchor, and of grounding upon it as the tide falls; and the channel to the anchoring ground through the place mentioned above, as pointed out by the buoys and beacons, is maintained at the plts.' own expense; and vessels can remain there protected by the bank from the storms of the sea in comparative safety and in a convenient place. There was, also, the statement that rights had been maintained at various periods, but that was not much pressed in the course of the arguments, and does not, in our opinion, materially assist the case of the plts. There is no evidence to show when or how these banks which protect the anchorage ground first came into existence; nor does it appear whether they were artificially made or mere natural banks thrown up by the sea. If they were originally made and partly formed by the former owner of the ground so as to create a protection to ships, they have been ever since, and still are maintained by the natural action of the sea; there is no reason why the original construction of these banks should not be a sufficient consideration for the payment of the anchorage due by all vessels anchoring at this place and enjoying the advantages of this protection; and where such payment has been made from time immemorial

C. P.]

THE SCIO.

[ADM.]

it is not unreasonable to presume that it had its origin in that way. It is not necessary to rest the case upon any such presumption, because, in our judgment, the maintenance of the buoys and beacons, and the advantages which the public derive therefrom, taken in connection with the ownership of the soil of the anchorage ground, are quite a sufficient consideration to support the legality of the present claim. The payment having been made from time immemorial, it ought to be referred to a legal origin, if there be anything to support it; and it may, in our opinion, well be referred to those services which have been performed, and the advantages which the public have enjoyed, which we have already adverted to, and which have existed throughout legal memory. And we think that this case is entirely in accordance with the decision of the H. of L.; because, after basing his judgment upon the ground that the claim could not be supported alone upon the ownership of the soil, Lord Westbury, L. C. says:—"If it may be claimed as an ancient anchorage due, some facts must be shown which either prove, or from which it can be inferred, that the toll claimed by the resps. was originally within the precincts of the port or harbour, or that some service to navigation was rendered to the public, in respect of which the alleged toll was paid. But nothing of the kind appears, and no such case can be presumed from the mere fact of an immemorial payment. No such case is made by the resps., and the payment is demanded merely upon the ground of its having been immemorially paid to the lords of the manor of Whitstable in respect of the ownership of the site of an ancient oyster fishery now vested in the resps." Lord Wensleydale was likewise of opinion that a consideration must be shown by some advantage having been conferred upon the public, or by the payment being a compensation for injury to the fishery; and Lord Chelmsford considered that the creation and erection of a port, would be in itself a sufficient consideration for such a payment. It was laid down in that case, in accordance with previous decisions on similar rights depending on long enjoyment, that every intendment ought to be made in favour of a payment which has been uninterruptedly received time out of mind, and that it is the duty of the court when a case admits of it, to find a legal origin for a right so long enjoyed. In the previous case no consideration was attempted to be shown for the payment, and no facts proved from which it could be inferred. There were no facts or circumstances to warrant a presumption that any corresponding benefit was given to the public for the imposition of the dues, and the case failed upon that ground; Lord Wensleydale, feeling probably there were other circumstances that could be proved, was desirous that the case should be sent down for a new trial, and said his own notion was, that it was consistent with the statement in the case, as it appeared, that some legal ground might be found for the establishing of a right to the anchorage due. Upon the statement of the case now before the court, it seems to us that the defect which existed in the former case has been supplied. The buoys and beacons have been maintained from living memory, and we think we ought to presume that they have existed from time immemorial; and when we find that anchorage dues have been received during the same period, and therefore ought to be referred to a legal origin, we consider that the maintenance of these buoys and beacons may be treated as a consideration for the payment that has been so immemorially made, and so would be a benefit to navigation by pointing out the anchorage-ground and the safe entrance to it. We think that would in point of law be a sufficient consideration to support the claim. Even if they

were maintained wholly and solely for the purpose of preventing vessels grounding upon the oyster-beds, it is not certain that they might not be a sufficient consideration, upon the principle stated by Lord Wensleydale, where he says: "It might also be due by right as a compensation for injury, by anchoring within the limits of the oyster fishery, to the breed of oysters. The grant of an oyster fishery beyond the time of legal memory, which would require expense and trouble to establish and keep up, would, I am strongly inclined to think, justify the imposition of such a toll within the limits where oysters were placed to breed. And Coleridge, J., a very able judge, in the case of *The Mayor of Colchester v. Brooke*, thought that the parties might be liable by ancient custom to pay to the lord of the manor a reasonable payment, as the owner of the soil, for grounding on the soil." In the present case, it being proved that Whitstable was a creek of the port of Sandwich, and although in the reign of Elizabeth it was discontinued as a place for foreign dues, it was continued as a place for the coasting trade, and as the anchorage ground was close to it, it is possible that the right might be supported on another ground suggested by Lord Wensleydale when he says, "It may be that the company of dredgers may have had the anchorage assigned to them beyond the time of memory by the owner of the port, who may have had the right of anchorage by virtue of his right to the port." Our judgment, however, is founded on the grounds already stated, the maintenance of the buoys and beacons in connection with the plaintiffs' ownership of the soil and their uninterrupted enjoyment of the anchorage due from time immemorial. There is no reason shewn why the payment should not have had a legal origin. Very slight evidence is, according to our notion, necessary in order to support a right which has been uninterruptedly enjoyed from time immemorial, the legality of which we are almost bound to presume. We consider the circumstances altogether to be sufficient in our judgment to support the claim, and that the plts. are entitled to our judgment.

Judgment for plts.

Attorneys for plts., *Nethersole and Speechly.*

Attorney for deft., *E. E. Towne for J. Towne, Margate.*

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister-at-Law.

Tuesday, March 12, 1867.

THE SCIO.

Mortgagees—Material-men—Priority.

Mortgagees are entitled to priority over material-men, whose claims arise after the registration of the mortgages, unless the material-men have acquired a possessory lien.

Where a graving-flat was attached to a vessel, and chisels and other implements were on board at the time of arrest, the property of the material-men, it was

Held, that these facts were inadequate to prove possession.

This was a motion for the payment of two mortgagees in priority over the material-men. The facts are detailed in the judgment.

Bayford, in support of the motion, cited,
Jackson v. Cramming, 5 M. & W. 649;
Jacobs v. Latour, 5 Bing. 180;
The Pacific, 3 New Rep. 709.

Dr. Deane, contra.

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THE MARIA.

[ADM.]

Dr. LUSHINGTON gave judgment as follows:—In the month of June 1865 8-64ths of the *Scio*, a British vessel, were mortgaged to J. Donthwaite, to secure 62*l*, and in July 40-64ths were mortgaged to J. Young to secure 300*l*. In Jan. following (1866) the *Scio* put into Lowestoft Harbour in a disabled condition, and from that time to June following she remained there undergoing repairs; the persons who performed the repairs and supplied the necessary materials were Mr. Hutchinson, ship-builder, and Mr. Rounce, whose firm were the authorised shipping agents for the club at Scarborough in which the vessel was insured. The owner of the vessel was insolvent, and early in June Mr. Donthwaite, as one of the mortgagees, came down to Lowestoft to take possession of the vessel, and proposed to remove her without paying the debts which had been incurred on the repairs of the vessel. A dispute thereupon arose between him and the master, Mr. Leadley. On the 16th June the master instituted a suit, No. 3341, to recover his wages and disbursements, and arrested the vessel and also cargo for freight. On the 18th Mr. Hutchinson and Mr. Rounce instituted another suit, No. 3342, to recover their debts under the 4th section of the Admiralty Court Act 1861, which gives to the court jurisdiction on any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court. The owner of the vessel has not appeared, but both suits are defended by the mortgagees, Messrs. Donthwaite and Young. The vessel has been sold under order of the court; the net proceeds of vessel and freight amounted to 455*l*, whilst the total of the claims against them exceed 1000*l*, as follows:—Marten, 174*l* 1*s* 10*d*; Hutchinson, for repairs, 289*l* 5*s* 3*d*; Rounce and others, 267*l*; J. Young, mortgage, exclusive of interest, 300*l*; Donthwaite, ditto, 62*l*; total, 1092*l* 1*s* 1*d*. Under these circumstances the mortgagees, Messrs. Young and Donthwaite, in November last, made motions in the suit 3341 to have their mortgage debts, &c., paid out of the proceeds in priority to any payment to Messrs. Hutchinson and Rounce, who had supplied the repairs and materials to the vessel, and who were the plaintiffs in the suit 3342. The court directed the motions to stand over until a statement of the facts relative to the question in dispute should have been filed. The parties failed to carry out this order, having, I presume, been unable to agree upon a statement, and accordingly, instead of a statement, a number of conflicting affidavits have been filed. It might have been satisfactory to have had an Act on petition in this case, but considering the small value of the property at stake, and the expenses already incurred in litigation concerning it, I am to decide the case upon these affidavits if they furnish the necessary materials for a judgment. As between the mortgagees and the master there is no dispute as to priority. The question is as between the mortgagees and those who repaired and refitted the vessel. If these men had simply supplied materials to the vessel, then (as established in the *Pacific*, 3 New Rep. 709) their right *in rem* to the proceeds of this vessel and freight commenced only upon the institution of their suit in June last, and consequently would be posterior to the right of the mortgagees, whose mortgages were registered in the months of June and Sept. 1865. If, on the contrary, the vessel at the date of her arrest was in the actual possession of the ship-builder, Mr. Hutchinson, then by the common law he would have a possessory lien upon her which could not be displaced by the mortgagees: (*Williams v. Allsopp*, 4 L. T. Rep. N. S. 550. Now Mr. Rounce was never in possession of the vessel. He was, as I have stated, the agent of the underwriter,

and he and those persons whom he represents seem to have done no more than advance money and supply rope, ironwork, provisions, &c., for the repairing and equipping of the vessel. The case of Mr. Hutchinson, the ship-builder, is somewhat different. When he commenced the repairs on the *Scio* she was lying in the graving-dock on the north side of Lowestoft Harbour. She was then removed to the south side of the harbour for the purpose of again taking in part of her cargo, which had been previously discharged there, and Mr. Hutchinson continued to repair her whilst lying there. Subsequently she was taken to deeper water on the north side, where she was still lying when she was arrested. On behalf of Mr. Hutchinson, it is deposed that at the time of the arrest his graving flat lay between the quay and the vessel, and was attached to the vessel by chain and rope painters, and floated close to her to enable the workmen to execute the external repairs about the hull. Also, that there were on board of the vessel chisels, chisels, and other implements and materials belonging to Hutchinson. These statements are disputed; but, supposing them to be true, I think them quite inadequate to establish that the vessel was in possession of Mr. Hutchinson so as to give him a possessory lien over her. He therefore, as well as Mr. Rounce, must submit to have his claim postponed to those of the mortgagees.

May 9 and June 18, 1867.

THE MARIA.

The Hull Pilot Act—2 & 3 Will. 4, c. 105, ss. 22 and 23—Compulsory pilotage.

Where a vessel which was being towed from one dock to another, within the port of Hull, came into collision with another vessel, the former having at the time on board a duly licensed pilot, to whose conduct the collision was solely owing, it was

Held, that the vessel was neither "passing into or out of" the port under the 22nd section of the above Act, nor "bound to or from" the port within the 23rd section; the pilotage, therefore, not compulsory.

On May 9th a cross cause of damage between the *Richard* and the *Maria* was heard by Dr. Lushington, assisted by Trinity Masters. It appeared that on the 5th Jan. last, the *Maria*, having on board a duly licensed Humber pilot, while being towed from the Victoria Dock at Hull through the Hull River, and through the old harbour into Humphrey's dry dock, came into collision, at the Victoria Jetty, which is at the entrance of the Hull river into the Humber, with the *Richard*, which was at anchor. There was a heavy gale at the time, by the force of which the *Maria* was driven against the *Richard*. There was also another collision next morning, and some damage was done to the *Richard*, on account of which her owners instituted this cause. The owners of the *Maria* also brought a cross cause against the *Richard*. At the time of the collision the *Maria* had finished her voyage, her cargo had been delivered, and her crew discharged.

At the hearing, the Court held that the pilot of the *Maria* was solely to blame for the collision, and took time to consider whether the pilotage was compulsory. On June 18th judgment was given.

Dr. LUSHINGTON (having first recapitulated the facts) said:—The section chiefly to be considered is the one which gives authority to appoint pilots, viz. the 22nd. That section closes with these words: "All ships and vessels sailing, navigating, and passing as aforesaid, except as hereinafter provided, shall be conducted and piloted within the limits aforesaid by pilots so licensed, and by no other pilot."

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[ADM.]

or persons." The exceptions made in a subsequent part of the statute, are of vessels not drawing more than six feet of water, vessels putting in for shelter, &c.; they clearly do not apply to the *Maria*, and therefore need not be considered here. The question is, what is the meaning of the words "vessels sailing, navigating, and passing as aforesaid." The section commences by reciting that the corporation of the Trinity-house in Kingston-upon-Hull had been previously empowered to appoint pilots to conduct ships and vessels sailing or navigating into and out of the port of Kingston-upon-Hull, and in the limits and liberties thereof, and into and out of, and upon the river Humber, and from the said river out to sea, and between Flamborough Head northward, and Winterton Nets southward, and into and out of the several ports, creeks, harbours, and places situate between those two last-mentioned headlands or places; and then enacts by giving power to the same guild to license pilots "for conducting ships or vessels 'into and out of the port of Kingston-upon-Hull, and of the port of Great Grimsby, and upon any part of the river Humber below the said port of Kingston-upon-Hull, and so far out at sea as . . . and also so far along the coast as" . . . It is argued on behalf of the owners of the *Richard* that the taking a pilot under the circumstances is not compulsory; that the words in the enacting part into or out of "the port of Hull," cannot mean within the limits of the port, and must refer only to inward or outward bound vessels; to vessels coming from outside the limits, or going to a place outside the limits of the port. That the *Maria* was neither inward nor outward bound, but passing from one part of the port to another. They further insist that this construction of the section is corroborated by the elaborate provisions made in the 40th and 41st sections for the distance to which outward bound ships, and the places to which inward bound ships are to be piloted, and also by the careful definitions in the 89th section of the term inward and outward bound vessels. On the other hand the owners of the *Maria* contend that the Act contains no words expressly limiting its application to inward or outward bound vessels, and that the words of the 22nd section are large enough to apply to vessels navigating within the port of Hull. It was also suggested that, even on the supposition that the Act was confined to inward or outward bound vessels, the *Maria* would come within the definition of these vessels contained in the 89th section, namely, "vessels bound to or from the said port of Kingston-upon-Hull, or to or from some other port or place situate on the said river Humber, or some or one of the several rivers and streams flowing into the same, or to or from some one of the several roadsteads in the said river Humber," because the *Maria* was going from one place on the Hull (which flows into the Humber) to another place on the Hull. But as both the Victoria Dock from which the *Maria* was going, and Humphrey's Dry Dock to which she was going, and the whole of the intervening course lie within the limits of the port of Kingston-upon-Hull, it is clear that if the 89th section bears upon the case of the *Maria* at all, it is by virtue of the words "to or from the said port of Kingston-upon-Hull." The owners of the *Maria* further contended that the case falls within the scope of the Act, because the same considerations apply as to vessels outward or inward bound: the *Maria* passing from the Victoria dock to Humphrey's Dry Dock would have to pass down, in part at least, the same intricate channel as an outward or inward bound vessel, and would equally require pilotage in order to navigate safely herself, and not to do injury to other shipping in the river. I do not, however, consider that the court can give much weight to these considerations

of expediency. On this point the case is of *Rodriguez v. Melhuish*, 10 Ex. 110, appears to be an applicable authority. That was a case under the Mersey Pilot Act which made pilotage compulsory "in the case of the master of a vessel outward bound when he shall proceed to sea." The facts were, that the vessel being under contract with the Post Office to go to sea on the 4th Dec., was, on the 2nd, taken under charge of a pilot out of the Prince's-dock at Liverpool, and towed by a steamer up the river, and there anchored; that on the 3rd, whilst she was anchored, the pilot being on board, and also riggers to complete the rigging, but the master being on shore, the boat of the pilot was in some way swamped by the vessel and by the vessel's fault. The Court of Ex. were unanimous in holding that the pilotage was not compulsory, because the vessel was not at the time proceeding to sea; and in delivering judgment the Chief Baron is reported to have said: "It might have been better, and the provisions of the Act would have been more symmetrical (if I may be allowed the expression), if the duties of the pilot and of the owner in the case of a vessel going outwards had been correlative with those of a vessel inward bound. It is likely to be a more difficult undertaking to take a vessel out of the dock and into the river than taking her out to sea. But we do not sit to make law, but to declare it as we find it." Moreover, it seems to me that the navigation of inward or outward-bound vessels into or out of a port and the navigation of vessels within the limits of a port are not necessarily upon the same footing with regard to compulsory pilotage, for by the 362nd section of the Merchant Shipping Act it is provided that "an unqualified pilot may within any pilotage district, without subjecting himself or his employers to any penalty, take charge of a ship as pilot for the purpose of changing the moorings of any ship in port, or of taking her into or out of any dock, in cases where such an act can be done by an unqualified pilot without infringing the regulations of the port or any orders which the harbour master is legally empowered to give." I am unable to hold that the *Maria*, being towed from one dock to another in the port of Hull was either a vessel passing "into or out of" the port within the terms of the 22nd section, or a vessel "bound to or from" the port within the terms of the 89th section. I am, therefore, of opinion that under the circumstances pilotage was not compulsory upon the *Maria*, and that she is liable for the damage she has occasioned to the *Richard*.

Proctors: for the *Richard*, Coote; for the *Maria*, Clarkson, Son, and Couper.

June 1 and 18, 1867.

THE ARGENTINA.

24 Vict. c. 6—Bill of lading—Agent—Assignee for value.

G., a merchant of New York, shipped to Bristol in the vessel *Argentina* three parcels of oilcake, two parcels for G. senior, his correspondent there, and the third for S. The bills of lading for all three parcels in triplicate he sent to G. senior, with strict injunctions not to part with the bill of lading of S.'s parcel to him without first receiving payment. G. drew a bill of exchange for the whole value of the parcels on G. senior, which was discounted. S. subsequently induced G. senior to deliver to him his bill of lading on giving a bill of exchange drawn on one Stiles, and a promise of immediate payment of the cash. S. having endorsed the bill of lading to R. for value, became bankrupt, as also did Stiles. On the arrival of the vessel, R. had notice served on the master not to deliver the goods but to his order. G. senior presented one of

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the copies of the bill of lading which he had retained, and demanded the delivery of the third parcel shipped for Stone, as well as the other two, to which his title was undisputed. The master refused to deliver the third parcel, and retained thirty-two barrels out of the other parcels for the alleged non-payment of freight. He also refused to deliver the third parcel to R. G. senior becoming bankrupt, two actions were brought in this court against the vessel, one by the assignees of G. senior's creditors for the non-delivery of the third parcel and the thirty-two barrels retained for freight, and the other by Russell for the non-delivery of the third parcel to his order. The master made an application to the Court of Ch. to compel the plts. to interplead, which was refused. The two suits having been heard together, the Court dismissed the claim in respect of the thirty-two barrels, and in reference to the third parcel, being of opinion (1) that R. was a bona fide assignee for value without notice of fraud; (2), that G. senior had authority to deliver the bill to Stone under the circumstances especially as the words in the instructions from G. senior were ambiguous:

Held, following *Gurney v. Behrend*, that R. was entitled to the goods, and granted (but with hesitation) the costs of his suit against the owners of the vessel, the suit of the assignees of G. senior's creditors to be dismissed with costs:

Semble, this Court had the power had it been applied to, to have relieved the vessel from the cost of resisting at the same time two conflicting demands.

All the facts of this case are sufficiently detailed in the following judgment.

The Solicitor-General, (Sir John Karslake, Q. C.), and Pritchard appeared for the plt. Russell.

Dr. Deane, Q. C. and Dr. Tristram represented the assignees of Gilbert the elder, and Brett, Q. C. and Clarkson were for the owners of the *Argentina*.

June 18.—Dr. LUSHINGTON.—There are two actions, each brought under the 6th section of the Admiralty Court Act 1861 by the assignees of bills of lading against the Austrian vessel the *Argentina*, for breach of contract or duty by the master, in not delivering the goods comprised in the bills of lading. The two actions relate mainly, but not altogether, to the same goods. The circumstances are as follows: On the 16th Jan. 1866, John Gilbert, jun., merchant, of New York, shipped on board the *Argentina*, then lying at New York, and bound for Bristol, three parcels of oilcake, consisting respectively of 600, 410, and 270 barrels, the invoice price of the whole being 1039*l.* 1*s.*, and of the last-named parcel, the 270 barrels, 231*l.* 17*s.* 4*d.* For each of the three parcels the master signed separate bills of lading, and in each case in triplicate; the tenor of each bill of lading was to make the goods deliverable unto order or assigns on payment of freight. John Gilbert, jun., drew upon his father, John Gilbert, sen., his correspondent at Bristol, for the total invoice price of the three parcels—namely, 1039*l.* 1*s.*, in two bills of exchange—and took the bills of exchange to Messrs. Dennistown and Co. to get them discounted. Messrs. Dennistown and Co. accordingly discounted them upon receiving as a security for the acceptance of John Gilbert, sen., the bills of lading for the two larger parcels, namely, those consisting respectively of 600 and 410 barrels, duly indorsed in blank by John Gilbert, jun. Then, in accordance with their usual practice, they forwarded the two bills of lading and two bills of exchange to their firm in this country who obtained from John Gilbert, sen., his acceptance of the bills of exchange and transferred to him the bills of lading. It is not disputed that John Gilbert, sen., thereby became entitled to receive the cake comprised in the bills of

lading for the two parcels upon payment of the freight. He has duly met the acceptance of the bills of exchange. The third parcel of oilcake, containing 270 barrels, John Gilbert, jun., disposed of differently. He intended them for a Mr. Stone, a merchant in Bristol; but for greater security he effected the sale through his father in the following manner, and sent to his father on the 23rd Jan. 1866, first the bills of lading triplicate for the 270 barrels, indorsed by himself, John Gilbert, jun., in blank; secondly, an invoice for the same goods, showing the price to be 231*l.* 17*s.* 4*d.*; thirdly, a bill of exchange for the invoice price, 231*l.* 17*s.* 4*d.*, drawn by himself, John Gilbert, jun., in his own favour, upon Frederic Stone; fourthly, a copy of a letter of the same date (23rd Jan.), which he was sending to Stone by the same mail, informing Stone that the shipment had been made, and that the drafts and bills of lading were to be sent by the same post. These four documents sent by John Gilbert, jun., to his father were inclosed in a letter, of which the following is an extract:—"I had a letter from Messrs. Stone, per *City of New York*, ordering 5000 or 6000 barrels of oilcake. I have thought it well to invoice the 270 barrels of oilcake to him at present market price, and draw against same at fifty days. I inclose you herein bills of lading and drafts on him for the amount of same, say, 231*l.* 17*s.* 4*d.* I have drawn them to myself, and indorsed the bill with merely my name, so that you can fill up as may be in consonance to your wishes. You will observe the 270 barrels are not injured. Please see that this is done. Though I sent Stone's bill it is understood, of course, you do not part with bills of lading without first receiving payment." It appears that Stone was formerly clerk to John Gilbert, sen., and had set up business for himself, and occasionally had dealings with his former master, and received consignment from John Gilbert, jun., from America. But neither of the Gilberts put much faith in him. On the 24th Oct. 1865 John Gilbert, jun., had written to his father. "With regard to Stone you ought to know him best, and though I should not like to prejudge anyone, I must say I do not think he is very reliable. I shall always, therefore, take the precaution of sending you bills of lading and drafts, and as we have had experience and pretty freely exchanged our opinions respecting him, I pray you be careful with the documents, and not suffer yourself to be fooled to part with them without the cash; let none of his professions or promises influence you. These are my strict wishes and orders." Again, later in Dec. 1865, in making a consignment for Stone by the *Glacier*, John Gilbert, jun., wrote to his father. "The bill lading, per *Glacier*, I shall indorse blank for Stone, and whatever shipments I might make him shall, as heretofore, remit to you the bills of lading, which you will not let him have without payment first being made you. I cannot make him out." And it would seem that on Jan. 31, 1866, Stone having sold this consignment by the *Glacier* to the plt., Russell, applied on behalf of the purchaser to Gilbert, sen., for the bills of lading, assuring him that he need not be afraid of the balance, as he (Stone) would give him the same the moment the bill of lading was forthcoming. To return to the transaction, the subject of the present proceedings: these letters of the 23rd Jan. from John Gilbert, jun., to his father and to Stone, reached Bristol about the 7th or 8th Feb., and shortly afterwards Stone applied to John Gilbert, sen., for the bills of lading of the 270 barrels. What passed at the interview is disputed, but the result was that Gilbert, sen., did not at that time transfer the bill of lading to Stone, nor did Stone accept the bill of exchange drawn upon him by John Gilbert, jun. Subsequently, on Feb. 16, John

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Gilbert, sen., handed to Stone the bill of lading, on receiving from Stone a cheque for 100*l.*, and a bill of exchange for 280*l.*, to fall due on April 19, drawn by Stone and accepted by one Stiles. This is admitted, but particulars are disputed. Stone declares that the cheque for 100*l.* on general account between himself and John Gilbert, sen. (for Stone was in his debt), and the bill for 280*l.* were the consideration for the unconditional delivery of the bill of lading; while Gilbert, sen., swears that the cheque for 100*l.* was on an account altogether different from that of the 270 barrels, and that Stone promised to bring him on the same day, Feb. 16, cash for the invoice price of the barrels, and that the bill of exchange for 280*l.* was offered and taken only as a security for the cash, and that it was understood that the bill of lading was not to be used till the cash had been brought; and, therefore, that he, Gilbert, sen., simply delivered the bill of lading without making any indorsement upon it, that delivery should be made to Stone or order. On the same day, Feb. 16, Stone met Russell, who is the plt. in one of these causes, and sold him the 270 barrels simply for the invoice price *plus* the insurance. This amount was really 240*l.* 18*s.* 6*d.*, but at the time Stone only knew it was something a little short of 250*l.*, as he had not the invoice with him, and, therefore, it was agreed that Russell should accept a bill drawn by Stone for 250*l.*, to fall due on April 19 (the same day as that on which the bill for 280*l.* fell due), and that Stone should subsequently return to Russell the difference. This was done, and Stone thereupon gave Russell possession of the bill of lading, having first indorsed it with "delivered to the order of Mr. W. Russell, Frederick Stone." On this bill Stone raised money, and the bill has been duly met by Russell. Stone never paid to Russell the difference, 9*l.* 1*s.* 6*d.* Three days afterwards, on Feb. 19, John Gilbert, sen., paid into his banking account the bill of exchange for 280*l.* drawn by Stone and accepted by Stiles, to be discounted, but the bank declined to discount it, and within a very few days, first Stiles and then Stone became bankrupts. Thereupon John Gilbert, sen., having in his possession two duplicates of the bill of lading for the 270 barrels delivered, one of them to Messrs. Turner, Nott, and Strong, with instructions to present it to the master of the *Argentina* as soon as ever the vessel arrived in port, and indorsed it "deliver to the order of John Gilbert, Bristol." He also intrusted to the same firm the bills of lading for the other two parcels (of the 600 and 410 barrels respectively) concerning the ownership of which there was no dispute. The vessel arrived at Bristol on the 24th March, whilst she was still at the mouth of the Avon, Russell caused the master to be served with notice that he was indorsee and holder of the bill of lading for the 270 barrels, and warned him not to deliver except to him (Russell) or to his order. But the first actually to present the bill of lading was Gilbert, sen., through Read, who received the bill from Messrs. Turner and Co., and who acted as broker for the ship. The master refused to deliver to Read the 270 barrels, but marked the bill of lading with his initials. Shortly afterwards Russell presented his bill of lading, and was referred by the master to Read. Messrs. Turner and Co. finding a dispute was inevitable, handed back to Gilbert, sen., his bill of lading, and Gilbert entered the goods at the custom-house at Bristol, and paid the dues. I do not think it necessary to consider the evidence as to whether freight was actually tendered by either party for these 270 barrels. It is clear that the master waived tender, and refused to deliver because of the dispute as to the ownership. Nor is it necessary to examine how it came about that part of the 270 barrels was delivered, some to

each claimant. As a fact, in some way or other nine barrels were delivered to Russell, and in some way or other forty barrels were delivered to Gilbert sen., and by him placed in the warehouses of Messrs. Turner and Co., but apparently without their consent. Two circumstances relative to this part of the delivery are disputed, but I am satisfied that the master never recognised the title of either party. He has never received any freight from either party in respect of any of the 270 barrels. The 270 barrels have been thus disposed of. Nine are in the possession of Russell; forty are in the warehouses of Messrs. Turner and Co., and are held by them subject to the order of the court; and 221 are in Read's possession, subject to the order of the court. The other two parcels containing respectively the 600 and 410 barrels, have also been delivered to Gilbert, sen., with the exception of thirty-two barrels, which are detained by the master on the alleged ground of non-payment of freight. On the 4th April Gilbert, sen., arrested the vessel and commenced this action under the 6th section of Admiralty Court Act 1861, for breach of contract, and duty on the part of the master in not delivering to him the 270 barrels, and also the 32 barrels, the remainder of the 1010. Russell instituted a similar action in respect of the 270 barrels. The master thereupon filed a bill in Chancery to compel Gilbert, sen., and Russell to interplead, but the V. C. dismissed the bill with costs, on the ground that the case was not one for interpleader, and accordingly the two actions have proceeded in this court, and have been carried on separately. Early in May Gilbert, sen., became bankrupt, and his suit was conducted by his creditors' assignee, Mr. Barrett, of the house of Dennistown and Co. With regard to the thirty-two barrels which were part of the 1010, and which have not been delivered, the only question is whether the entire freight has been tendered. That some freight is still due is not denied, but Gilbert, sen., alleges that when he paid to Read a sum on account, he (Gilbert, sen.), promised to pay the balance as soon as Read would give him the freight note, and that Read, though repeatedly asked, has never done so. Gilbert, sen., also alleges, and in this he is to a certain extent corroborated by his clerk, that he tendered further cash to the master and mate. This is denied by Read, who is the broker of the vessel. There is thus a conflict of evidence. Upon the whole, considering that the master never disputed the title of Gilbert, sen., subject to payment of freight, and that there was no dispute as to the amount of freight due, and that some freight is still due, I consider that the probabilities are in favour of the master's contention that freight was not tendered. I think therefore, that the claim of Gilbert, sen., in respect of these thirty-two barrels falls to the ground. I now proceed to discuss the title to the 270 barrels. The law is, in my opinion, settled by the case of *Gurney v. Behrend*, 3 El. & Bl. 622, and *Pease v. Gloahac* (the *Maria Joseph*), 13 W. R. 112, Russell, as assignee of the bill of lading, would be entitled to the goods, if, first, he were *bonâ fide* assignee for value, without notice of fraud or insolvency on Stone's part; and, secondly, if Gilbert, sen., had authority to transfer the bill of lading to Stone. If these conditions were observed it would be immaterial whether the bill of lading was obtained by Stone on false representations or promises (that he would bring cash), which were never fulfilled. The first question, therefore, for the court is whether Russell is a *bonâ fide* assignee for value without notice. As to this I have no doubt, Russell certainly is an assignee for value, for he paid 250*l.* for the goods; Gilbert, sen., declares that Russell must have known of Stone's insolvency, for that Russell and Stone were partners, but the existence

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of any partnership is denied by both of them, and I see no evidence of the fact. The purchase by Russell from Stone of a previous consignment from Gilbert, jun., proves nothing at all. Then the circumstances that the transfer of the 270 barrels was made at the invoice price without profit to Stone, and that Russell, without waiting to ascertain what was the exact price, gave to Stone a bill of exchange for 250*l.* are unusual indeed, but quite insufficient to establish a charge of collusion, or to show that Russell was aware of Stone's impending insolvency. Both Russell and Stone depose that their meeting which led to the bargain was an accidental meeting on Change. I shall, therefore, hold that Russell is a *bona fide* assignee for value without notice. The second question is, whether Gilbert, sen., had authority to part with the bills of lading to Stone. It is asserted that Gilbert, sen., was not a partner with his son, in which case of course he could have authority to deal with the bill of lading, but only an agent, and that as such agent he had received strict injunctions not to part with the bill of lading without payment. Now, in the first place, "without payment" is an ambiguous term. Payment may be in cash or may be in bills; and I quite concur in the opinion expressed in *Gurney v. Behrend*, that "if the language is equivocal, the construction to be put upon it ought to be rather against the party who places an indorsed bill of lading in the hands of third persons, and enables them to deal with others as if they had complete control over it." In the third place it seems very doubtful that Gilbert, jun. had any power to impose such restrictions upon his father. Not only according to his own account had his father an equal interest in the consignment—a position which it is difficult to distinguish from that of partner—but the son in New York had already received payment for these goods, and that by means of discounting bills drawn by himself on his father; so in fact the son had no further interest in this transaction, except a contingent liability upon the bill, in the event, which did not take place, of the father's acceptance being dishonoured, and on the other hand the father was immediately liable to the whole of the invoice price of the goods. Under these circumstances it seems impossible to question that Gilbert, sen., had power to deliver the bill of lading to Stone. In my opinion, therefore, Russell had established his claim to the 270 barrels upon payment of freight, and Gilbert, sen., has failed. With regard to costs, Gilbert, sen., having failed in his suit, must pay the costs of it. With regard to the costs of Russell's suit against the ship, the court has had some difficulty in coming to a satisfactory conclusion. Russell has succeeded in his suit against the ship, and having succeeded would, according to the ordinary rule, be entitled to his costs. But the difficulty in which the master was placed between the two conflicting claims, renders the court reluctant to enforce the rule against the owners of the vessel. Admitting this, however, and giving full consideration to the fact that the master endeavoured, by application to the Court of Chancery, to compel the *plts.* in the two suits to interplead, I think no sufficient cause is made out to exempt the vessel from bearing the costs of a suit which has been unsuccessfully defended on its behalf. I shall, therefore, pronounce Russell entitled to recover his costs. The court has reason to lament that it did not receive information of these concurrent suits at the time when they were first instituted. For I feel assured that it was competent to the court, in the exercise of its jurisdiction, to have relieved the vessel from the costs of resisting, at the same time, two conflicting demands.

Proctors: Russell, Fielden, and Sumner; Pritchard and Englefield; Toller and Sons.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATERNUS, Esq., Barrister-at-Law.

Saturday, July 20, 1867.

(Present—The Right Hon. Lord CAIRNS, Sir W. ERLE, Sir J. W. COLVILLE, Sir E. V. WILLIAMS, and Sir R. T. KINDERSLEY.)

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Ship—Collision—Two vessels nearing and about to cross—18th and 19th rules—Evidence before receiver of wrecks.

Two vessels being bound down Channel, as they were nearing and about to cross, it being the duty of ship A. to keep out of the way of ship E., ship A. gave way, and ship E. did not keep her course, and a collision occurred:

Held, that if a ship bound to keep her course under the 18th rule justifies her departure from that rule under the words of the 19th rule, she takes upon herself the obligation of showing both that her departure was at the time it took place necessary in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger.

The practice of taking seamen of one ship before the receiver of wrecks to be examined in presence of the master of the other ship involved in a collision, is highly censurable; yet this circumstance ought not to exclude, though it properly affects, the weight of such evidence.

This was an appeal from a decree of the High Court of Admiralty. The cause arose out of a collision, which occurred between the ship *Agra* of 925 tons register, and the late barque *Elizabeth Jenkins*, of 667 tons register.

The collision occurred at about eight p.m. of the 10th Nov. 1866, in the English Channel, off the Ower's Light Vessel.

The weather at the time was cloudy, and the wind was a fresh breeze from about S. S. W. The *Elizabeth Jenkins* was bound down Channel with a cargo for Boston, in the United States of America, and the *Agra* was also bound down Channel, and was prosecuting a voyage to New York, with a general cargo.

The *Elizabeth Jenkins* had her proper sailing lights, viz., a green light on her starboard side and a red light on her port side, duly exhibited and burning brightly, and was proceeding under all plain sail, close-hauled by the wind on the starboard tack, and heading south-east, and making about six knots an hour.

The *Agra* was sailing by the wind on the port tack, steering about west, and her green or starboard light was seen from the *Elizabeth Jenkins* at the distance of about a mile to a mile and a half, and bearing about two points on the lee (port bow) of the *Elizabeth Jenkins*.

Under these circumstances it was alleged that it was the duty of the *Agra* to get out of the way of the *Elizabeth Jenkins*, and that the latter vessel was therefore kept on her course; that the *Agra*, however, neglected to take in due time proper measures for keeping clear of the *Elizabeth Jenkins*, but approached the *Elizabeth Jenkins*, and caused immediate danger of a collision, and thereupon the helm of the *Elizabeth Jenkins* was put hard a-starboard, and the head of her spanker was hauled in; but a collision occurred almost immediately afterwards, and the *Elizabeth Jenkins* was so much damaged that she foundered, and her master and nine other persons on board her were drowned.

The evidence on both sides was taken orally in open court before the learned judge of the court below, assisted by two of the elder brethren of the

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Trinity Corporation; and the learned judge and the Trinity Masters came to the conclusion that the *Agra* was solely to blame for the collision; and the learned judge made the usual decree in favour of the owners of the *Elizabeth Jenkins*. His direction was as follows:

Dr. LUSHINGTON.—Gentlemen, without intending to intimate any opinion as to the ultimate result, I wish to call your attention to the fact that there were fifteen persons on board the *Elizabeth Jenkins*, and the calamitous result of the collision was that nine lives were lost. I do so, not for the purpose of in any degree prejudicing either party, but to show you what are the rational and inevitable consequences of this calamity. Now, under those circumstances, I advise you to take this view of the case, not to raise up as against those who are now supporting the cause of the *Elizabeth Jenkins* any supposition on account of any omission which is almost inevitable under such a calamity, and, on the other hand, not to prejudice the case of the other party by supposing that anything might have been proved which has not been established. Having disposed of that point, I proceed at once to make an observation or two upon the question which has been much discussed by the counsel who addressed you on the part of the defendants. I allude to the circumstance of the second mate and some of the seamen who were survivors being taken before the receiver of wrecks, and, in the presence of the captain of the *Agra*, called upon to give their evidence, which is taken down and sworn to; and, in addition to that, certain suggestions are adopted by the mate which formed part of his evidence. Now, I cannot but view such a proceeding with severe censure, for it goes to destroy the fidelity of all testimony. The mate may be a man of some resolution and determination, and of more knowledge than an ordinary seaman; but take the case of an ignorant seaman in the hands of the master of the opposite ship, which is going to sue his owners, or going to be sued by them, taken before the receiver without any person to counsel him or assist him, or keep him straight in his testimony. That is a practice most severely to be censured, and so severely to be censured that I have thought in this case it was necessary that some communication should be made to the Board of Trade, that their receivers should, for the future, allow no such thing as the master of the one vessel to be present when one of the crew of the other is examined. Now I advise you, in the further consideration of this case, to throw entirely out of your minds everything that took place before the receiver of wrecks. There is not a single word of the statements that were taken there that is, properly speaking, trustworthy; and it would be contrary, in my opinion, to all justice to avail ourselves of what was taken under the circumstances to which I have adverted, for the purpose of proving any one fact in this cause. I come now to the consideration of one of the most important facts in this case. I am not going to trouble you with unnecessary detail. The law is perfectly clear as applying to this case. One vessel is on the starboard tack, close-hauled, proceeding in a southeasterly direction, and the other is upon the port tack, close-hauled, and sailing west; and we know that, under such circumstances, it is the duty of the vessel on the port tack, though close-hauled, to keep out of the way. The words of the 12th rule are clear, and no comment upon them is necessary. Now, these two vessels being in danger of meeting, let us see how the case stands. The *Agra* says that she descried the loom of a vessel at a distance; and, as a reason for not having seen the vessel herself, or the light, at an earlier period, she alleges

that the light was not visible. She does not go the whole length of saying that there was no light at all, and for this obvious reason, that her own witnesses state that very soon after having seen the loom of the vessel about a mile off they saw a red light. Then it has been argued that though there might have been a light, yet it was so dim and of such an inferior description that it did not afford them the assistance which they had a right to expect from a vessel in that position, in fact that it gave a light which was not visible at a distance at all; and the first point relied upon for establishing that proposition is that on the 1st or 2nd Nov., when the *Elizabeth Jenkins* left London, her lights entirely failed. Now, I request you carefully to consider this argument, and to deliberate what degree of weight ought properly to be ascribed to it. The evidence is substantially this—that the lights in the first instance became very dim, or went out in about fifteen minutes; that they were afterwards trimmed, and that they lasted from two hours to two hours and a half; and that the pilot (it being a dark night, and it being impossible with the wind west-south-west, as he states it was, to have prosecuted his voyage further at the utmost than seven or eight miles) deemed it more advisable under those circumstances to anchor. Now, whatever may have been the state of the lamps at that moment, was that same state of things continued to the 10th Nov., when the collision occurred? That is the question. It signifies nothing at all what was the state of the lamps on the 1st or 2nd Nov., unless there was some continuing cause which would produce the same deleterious effect at the time of the collision. Now, with respect to the oil, the pilot could not say what the oil was. With respect to the lamp itself, he said the lamps were common lamps, and he used this expression, which I took down: "They were very well constructed." The vessel goes on, and we have no intimation of anything having occurred with regard to the lamps up to the very hour of the collision. Now, if there were inferior oil on board, and nothing but inferior oil, that might, perhaps, account for the lamps being dim; but we have no evidence whatever of the quality of the oil, and one witness, when he is asked the question, says they burn all sorts of oil—colza, paraffin, petroleum, &c. I think, therefore, you must be cautious in importing into the consideration of the question whether the lights were burning or not anything that occurred in the river Thames, but you will pay the strictest attention to everything that occurred antecedent to the collision. You will pay attention to the fact that several of the witnesses on board the *Agra* certainly did not discover the light of this vessel at the distance of a mile, and that they did afterwards discover what they represent to have been a dim red light. Then, on the other hand, you must consider that those who were on board the *Elizabeth Jenkins* herself state that the lamps were burning well; not uncommonly well, they said, but fairly well. Now, it is upon a consideration of those combined circumstances that you must form your opinion, in the first instance, whether the state of the lamps contributed in any degree whatever to this collision. It is only important with regard to time; it is not at all important further, because those on board the *Agra* saw the *Elizabeth Jenkins* at the distance of a mile, according to their own statement; and it is only important in considering the question whether they were justified, in the absence of light, in delaying to take any measures in order to avoid a collision. Now, with respect to the *Elizabeth Jenkins*, her statement is this—that she saw (I think I am correct in stating) a green light upon her starboard bow, and that green light was that of a vessel going to the westward. She watched that green light, and seeing

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that it was still further approaching her, as a measure of safety she starboarded her helm to get out of the way. Now, this is the consideration. Did she delay starboarding her helm until there was a reasonable risk of immediate danger, and did she then take the wisest and the properest measure in starboarding her helm upon that occasion? It is quite true, as was observed by Mr. Clarkson, it is not in the case of unavoidable danger that you put your helm one side or the other, but it is with the prospect, the hope, the chance, of avoiding immediate danger, or mitigating the consequences thereof. I think this case turns upon that, because, if you are of opinion that there was improper delay in getting out of the way on the part of the *Agra* which occasioned danger to the *Elizabeth Jenkins*, and she, in order to save herself and property and crew from the chance of immediate danger, starboarded her helm, and that that was a proper measure to take under the circumstances, then she is not to blame, but the other vessel. These are the considerations which are involved in this case. I shall not trouble you with the details of the evidence.

After consultation.—We are of opinion that the *Agra* is solely to blame for this collision.

The *Agra* now appealed.

Aspinall, Q. C. and Butt for the Agra.

Brett, Q. C. and Clarkson for the Elizabeth Jenkins.

Sir W. ERLE.—The collision between the barque *Elizabeth Jenkins* and the ship *Agra* took place about eight o'clock p.m. on the 10th Nov. 1866, off the Ower's light-ship, in the English Channel. The night was cloudy, but not thick. The *Elizabeth Jenkins* was heading south-east, under plain sail, close-hauled on the starboard tack, making six knots an hour. The *Agra* was steering west, close-hauled on the port tack, making about six and a half knots an hour. The wind was south-south-west. Under the 12th and 18th of the Regulations of 1863, it was, in these circumstances, the duty of the *Agra*, having the wind on the port side, to keep out of the way of the *Elizabeth Jenkins*; the *Elizabeth Jenkins*, on the other hand, ought to have kept her course, unless a departure from her course was warranted under the 19th rule, by the necessity of avoiding immediate danger. As the ships were nearing, and about to cross, the *Agra* gave way, porting her helm, squaring her after-yards, and letting go her spanker. The *Elizabeth Jenkins* did not keep her course, but starboarded her helm and hauled in her spanker; and the result was a collision, the starboard bow of the *Agra* near the stem, striking, or being struck, by the stem of the *Elizabeth Jenkins*; the *Elizabeth Jenkins* foundering, and the master and several seamen being drowned. It is contended for the owners of the *Elizabeth Jenkins* that the *Agra* so long delayed porting her helm and giving way that those on board the *Elizabeth Jenkins* were led to think she was trying, and intended, to cross the bows of the *Elizabeth Jenkins*, and that a collision must, if the *Elizabeth Jenkins* kept her course, take place; and that the change in the course of the *Elizabeth Jenkins* was thus necessary in order to avoid immediate danger. For the *Agra*, on the other hand, it is said that she ported and gave way as soon as she saw the red light (the only light that she admits she did see of the *Elizabeth Jenkins*). That she observed the loom of the *Elizabeth Jenkins* when about a mile or three-quarters of a mile distant. That at that time the *Elizabeth Jenkins* had no lights visible; for the master and pilot of the *Agra* seeing the loom of the *Elizabeth Jenkins* before them, endeavoured to make out her

lights, first with the naked eye, and then with glasses, and could not do so, and therefore concluded she was on the same tack, with her stem towards the *Agra*. That they continued watching, and after some little time saw the red light of the *Elizabeth Jenkins*, and immediately ported their helm; and that it was thus the want of proper lights on board the *Elizabeth Jenkins* which made the *Agra* delay porting so long, and that the *Agra* is free of all blame. It is further said for the *Agra*, that when the *Elizabeth Jenkins* did depart from her course, she ought to have put down her helm and luffed up to the wind, in order to deaden her way, in place of starboarding, and thereby accelerating her speed, and increasing the violence of a collision. Their Lordships do not see any reason to disbelieve the very precise and consistent evidence of the master of the *Agra*, and of Albert the pilot, corroborated as it is by that of Jones the mate, and rendered probable by the statements of Tracey the Trinity pilot, as to the dimness of the lights of the *Elizabeth Jenkins*, on the 2nd Nov. previous; and they are disposed to think that when the loom of the *Elizabeth Jenkins* was first seen by the master of the *Agra*, and examined through the night glasses, her lights could not, for some reason or other, be made out. They think, however, that between that time and the moment when the red light of the *Elizabeth Jenkins* was actually seen, an interval longer than these witnesses represent must have elapsed, and that during this interval a more careful and continuous look-out on board the *Agra* would have enabled them to discover the red light sooner, and would have shown, even irrespective of the light, that the *Elizabeth Jenkins* was nearing them, and the course she was pursuing. Their Lordships, therefore, cannot acquit the *Agra* of blame. They think she might and ought to have ported sooner. Was, then, the *Elizabeth Jenkins* free from blame, or is blame to be attributed to her as well as to the *Agra*? That she departed from the 18th rule is clear, for she did not keep her course; and that this departure had not the effect of avoiding danger is also clear, for a collision of a most disastrous character occurred. Now, their Lordships are clearly of opinion that if a ship, bound to keep her course under the 18th rule, justifies her departure from that rule under the words of the 19th rule, she takes upon herself the obligation of showing both that her departure was at the time it took place necessary, in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger. Their Lordships find that this has been the construction put upon the 19th rule in the cases of the *George Dean v. The Constitution*, Admiralty Court, Feb. 1, 1865; *Holt, Rule of Road*, 101; the *Planet v. The Aura*, Admiralty Court, Dec. 7, 1865, *Ibid.* 257; and inferentially, in the case of the *Great Eastern* before this board, 3 Moore P. C., N. S. 31. This obligation the owners of the *Elizabeth Jenkins* have not, as their Lordships think, discharged. It is remarkable that no one of the witnesses for the *Elizabeth Jenkins* ventures to say that had she continued her course, the *Agra* porting when she did, the collision would not have been avoided. Robins, the mate of the *Elizabeth Jenkins*, in his examination in chief, states that he thinks the collision would have taken place had his ship continued her course; but he evidently speaks on the hypothesis of the *Agra* having continued her course also; and it is clear that when the order to starboard was given by the master of the *Elizabeth Jenkins* to Robins, the latter thought it an erroneous order, and remonstrated against it. Looking to all the evidence in the case, their Lordships think—and it is also the opinion of the nautical gentlemen by whom they are assisted—that the *Agra* would have passed free of the *Eliza-*

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both *Jenkins* had the latter maintained her course; and that even if the *Elizabeth Jenkins* had, from apprehension of danger, altered or interrupted her course, she should have done so by luffing up to the wind, thereby stopping her way, and mitigating, as far as possible, the effect of a collision, if a collision should take place. Their Lordships, therefore, have come to the conclusion that both vessels were to blame, and that the collision is attributable to both; the *Agra* for not sooner observing and getting out of the way of the *Elizabeth Jenkins*; and the *Elizabeth Jenkins* for departing from her course without sufficient necessity, and for departing from it in a manner calculated to increase, and not to diminish or avoid danger. Their Lordships have referred to the testimony of Robins, the mate of the *Elizabeth Jenkins*, and to the opinion which he appears to have expressed at the time to the master as to the course the latter was taking. They see no reason for looking at this evidence as otherwise than trustworthy, and they cannot but consider it, if trustworthy, as having an important bearing on the facts of the case. They agree with the very learned and experienced judge from whose decision this appeal is brought, and who has so long, and with such advantage to the public, presided over the Admiralty Court, as to the jealousy with which any attempt to warp the evidence of a witness by communications between him and either of the litigating parties should be watched and reprobated; but they cannot think that the evidence should, merely on the ground of such communications, be entirely thrown aside. The evidence of Robins appears to them to have been given fairly, and with no desire or design to bear against the *Elizabeth Jenkins*; and they cannot but think that less weight than that to which it was fairly entitled was attributed to it in the observations of the learned judge, and that in this way an element in the case, materially bearing on the questions proposed to the nautical assessors, was to a great extent withdrawn from their consideration. Their Lordships have for this reason, and also because the effect of the 19th rule was not presented to the nautical assessors with the distinct explanation that was desirable, and which it appears to have received from the same learned judge himself in the case of the *Planet* and the *Aura*, the less difficulty in departing, to the extent already stated, from the decision of the court below. Their Lordships will humbly advise Her Majesty that the judgment of the court below be altered by finding that both ships were to blame. The consequence will be, that the damages must be equally divided, and each party will bear his own costs, both here and in the court below.

Decree varied.

App.'s proctors, *Dyke and Stokes*.Resp.'s proctors, *Clarkson, Son, and Cooper*.

UNITED STATES DISTRICT COURT— IN ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate.

SOUTHERN DISTRICT OF NEW YORK.

THE BRIG BLOHM.

Seamen's wages—Priorities—Lien—Hamburg code—Extra pay on sale of vessel abroad—Mortgagor—Gold or greenbacks.

Seamen shipped in Hamburg for a voyage to New York and back. In New York the vessel was sold by a decree of the Court of Admiralty for advances, whereupon the seamen petitioned to have their wages,

with two months' extra pay, paid first out of the fund:

Held by the Court, that a sailor who was made second mate was entitled to second mate's wages from that time:

That a sailor, shipped in New York, who rendered services on board in port only, was entitled to a lien:

That by the Hamburg code, when a vessel is prevented by higher power from completing the voyage, and the crew are discharged, they are entitled to a free passage home, or two months' extra pay:

That the sale of this vessel by decree of court was a preventing by higher power, and two months' pay was a lien on the vessel:

That a mate who had loaned money to the master, and taken from him an agreement in place of interest to divide all profit and loss, as if he were part owner, was only mortgagor, and was entitled to recover his wages as mate:

That an increase of wages by the master in the foreign port did not give the sailors a lien for such increase prior to that of creditors for advances to the vessel:

That the amount decreed to the seamen must be the amount of their wages in Hamburg money, reduced into coined dollars of the United States, without adding anything by reason of the premium on gold.

The brig *Blohm*, a Hamburg vessel, shipped a crew in Hamburg for a voyage to New York and back, at various rates of wages, payable in marks courant.

After the vessel had arrived in New York, the second mate left her, and one of the crew, named Struck, was appointed second mate in his place, and another sailor named Ternan was shipped to supply Struck's place.

While the vessel lay in New York, the master, as it appeared, agreed to raise the wages of the rest of the crew above the rate specified in the articles.

After this agreement was made the vessel was libelled in the Court of Admiralty for advances made to her, and was sold under a decree of the court; whereupon the crew applied by petition to the court for their wages, and for two months' extra wages under the Hamburg code. The proceeds of the vessel not being sufficient to pay the sailors' claim, and also the decree for the advances, the amount of the sailors' claim was contested by the libellants in whose favour that decree was made.

The libellants contested the claim of the sailors on the following grounds:

1. They claimed that, even if the master did advance the men's wages, their own claim should be paid in preference to such advance.

2. They claimed that Ternan having only rendered services in port, had no lien.

3. They claimed that the two months' extra pay was not a lien on the vessel.

4. They claimed that the mate Vogelgesang was really a part owner of the vessel, and therefore could not claim wages of her. This claim was based on the fact that in Aug. 1865 the mate loaned Tiedemann, who was master and owner of the bark in Hamburg, 7000 thalers, and on the 14th Aug. 1865, they entered into a written agreement, which recited that Vogelgesang had loaned Tiedemann that amount, for the purchase of the brig *Blohm*, and provided that "for increased security of this capital Tiedemann mortgages to Vogelgesang the vessel, and gives him the first mortgage for this money," "and that, instead of paying interest the parties agree that they shall divide all profit and loss, the same as if he was part owner."

It was also agreed that in case Vogelgesang should die, his share of the profit or loss should be

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for the benefit of another party. And by a subsequent article dated in September, the parties agreed that in case of Vogelgesang's death the money should be paid to this third party, with 5 per cent. interest, and the vessel should be mortgaged to him till it was paid.

5. The libellants also claimed that the amounts to be paid the seamen should be calculated by reducing the marks courant to dollars of the coin of the United States, and giving them a decree for that amount, while the seamen claimed that the amount of the present premium on gold should be added in calculating the amounts decreed to them.

Hill for the petition.

Da Costa in opposition.

BLANCHFORD, J.—The contract of Aug. 14, 1865, with the supplemental contract of Sept. 11, 1865, between Vogelgesang, the mate, and Tiedemann, the master of the vessel, was merely a mortgage of the vessel to Vogelgesang as a creditor of Tiedemann, and did not constitute Vogelgesang a part owner of the vessel. He is therefore entitled to his wages as mate, of 84 marks courant per month. As to Ternan, the man shipped at New York, he was shipped to supply the place of Struck, who was promoted to be second mate, in place of a second mate whom the master had discharged. No objection is made to the promotion of Struck, and the employment of Ternan under the circumstances was proper. He is therefore entitled to his wages of 60 marks courant per month. Struck is entitled to his wages as seaman at 42 marks courant per month to Feb. 5, 1867, and from that time to wages as second mate at 60 marks courant per month. The alleged increase of the wages of Adams, Ahrent, and Struve, made Feb. 5, 1867, cannot be admitted. They shipped for the round voyage back to Hamburg, and it does not sufficiently appear that the agreement made by the master to raise their wages from the 5th Feb. 1867 was a voluntary act on his part by which the vessel ought to be bound, especially as against creditors advancing money on the strength of a lien on the vessel. Accordingly Adams, Ahrent, and Struve are entitled to wages for the whole time, since they shipped at the rates named in the shipping articles, and no more, namely: Adams, 27 marks courant per month; Ahrent, 21 marks courant per month; and Struve, 12 marks courant per month. The Hamburg law formed part of the contract with these seamen, and according to that, I think that each of the crew is entitled to either a free passage to Hamburg from New York, or to two months' extra wages. It is urged that this cannot be enforced as wages, and is not a lien, but is merely a penalty enforceable against the master and owners personally. It is true that in article 24 of the Hamburg code this two months' wages is called forfeiture money, but in article 25 it is expressly provided that if a vessel is entirely prevented by higher power from the continuation of her voyage, the crew have to look for their passage home or money in lieu, according to article 24, entirely to the vessel or the proceeds of the same, and not to the master or owners. In this case the vessel is a Hamburg vessel, and has been prevented by the *vis major* of a sale, under a decree of this court, from continuing her voyage, and the crew have been discharged from her by the purchaser under the sale. The choice as to whether the crew shall have a free passage home or this "distance money," as it is called in article 25, is given by that article to the master. As he appears to have been derelict to all his proper duties, and no free passage home has been provided for the seamen, each of them is entitled to

two months' extra wages, at the rate of his ordinary wages, to be paid out of the proceeds in court. The only remaining question is as to how the computation is to be made of the amounts due to the seamen. It is shown by the evidence that 125 marks courant are equal to 100 marks banco of Hamburg. The Act of March 8, 1843, sect. 1 (5 U. S. Stat. at Large, 625), fixes the value of the marc banco of Hamburg at 85 cents, in all computations of its value at the Custom-houses of the United States. This Act does not apply to its value for commercial purposes; and by the Act of Feb. 21, 1857 (11 Id. 163) all former Acts declaring foreign gold or silver coins a tender in payment of debts are repealed. The question, therefore, is one of evidence, to be taken before a commissioner, as to the commercial value of the mark courant of Hamburg, in the coined money of the United States. When that value is ascertained a further question arises. The claimants contend that the amount due to the seamen, in dollars, computed at that value, must be paid in United States currency or legal tender notes; while the petitioners claim that they are entitled to be paid the amount in gold, or if paid in United States currency, or legal tender notes, to be paid so much as will purchase an amount in gold equal to the amount in dollars found to be due to them. The ground of this claim of the petitioners is, that the contract of the seamen was made in Hamburg for service on board of a Hamburg vessel, and that their wages are made payable in Hamburg currency. It is difficult, perhaps, to reconcile some of the decisions which have been made on this subject. The case of *Couner v. The Steamer-tug Griffin*, 5 Am. Law Reg. N. S. 45, decided by Hall, J. in the District Court for the Northern District of New York, and affirmed by the Circuit Court on appeal; and the case of the ship *Rockabeau*, 26 Boston Law Rep. 564, would seem to sustain the views of the petitioners. But the practice of this court has been to the contrary, even in cases of foreign seamen shipped abroad on foreign vessels under contracts in which the rate of wages was expressed in a foreign currency: (*The Isis*, before Betts, J., Nov. 1864; *The Tuxed*, before Benedict, J., Feb. 1866.) And I am satisfied that the weight of authority, both on principle and by precedent, is in favour of the view which has prevailed in this court: (*Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 400; *Wilson v. Morgan*, 30 Howard's Pr. Rep. 386; *Swanson v. Cooke*, 45 Barb. S. C. R. 574; *Keupson v. Bronson*, Id. 618.) When the amounts due to the petitioners in coined money of the United States are ascertained, according to the evidence which shall be given as to the commercial value of the mark courant of Hamburg in the coined money of the United States, they will be entitled to a decree for the payment of those amounts in United States currency or legal tender notes, dollar for dollar, without any allowance for any premium on such coined money or any depreciation in the value of such currency or notes. If the parties do not agree on the amounts due to the petitioners on the principles thus declared, there must be a reference to a commissioner.

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HOUSE OF LORDS.

Reported by JAMES PATTERSON, Esq., Barrister-at-Law.

Tuesday, July 16, 1867.

XENOS v. WICKHAM.

Ship—Policy of insurance—Execution and delivery—Cancellation—Broker's duty.

B., an insurance broker, agent for *X.*, gave instructions to *W.*, an insurance company, to prepare policy on ship for 2000*l.* and delivered a slip. Before policy was ready, *X.* ordered a policy for 1000*l.* only, on different terms, and a second slip was delivered. *W.* acted on the second slip, and debited *B.* accordingly. The policy was duly filled up, executed, and sealed by *W.*, and retained as usual by *W.* till called for. On the premium becoming due *B.* was asked for payment, but he said it was a mistake, and on being assured it was not, and on the policy being shown to him executed, he sent to *W.* and asked that the policy might be cancelled. *W.* thereon indorsed a memorandum cancelling the policy. The ship was afterwards lost, and *X.* sued *W.* on the policy:

Held (reversing the judgment of the Ex. Ch.), that the policy took complete effect from the time it was sealed and executed, though still remaining in the hands of *W.*; that *B.* had no implied authority to cancel it, and therefore that *X.* was entitled to recover.

It is no part of the ordinary duty of an insurance broker to cancel a policy once validly and completely entered into.

This was an appeal from a judgment of the Ex. Ch., affirming a judgment of the C. P. on a special case.

An action was brought on a valued time policy of insurance for 1000*l.* on the ship *Leonidas*, by the apps. against the resps. The plts., who traded as the Greek and Oriental Steam Navigation Company, had employed a broker named Lascaridi, on the 25th April 1861, to effect an insurance on the ship *Leonidas* from England to the Baltic. Lascaridi applied to the defts. who are an insurance company, and they agreed to become insurers to the extent of 2000*l.* for the season, at eight guineas per cent., and a slip was accordingly prepared by Lascaridi and initialed by the defts.' clerk.

Before any policy was actually prepared, the plts. became desirous to be off that insurance, and in lieu of it, to obtain an insurance for all seas for a year, from 30th April at ten guineas, and accordingly on the 29th April 1861 they wrote to Lascaridi as follows:

Please cancel *Leonidas* insurance, and insure the same for all the year, and for all seas; 4000*l.* valued 12,000*l.*, with other policies at 10*l.* 10*s.*

Lascaridi thereupon applied to the defts., who agreed, at his request, "to be off" that insurance, and the slip for 2000*l.* was destroyed accordingly, and another slip prepared by Lascaridi in conformity with his instructions from the plts., and initialed by defts.' clerk for 1000*l.* A separate slip was made out by Lascaridi for 1000*l.* and left with defts.' company at their office, in order that a policy might in the usual course be made out by them from it.

In the case of insurance companies, the slip is always prepared by the broker, and the policy is afterwards prepared and filled up from the slip by the officers of the company, and the policy, when executed, is kept by the company "until sent for by the assured or his broker."

The custom between insurance companies and insurance brokers is for the company to give credit to the broker for the premium, and where an insurance is effected for cash, or on a cash account, a

month's credit is given, that is, all premiums for insurances effected during each month are payable on the 8th of the succeeding month; and the course is to make out prior to the expiration of the credit, and send to the broker at the end of the month, a debit note for the amount of the premiums due, less a discount and brokerage of 15*l.* per cent.

Lascaridi was accordingly debited in the books of the defts.' company on the 1st May with 105*l.*, and 2*l.* stamp.

On the 1st May, the plts. paid to Lascaridi the premium and stamp duty on the entire insurance. In the course of a few days afterwards a policy dated the 1st May 1861, in the form usually adopted by the defts.' company, was filled up from the said last-mentioned slip, and was signed, sealed, and delivered, by two directors of the defts.' company, but was according to the usual course of business retained by the company in their own custody until sent for by the assured or his broker. On the 8th June a debit note for the premium and stamp duty upon the policy, less the discount, was sent to Lascaridi's office, with a request for payment. On presenting the debit note to one of Lascaridi's clerks, the messenger was informed that no premium was due; and upon a second request, accompanied by a statement of the name of the vessel, and the rate of premium being sent to Lascaridi's office, the messenger of the defts. was told by the clerk that it ought not to have gone forward, and subsequently a clerk of Lascaridi's called at defts.' office and said that the policy had gone forward under mistake, and requested that it might be cancelled.

A memorandum of cancellation was thereupon indorsed upon the policy, and signed by two directors and the secretary of the defts.' company. It was agreed that Lascaridi should be debited with the expenses of the stamp, and the policy so indorsed was handed to Lascaridi's clerk in order that Lascaridi might obtain a remission of the stamp duty.

The ship was afterwards lost, and the plts., who were entirely ignorant of the arrangement for cancellation of the policy made by Lascaridi, and who never authorised it, or received back any part of the premium which they had paid for the insurance of the *Leonidas*, brought their action against the defts. on the policy for the amount insured with them. On the trial of the cause, a verdict was found for the defts., the question being reserved whether the policy, which purported to be under the seals of two directors of the company, had ever been executed, or, if executed, had been cancelled. The Court of C. P. were of opinion with the defts., holding that the policy in question never was perfectly delivered, so as to vest a right of action in the plts., and that the original executory contract for the last insurance had been rescinded before breach.

The Ex. Ch. affirmed the judgment of the Court of C. P., the majority being Pollock, C. B. and Martin, Bramwell, and Channell, BB.; the minority being Blackburn and Mellor, JJ.

The plts. now appealed, and the following learned judges attended the argument—viz., Willes, Blackburn, Mellor, JJ., Pigott, B., and Smith, J.

Sir G. Honyman, Q. C. and Watkin Williams for the apps.

Bovill, Q. C. and Archibald for the resps.

At the conclusion of the arguments the House put to the learned judges the following question:

Whether, on the facts stated in the special case, the Victoria Fire and Marine Insurance Company were, when the ship *Leonidas* was lost, liable as insurers to the plts. on the policy, or alleged policy, in the pleadings mentioned? *It is to be assumed*

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that the ship *Leonidas* was totally lost on the 1st Sept. 1861.

The learned Judges having asked time to consider, afterwards returned the following opinions:—

M. SMITH, J.—I answer the question of your Lordships in the negative, on the ground that there never was, as it seems to me, a complete and available contract of insurance. I assume it to be clear that the slip does not create a valid contract of insurance, and that it is only of avail as a proposal, or an order for a complete contract or policy of insurance. I apprehend it to be equally clear that the contract is not complete until the policy is executed, and delivered to and accepted by the assured, or some agent for him. This policy, although executed, was not in fact delivered out of the office of the resps., either to the assured or to his broker, Lascaridi, who had ordered it, and whilst it lay in the office, the intended insurance was by the broker put an end to, on the ground that it had been put forward in mistake. I assume, in favour of the apps., that if the contract of insurance had been complete Lascaridi had no authority to rescind the contract; but I assume also in favour of the resps. that whilst it was incomplete Lascaridi had authority to intercept its completion. The whole case, therefore, is reduced to the question, which is mainly one of fact, whether, after the policy was executed, and before it came to the hands of the assured or his broker, the contract was perfected. The apps.' case on this cardinal point wholly rests on the assumption that Lascaridi had made the officers of the company his agents to accept the delivery of the policy on his behalf. I think this is an assumption which is not warranted by the facts of the case. It arises from the very nature of the transaction that the person intending to insure, or his broker (when he acts through a broker), has a right to see the terms of the policy, and to object to them if he thinks fit. This right may, of course, be delegated by the person intending to insure, and I will assume by his broker also; but it seems to me that clear evidence of such delegation is necessary, and the person intending to insure cannot, I think, with reason, be presumed to have delegated it to the insurers, from the fact that the policy was left in the office of the company, and not sent for; and yet such a presumption must be made if the argument for the apps. is to prevail. The right to object to the terms of the instrument, which may obviously be of the utmost importance, would, if this presumption is made, be gone as soon as the directors have executed the policy and handed it to their own clerks. In the result I think that the assumption on which the apps.' case rests is not warranted by the evidence, and I confess it seems to me that consequences full of real danger to the interests of persons intending to insure would follow from a rule founded on such an assumption. I agree with my learned brothers who think that it is better to adhere to plain inferences of fact, than to attempt to remedy the inconveniences of a negligent mode of doing business by making the facts bend to the exigencies of the negligence.

FIGOTT, B.—My Lords, in answer to your Lordships' question—viz., "whether on the facts stated in the special case, the Victoria Fire and Marine Insurance Company were, when the ship *Leonidas* was lost, on Sept. 1, 1861, liable as insurers to the plts. on the alleged policy in the pleadings mentioned"—I answer that in my opinion they were so liable. The facts are very fully and accurately set forth in the judgment delivered by Blackburn, J., and reported at page 41 of the paper books, in which judgment I entirely agree. It is unnecessary for me to do more than refer to the more prominent

ones in stating the grounds of my opinion. That opinion is based upon two considerations. First, I think there was a perfect and binding contract of insurance between the parties, dated on May 1; and, secondly, that it was never cancelled or made void as between the plts. and the defts. The whole difference between the parties has obviously arisen from the fraudulent conduct of Lascaridi, the plts.' broker; but it is equally clear, I think, that the plts. are not to be held responsible for, nor ought their rights to be affected by it. The authority with which Lascaridi was invested by the plts. was that of a broker employed to effect an insurance in the ordinary manner, with this additional circumstance only, that after he had bespoken the policy, and before it was filled up from the slip, he had express authority to procure an alteration in the terms of insurance. To that alteration the defts. acceded, and thereupon a second slip was initiated by them for the insurance in question (the former slip being destroyed). The case states in paragraph 12 what is the course of proceeding where, as in this case, an insurance company are the insurers. It is that "a separate slip is prepared by the broker of the assured, and the policy is afterwards prepared from it by the company, and is kept by them until sent for by the assured or his broker." A separate slip was in fact so prepared for this policy, and was left by Lascaridi at the defts.' office in order that a policy might be made out in the usual course by the defts. Then with regard to the premiums it is the custom for insurance companies to give credit to the brokers for them, and to debit them in account. This was done in the books of defts. on the 1st May, the day of signing the slip for this policy. On the same day Lascaridi sent to the plts. (his principals) an account in which he debited them with the premium and duty, and he also drew upon them at the same time for the amount. This draft was accepted by plts., and was paid at maturity. When they accepted this bill they were told by Lascaridi that the policy would be ready in a day or two. In a few days afterwards a policy in the form usually adopted by the defts.' company was filled up from the last slip, and was duly executed by two directors of the company. It bears date on the 1st May; it purports to have been signed, sealed, and delivered in the presence of a witness; it was, therefore, in form complete. In that state it continued in the custody of the defts. until the 8th June, when the defts. sent a debit note for the premium and stamp to Lascaridi's office. At the instance of Lascaridi they were then induced to cancel the policy, on the representation that it had been "put forward in error." This was a false statement on the part of Lascaridi (as we now know). It is on the circumstance of the policy remaining in the hands of the defts., as above stated, that the question depends, whether the transaction constituted a complete contract in law and fact or not. I am of opinion that it was complete. What inference might have been drawn from the fact of its so remaining if there were no explanation about it, it is unnecessary to consider; for we have in paragraph 12 the reason given; and that reason is, not that it awaited anything to be done upon it by the defts., or to be assented to by the plts., but that it was there only till sent for by the assured or his broker, or, in other words, that it remained there according to the trade usage or by a tacit understanding. This reason necessarily implies that in all other respects it was a completed transaction. But further, it is plain that the formal assent of the plts. was not wanting to any of the terms of the policy, for that was evidently intended to be and accordingly was made out in the defts.' usual form, filled up with the particulars from the slip. But further, the defts. acted upon the policy

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as a perfected transaction, when on the 8th June they demanded payment of the premium for which they had given credit to the broker. In the face of this demand I confess it seems startling that they can be heard to say that there was no complete contract subsisting at that period. It was in form complete, and was shown by the conduct of all the parties to it to be believed and intended by them all (apart from Lascaridi's fraud) to be completely in operation also. It seems, therefore, to be reduced to this, viz., was it essential that the deed should be given out of the defts.' possession in order to its perfect delivery as an operative instrument? I know of no such necessity in law or good sense. Sheppard, in his Touchstone, writing of the requisites of a good deed, treats, fifthly, of delivery as a matter of fact to be tried by jurors (vol. 1, p. 54, 7th edit.), and by the whole context shows that it is a question of intention. He says, at p. 57, that "Delivery is either actual, i.e., by doing something and saying nothing, or else verbal, i.e., by saying something and doing nothing, or it may be by both; and either of these may make a good delivery and perfect deed." *Doe dem. Garnes v. Knight* is an authority most satisfactory on this subject, and it is only necessary to quote one passage from Bayley, J.'s judgment. He says, "When an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed, and the delivery to the party who is to take by it, or to any person for his use, is not essential." This passage seems to be exactly applicable to the facts of the present case, with this addition, that there is here not only nothing to qualify the delivery, but, as above suggested, much to show that the defts. did intend it to be unqualified, and a deed in full operation. The only remaining question which could arise, viz., whether the plts. were bound by the fraudulent conduct of Lascaridi in procuring the cancellation of the policy, was not much urged at your Lordships' bar, although it had been relied upon at *Nisi Prius* and in the Court of C. P. It is a proposition clearly not sustainable. The act was without authority, express or implied; and it is enough to say upon it that Lascaridi was the broker employed to procure a policy, and from that employment it is impossible to imply an authority to cancel it. Then he certainly had no express authority, as is admitted by paragraph 81 of the special case. I therefore answer your Lordships' question in favour of the plts., and in the affirmative.

MELLOR, J.—My Lords, I answer the question put by your Lordships to the Judges in the affirmative. I carefully attended to the arguments urged by the learned counsel who appeared for the parties in this case at the bar of your Lordships' House, but I confess that the observations then addressed to your Lordships did not affect the conclusion at which I arrived when the case was heard by the judges in the Court of Ex. Ch. I do not venture to repeat the observations which I then made, but I humbly refer your Lordships to the judgment which was then read for me by my brother Blackburn, and which is set forth in the printed case. My judgment depends upon the facts which I consider to be admitted by the case, viz., that the policy in question was prepared by the defts. in conformity with the instructions of the plts., given through their broker Lascaridi; that by the mode of dealing between the plts.' broker and the defts., the amount of the premium and the stamp must, as against the defts., be treated as paid; that the policy was duly executed and delivered as a deed by the defts., who did everything that they intended to do to complete

such execution and delivery, and that it was merely kept in their custody until called for by the assured or their broker. The plts., as I think, were bound by it because it was prepared in conformity with their instructions. The defts. were bound by it, because they had accepted the terms and mode of payment of the premium and stamp, and acted upon the instructions of the plts., and done everything which they intended to do by way of execution and delivery of the policy as a deed, and retained it only for safe custody until sent for by the assured in the ordinary course of business.

BLACKBURN, J.—I answer your Lordships' question in the affirmative. Two questions are involved in your Lordships' question. First, whether the policy before the 8th June was so executed as to bind the defts.' company to the plts.; second, whether the transaction between the defts.' company and Lascaridi (the plts.' broker) operated so as to release the company from the obligation they had contracted to the plts., supposing them to have done so. I have already, in the judgment I delivered in the court below, expressed the reasons for my opinion at length. That judgment is to be found in the report, 13 C. B., N.S., 461 (where it is more accurately printed than in the appendix to the present case). And as I have not been induced by anything I have heard at your Lordships' bar to alter the opinion I then expressed, I think it better to refer your Lordships to that printed opinion than to repeat again the reasons I there gave. I have had an opportunity of perusing the opinions of my brothers Willes and Smith, and, if I understand them rightly, they agree with me in thinking that if the policy was binding before the 8th June, what occurred subsequently would not discharge the company. I shall therefore say nothing more on that branch of the question. As to the other branch, I would wish to call your Lordships' attention to what I think are the real points in controversy. They are, I think, two; one of fact, the other of law. The question of fact is, I think, this: Was the policy really in fact intended by both sides to be finally executed and binding from the time when the directors of the defts.' company affixed their seals to it, and left it in their office; or was it, in fact, intended that the assured or their brokers should exercise a subsequent discretion as to whether they would accept it or not? If I thought that the parties did not in fact intend it to be then finally binding, I do not think there would be any magic in the law to make it binding, contrary to their intention; but I submit to your Lordships that the statements in the 12th paragraph of the case as to what is stated to be "always" the practice, and the statements in the 15th and 18th paragraphs as to what was done in this particular case, show that the intention of both parties was, that the policy, when drawn up by the company in conformity with the instructions in the advice slip sent in by the broker, should be finally binding as soon as executed by the officers of the company. It was not intended by either side that anything more should be done, but that they meant that the policy from that time should be binding, and should lie in the company's office as the property of the assured till sent for by them, and then be handed over to their messenger. It seems that some of the judges take a different view of the fact, and think it really was intended that the policy should not be finally binding till something more was done by the assured. Your Lordships will decide which is the true view of the facts. Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a bailee for the assured, the question of law arises, whether the policy could in law be operative until the company

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parted with the physical possession of the deed. I can on this part of the case do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying, "I deliver this as my deed;" but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. In *Butler and Baker's case*, 8 Rep. 266, it is said: "If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offer to B., there B. may refuse it *in pais*, and thereby the obligation will lose its force." I cannot perceive how it can be said that the delivery of the policy to the clerks of the deft.'s company, to keep till the assured sent for it, and then to hand to it to their messenger, was not a delivery to them to the use of the assured. There is neither authority nor principle for qualifying the statement in *Butler and Baker's case*, by saying that C. must not be a servant of A., though of course that is very material in determining the question whether it was "delivered to C. to B.'s use," which I consider to be, in other words, whether it was shown that it was intended to be finally executed as binding the obligor at once, and to be thenceforth the property of B. In the present case the assured could not have refused the deed *in pais*, for it was drawn up in strict pursuance of the authority given by them in the slip set out in par. 15; and I think a prior authority is at least as good as a subsequent assent. That question, however, does not arise, as they did not refuse it *in pais*. No authority, I think, has been cited which supports the position that there is a technical necessity for some one who is agent of the assured taking corporal possession of a policy under seal before it can be binding, though intended by both parties to be so. I think it would be very inconvenient, and would work great injustice, if such were the law. I must leave it to your Lordships to determine whether it is so or not.

WILLES, J.—My Lords, I answer the question in the negative, that upon the facts stated in the special case the Victoria Fire and Marine Insurance Company were not, when the ship *Leonidas* was lost, liable as insurers to the plts. on the policy or the alleged policy in the pleadings mentioned. Assuming, as upon the statement it must be assumed, that the broker had no authority to revoke this policy if once completed so as to be the contract of and binding upon both parties, the question is, whether it ever was so completed? In dealing with this question as a practical one, it must be borne in mind that albeit consent not corporal possession makes the contract, yet the plain duty of the broker is not merely to bespeak but to procure the policy, and to procure it upon his own credit. A loose way of business upon trust cannot abrogate any part of that duty, or make up for the consequence of neglecting it; and, indeed, taking the practice alleged to prevail as a whole, it is for the most part, viz., the insurances affected at Lloyd's, consistent with the duty of the broker to effect the policy in such a manner that his employer, or he on behalf of his employer, should

have the policy. In case of insurance at Lloyd's no difficulty can arise, for the broker sends round the policy, and procures the signatures. When the policy is effected with a company, therefore, if analogy is to prevail, the broker ought to call for the policy. A careless practice, not stated to have grown into a known usage of trade, may exist of not asking for the policy, but if this be so it is pure negligence. Nor can it be doubted that the employer in such case, equally as in that of insurance at Lloyd's, is entitled to have the policy in his broker's hands. Nor could the broker, in case of any damage arising for want of a policy, or of a proper policy, through his default in not asking for it, or looking to see that it was in order, resist an action such as was brought by the employers in *Turpin v. Bilton*, 5 M. & G. 455. The statutes requiring contracts of marine insurance to be in writing and stamped (35 Geo. 3, c. 64, s. 11; 55 Geo. 3, c. 144, ss. 4, 5) annul contracts not so framed, consequently a marine policy or contract for a marine policy to be valid must be in writing, which, by the assent of both parties, shall represent the contract between them. But for the decided cases, it might have been supposed that upon the slip being completed there was a contract on the part of the assurers to prepare and hand over a policy according to the slip, and that, although, because of the statutes, no action could be maintained as upon a policy of insurance, yet an action might be maintained for not preparing a policy. And causes have even been tried without objection upon the notion that the insurance is complete from the date of the slip. But the law as settled by the decisions upon the construction of the statutes referred to is, that as there can be no valid insurance or contract for an insurance unless by writing with the statutory requisites, the slip by itself has no binding force. Thus it has been held, that, notwithstanding the slip, the proposed insurer, upon the one hand, can insist upon being off, and can retract his order, and refuse to accept the policy (*Warwick v. Slade*, 3 Camp. 127, where the employer retracted the broker's authority after the slip was signed, though before the policy was completed), and, on the other hand, that the slip imposes no liability upon the proposed insurer, and there is no remedy against him until the policy is complete (*Parry v. The Great Ship Company*, 4 B. & S. 556). It follows that the slip, though complete, is no contract nor even part of a contract of insurance, but a mere proposal that a policy of insurance shall be entered into *in futuro*, and in case of insurance with a company, a request that the policy shall be prepared at the office. Does it follow that when a policy is prepared in alleged compliance with the request it shall be, without more, the contract of both the parties? That cannot be the rule, because it must be open to the customer, or to his broker, when the negotiation takes place through a broker to object, and especially in the case of company policies, which do not always follow Lloyd's form, that the policy is wrong. In case of war or a dangerous voyage, or indeed any case with a special provision, disputes may easily arise. In this very case a question might have been raised upon the omission of the running down clause, which has been so commonly added in the margin since *Devaux v. Salvador*, 4 A. & E. 520: see *Taylor v. Dewar*, 5 B. & S. 58. It is thus obvious that there must be power to object or refuse assent to the policy when prepared by the company; and inasmuch as such objection or refusal touches the question, policy, or no policy, it lies within the scope of the broker's authority. He may give a bad reason for his refusal, as the broker in the principal case is said to have done; but the badness of the reason assigned cannot take away from the effect of the act done, which, according to the maxim, must

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depend upon the power he had to do it, not upon the soundness of the reason he gave for doing it. By way of removing this difficulty, various suggestions have been made in argument. One was that the case is analogous to a conveyance of property where assent is presumed until disclaimer. I am not aware, however, that this doctrine of assumed assent has ever been applied to the case of a mercantile contract, with something to be done on both sides, such as to insure upon terms which may or may not be correctly expressed, in consideration of being paid or allowed to debit in amount a premium which may or may not be commensurate to the risk. In the case of a simple benefit conferred, to be taken as it is or not at all, like a bond or a release, there might be room for such a presumption, though it is difficult even there to recognise a complete contract before assent. But the presumption is out of place as applied to a contract with mutual obligations, which must be matter of bargain, and must be incomplete so long as either mind may dissent. Indeed, the suggested analogy to conveyances of visible property, if it held good, would not help the plt., but rather tend to illustrate the necessity of subsequent assent. Thus, if B. order of a watchmaker a watch of the same make and materials as that of A., with B.'s name upon it, and the watchmaker makes it accordingly, intending it for B., and puts B.'s name upon it, so that it is as much as it can be the very watch bargained for, yet without a new assent on B.'s part it does not vest in him; the watchmaker cannot make B. take it, nor B. compel its delivery. See the argument in *Atkinson v. Bell*, 8 B. & C. 277. And in like manner as to a contract to be prepared in futuro, if goods are bought, to be paid for by the buyer's promissory note or cheque payable to the seller or order, and the goods are delivered and accepted, and the buyer makes the note or cheque, and leaves it with his servant, to be handed to the seller when he calls for it, that transaction is not enough to vest the note or cheque in the seller, and the buyer may, without more, retake the note or cheque from his servant, and put it into the fire. It is clear, therefore, that the doctrine of presumed assent to a conveyance will not help, and that the mere previous request (even though binding as part of a contract), that a contract, which to be valid must be in writing, shall be prepared by one of the parties proposing to contract for the other, has not the effect of vesting a right in any contract in writing if and when so prepared, and much less can a previous colloquy not binding as part of a contract have that effect. As another way of getting out of the difficulty, it was suggested to assume that the insurance company or servants of the company were made agents of the employer of the broker, for the purpose of assenting to the policy on his part. That would, however, be simply assuming the thing that is not, for the sake of shutting out an unpleasant consequence of the thing that is. To hold an auctioneer, or common broker, or other independent go-between, to be authorised to complete the contract for both buyer and seller, is but a necessary conclusion of fact from his being their common agent. To reason thus as to a clerk or servant of one of the parties employed by him for attending to his business in a dependent capacity involves a contradiction, and has no foundation of fact. These sources of light thus failing, let the transaction itself be examined with attention. It has been observed that the slip amounts only to a proposal that a policy shall be prepared upon certain terms. Those terms, so far as they are to bind the insurer, commonly includes some known uniform ones, as to which there can be no question, but also others applying to the particular transaction, sometimes obscurely worded, sometimes imperfectly understood, and as to which disputes may arise. This consideration alone keeps

the policy *in fieri* until objection is waived. On the other hand, the terms, so far as they are to bind the insured, include, besides the implied warranties, payment of premium either in cash or by being credited in account. If then the plt. had ordered the policy without the intervention of a broker, or obtaining credit for himself, he could not have insisted upon obtaining it without paying the company in cash. Had they offered him the policy, and he refused to pay for it, they might have treated the negotiation as at an end, and cancelled the proposed policy. Had the loss happened before he called for the policy and paid the premium, the same result would follow, though the office might not choose to take advantage of a short delay. So much for a cash transaction. If the office agreed to insure against the plt.'s promissory note at a month, like considerations would arise. Had the company in such case prepared the policy, and left it with their clerk, and the plt. had drawn the note, and left it with his clerk, it is difficult to see why, without more, the policy should vest in the plt., and not the note in the company, which, without more, it clearly would not. In the principal case the company were content to take the broker's credit instead of cash; that is to say, instead of stipulating for cash down they stipulated for the broker's allowing them to charge him in account with the premium; and this the broker, refusing to take to the policy, refused to allow them effectually to do, and so put the office in the same position as if they had stipulated for cash, and cash had not been paid. Some confusion has arisen from an attempt to deal with this case as if it were that of an agent of a named principal, undoing, without authority, a contract which he had completely effected in pursuance of his authority. The case ought not to be so regarded. The broker was an agent to procure a policy in consideration of a payment to be made to him by his employer, with whom directly the office had nothing to do, he taking care that the policy was effected upon the given terms and upon his credit, the office looking to him for payment, and having no claim against his employer. Inasmuch, then, as the broker had to exercise a judgment upon the sufficiency of the policy, it was necessarily within the scope of his authority to reject that prepared as not being one or the one ordered. When he does so properly his employer gets the benefit; when he does so improperly his employer has his remedy by action against the broker. But the office which dealt with the broker only, and stipulated for his taking to and being debited for such a policy, must, upon his rejecting it, and refusing to be debited in account with the premium thereupon, have an equal right to consider the negotiation at an end, and to cancel the proposed policy, as if cash had been stipulated for and refused. The transaction cannot properly be split up into parts. It stands upon the same footing as if, upon one and the same occasion, the broker had ordered the policy at the office, and whilst he waited for it the seals had been affixed to a form of policy in another room, and before he received or assented to the policy he had said, "Stay! I made a mistake. I decline to take up the policy, and you must not charge me in account with the premium." Whereupon the form was cancelled. No subsequent protest by the principal that his agent ought to have acted otherwise can avail him. His payment of the premium was not made to the office, but to his own ill-conducted broker, and his remedy must be against him. The office has not received and has been refused the premium; and it was in no default, because it acted upon the refusal of the broker, to whom the whole business of effecting the policy was left. The fallacy of the argument for the plts. consists in separating the

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preparation of the policy from the rejection of it by the broker, and thus splitting up into several contracts one of which is alleged to be authorised and the other not, what in reality, though distinct events in point of time, constituted together but one negotiation, which by reason of the misconduct of the plts.' agent was abortive. The question is thus answered in the negative.

Cur. adv. vult.

The LORD CHANCELLOR.—My Lords, the difference of opinion which has prevailed among the learned judges in this case must necessarily diminish the confidence which I feel in the judgment I have formed upon it, more especially as that judgment is not in accordance with the views of the majority of the judges. The question is one more of fact than of law, and therefore in considering it it will be necessary to refer to the facts contained in the special case. The action was brought on a time policy of insurance which the plts. alleged had been effected with the Victoria Fire and Marine Insurance Company, represented upon the record by the deft., the chairman of the company, for 1000*l.* for twelve months, on the ship *Leonidas*, valued at 13,000*l.* In April 1861 the plts. employed an insurance broker of the name of Lascaridi for six months to the amount of 5000*l.* Lascaridi accordingly prepared a slip in the usual form, which was initiated in the customary manner by various underwriters and by a clerk of the deft.'s company on their behalf. In the case of private underwriters at Lloyd's it is customary to have only one slip, which is signed by different underwriters for the amounts for which they are willing to undertake the insurance. In the case of insurance companies a separate slip is always prepared for each company by the brokers of the assured, and the policy is afterwards prepared and filled up from the slip by the officers of the company, and is kept by the company until sent for by the assured or his broker. Before any policy was made out upon the slip left at the office of the deft.'s company, Lascaridi received a direction from the plts., dated the 29th April 1861, to "cancel *Leonidas*' insurance, and insure the same for all the year and for all seas, 4000*l.*, valued 13,000*l.*" Lascaridi after receipt of this order called at the office of the company, and told them he wished the insurance to be off, as he was going to re-insure the vessel for twelve months and for all seas. Accordingly, the slip left at the office was destroyed, and another slip was prepared by Lascaridi, which was signed by different underwriters and initiated by the same clerk of the company who had placed his initials upon the cancel slip. A separate slip was prepared by Lascaridi, and left with the company, in order that in the usual course the policy might be made out from it. Lascaridi on the signature of the new slip was debited in the books of the deft.'s company under date of the 1st May 1861 with 105*l.*, the amount of the premium, and 2*l.* the amount of stamp duty. The usage with respect to premiums upon insurances effected by brokers is clearly explained by Lord Ellenborough in *Jenkins v. Power*, 6 M. & S. 287, and by Bayley, J. in *Power v. Butcher*, 10 B. & Cr. 339. The late learned judge says: "According to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not in the first instance pay the premium to the broker, nor does the latter pay it to the underwriters. But as between the assured and the underwriters, the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, as he is a middle man between the assured and the underwriters. On the

1st May Lascaridi sent to the plts. an account debiting them with the amount of premium and stamp duty, payable as on the insurance of the *Leonidas*, and drew upon the plts. a bill for four months, which was accepted and paid at maturity. A policy in the form usually adopted by the deft.'s company was filled up from the slip, and dated 1st May 1861. A *fac simile* of it forms part of the special case, and it appears to be in entire accordance with the slip. About the 8th June 1861 a debit note for the premiums was sent to Lascaridi's office, with a request for payment. On presenting this note at the office, a clerk there said that no premium was due, and upon a second application, the clerk said that the policy had not gone forward. This same day the clerk of Lascaridi called at the office of the deft.'s company and said that the policy had been put forward in error, and requested that it should be cancelled. A memorandum of cancellation was accordingly indorsed upon the policy, and signed by two of the directors of the company and by the secretary, and the policy so cancelled was handed to Lascaridi, in order to enable him to obtain a return of the stamp duty. The *Leonidas* was lost on the 1st Sept. 1861. On the following day a clerk of Lascaridi's called at the office of deft.'s company and said the policy was cancelled by mistake, and wished it to be reinstated. The company, however, having heard of the loss of the vessel, declined to comply with the request, and the present action was therefore commenced. It was admitted by the defts. that the plts. never at any time in fact authorised the cancellation of the policy, or were aware of it, nor did they ever receive back from Lascaridi any part of the premium nor any credit for the same. The questions which arise out of these facts are, first, whether there was a complete contract of insurance between the parties; and, secondly, if there were, whether it was afterwards cancelled by the plts.' authority. Upon the first question we have no evidence of the fact of execution of the policy except that which arises upon the face of the instrument itself, and upon the fact stated in the special case that the policy (which must be taken to mean the executed policy) is kept by the company until sent for by the assured or his broker. The policy purports to be signed, sealed, and delivered by two of the directors of the company, in the presence of Registrar Scaife, resident secretary. This statement on the face of the policy, that all acts were done to render the execution complete, which is acknowledged by the directors who executed it, must, I think, be taken to be conclusive against the company, that it was not only signed and sealed, but also delivered. We all know the formal mode of executing a deed by the words, "I deliver this as my act and deed," a form which, no doubt, or something equivalent to it, was observed on this occasion. The policy, most probably, was afterwards given to the secretary to be kept till called for. Now, although the policy was thus retained by the company when formal execution of it took place, they held it for the plts., whose property it became from that moment. It is a mistake to suppose, as some of the learned judges have done, that the policy wanted its complete binding effect till it was delivered to and accepted by Lascaridi. The usage of insurance companies to keep the policy until sent for by the assured or his broker, is not for the purpose of completing the instrument by a delivery personally to the party or his agent, but merely as a matter of convenience. And as to Lascaridi's acquiescence and acceptance being necessary to complete the contract, I apprehend that there is no ground for such an opinion. He was the broker and agent to the plts. to effect an insurance upon their vessel upon certain terms dictated by them.

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He prepared the slip according to his directions. When the policy was executed in exact conformity to his instructions his duty was so far discharged, and without the authority of the plts. he could not refuse to accept it. They had effected, through their agent, a complete binding contract, which they alone could have a right to abandon. It is hardly necessary, after the preceding observations, to say anything upon the second question as to the supposed cancellation of the policy. All the judges seem to have thought that, if the contract was binding, Lascaridi had no authority to cancel it. The company could not have been led, from anything in the previous transaction respecting the same vessel, to suppose that Lascaridi was authorised to act beyond the ordinary scope of the authority of a broker. It is one thing to cancel a slip which is merely the inception of a contract, and to change the terms of the proposal for an insurance, and an entirely different one to release the underwriters from their liability upon a policy. It is quite clear that Lascaridi had no authority from the plts. to relinquish on their behalf the benefit of a contract to which they were entitled, and that the company had no reason to suppose that he possessed any such authority. I think that the judgment of the Ex. Ch. was wrong, and ought to be reversed, and that judgment should be entered for the plt.

LORD CRANWORTH.—My Lords, my noble and learned friend has gone so fully into the facts of this case that I shall not further advert to them; but I shall assume that they are present to the minds of your Lordships. There is one part of this case which seems to me to admit of no doubt. If the policy was so executed as to have become a complete instrument binding on the resps., and giving a good right of action to the apps. in the event of a loss, I think it is clear that they could not cancel it at the instance of Lascaridi. They had a right to consider him as having authority to do all which a broker can do in discharge of his duty in effecting a policy, and they might safely settle with him in case of a loss, if that be the ordinary mercantile usage; but there is no suggestion that it is part of the ordinary duty or power of a broker to cancel an agreement once validly and completely entered into. The only semblance of plausibility in support of such an argument was the fact that he had on a previous occasion had an authority expressly delegated to him by the apps. not to cancel a policy, but to cancel a slip. They had originally proposed through Lascaridi to effect a policy on the *Leonidas* with the resps. on terms materially differing from that ultimately acted on, and a slip had been signed and handed to the resps. for that purpose five days before the signing of the slip on the 30th April; but on that latter day, and before anything had been done, Lascaridi called on the resps. at the instance of the apps., expressing their desire to substitute the terms of insurance ultimately acted on for those originally proposed. To this the resps. agreed, and the slip dated the 30th April 1861 was accordingly prepared, and left with the company as the groundwork of the policy to be prepared by them. It was suggested that the apps. had thus authorised Lascaridi to make this important change in the nature of the contract to be entered into, and the company might reasonably suppose he had authority to sanction the cancellation of a policy already validly binding on the assurers. To this I cannot accede, as it is admitted that Lascaridi had not in fact any authority to cancel the policy of the 1st May. If it was a binding instrument his act cannot affect the apps. unless it was done according to some ordinary course of business which would warrant it. I can see nothing whatever to warrant such an assumption; and,

indeed, the point was not much insisted on. The point really argued was, that the circumstances are not such as to show that any absolute liability ever attached on the resps. The policy it is said did not become a binding contract on the resps. until it had been taken from the office by the apps. or their broker, and been accepted by them as the terms by which they were to be bound. There is no direct evidence as to what actually took place when the policy was, according to the practice as stated in the language of the special case, filled up from the slip by the officers of the company, but as the policy purports to have been signed, sealed, and delivered by two directors of the company in the presence of the registrar, in pursuance of the powers and directions contained in the deed of settlement of the company, the fair inference is that that was the course prescribed by the deed, and that that course had been duly followed; but as to the effect of what was so done the parties differ. The app. contends that by thus signing, sealing, and delivering the policy the directors made it an instrument thenceforth binding on the company. On the other hand, the company (now resps.) contend that until the policy was taken away by the assurer or his broker it did not become binding on them. This latter view is that which has been taken by the great majority of the learned judges, and it is therefore not without some hesitation that I have arrived at a different conclusion, and that I concur with the opinions of the small majority of the judges who heard the case when it was argued at your Lordships' bar. I am of opinion that, from the moment when the directors, acting, as I infer they did, in pursuance of the powers and duties conferred and imposed on them by the deed of settlement, executed the policy, it became absolutely binding on the company, and that it was not necessary to give it binding efficacy that it should be taken away by the app. or his broker. I come to this conclusion on the following grounds:—In the first place the efficacy of a deed depends on its being sealed and delivered by the maker of it, not on his ceasing to retain possession of it. This as a general proposition of law cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed becomes absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed: it is a mere escrow. If, therefore, the directors who executed this policy delivered it only conditionally, that is, to take effect only when taken away by the app. or his broker, then, as it was not so taken away, it never became operative. But I can discover nothing leading to the inference that there was any such condition attached to the delivery. The expression in the case that the policy is kept by the company until sent for by the assured or his broker, can only mean that this is the ordinary course of practice. But such a practice cannot, without more, have the effect of converting that which would otherwise be an absolute, into a conditional delivery—of converting delivery as a deed into delivery as an escrow. The practice referred to is at least inconsistent with the hypothesis of delivery as an escrow. A policy of this company can only be executed (as I presume) when a certain number of the directors and officers of the company are assembled, and this explains why it is executed in the absence of the party assured. The practice assumes previous assent on the part of the assured to the policy to be executed. It is not executed. It is not

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the practice that the assured should call for or examine the policy before he takes it away, but that he should send for it, evidently treating it as an instrument complete when it is taken away from the office. If, when it has been sent to him, he should discover that it is not conformable with the slip, his only remedy would be a remedy in equity to get it corrected according to the real meaning of the parties. I know of nothing intermediate between a deed and an escrow. If the policy, when signed, sealed, and delivered by the directors, does not thereby immediately become the deed of the company, I do not see when and how it afterwards acquires that character. The practice is, that it should be kept by the company till sent for by the assured or his broker, not till the assured has had an opportunity of examining it, so as to ascertain that it conforms with the slip. It can hardly be argued that, after the assured has sent for and obtained possession of it, the company is not bound by it, even if it is not in conformity with the slip. Suppose the liability of the company according to the slip was to endure for a year, but that by the policy it is restricted to six months. The assured, on receiving the policy and discovering the error, might well object, and insist on having a different policy; but yet, if a loss should happen within the six months, it surely cannot be doubted that the company would be liable on the policy actually executed. So if a loss should occur while the policy remains in the office, in consequence of the assured having carelessly forgotten to send for it. This can only be because it had been completely executed, though never seen and approved, by the assured, and, if executed, I am of opinion that it became complete when signed, sealed, and delivered. If the usage had been that it should, after being signed, sealed, and delivered, remain in the hands of the secretary till the assured or his broker had done some act signifying his approbation of it, that might have raised a question whether until that approbation had been expressed it was more than an escrow. But no such usage is stated; on the contrary, the thing sent for by the assured or his broker is, as I have already stated, clearly looked to as something complete before it is taken from the office, not as a document to be made perfect afterwards by some act of the assured. On these grounds I have come to the conclusion, after much consideration, that the three learned Judges who were the majority giving their opinion to your Lordships were right, and so that judgment ought to be for the apps.

Judgment reversed, and judgment given for the plt.

Attorneys for the apps., Colterill and Sons.

Attorneys for the resps., Ray and Cartwright.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., Barrister-at-Law.

Thursday, July 25, 1867.

(Present—The Right Hon. Sir W. ERLE, Sir J. W. COLVILLE, Sir E. V. WILLIAMS, and Sir R. T. KINDERSLEY.)

THE VELASQUEZ.

Ship—Collision—Negligence of pilot—Contributory negligence of crew—Onus of proof.

Where there are acts of negligence on the part of the master and crew which may have contributed to a collision as well as fault on the part of the pilot, it is the duty of the owners to show that the master and crew did not contribute in part to the accident, as for

example by not keeping a sufficient look-out, so as to give the pilot the earliest possible information of an approaching vessel.

This was an appeal from an interlocutory sentence or decree of the High Court of Admiralty.

The cause arose out of a collision which occurred between the barque *Star of Ceylon*, of which the resps. are the owners, and the screw steamship *Velasquez*, of which the apps. are the owners.

The collision took place about 7.30 p.m. on the 11th Oct. 1866, off the coast of Kent, between St. Margaret's Bay and Kingsdown.

The *Star of Ceylon*, which was a barque of 339 tons measurement, was on a voyage from London to Point de Galle, with a general cargo, and the *Velasquez*, which is a screw steamer of 811 tons register, was on a voyage from Malaga, in Spain, to the port of London, with a general cargo.

At the time when the vessels sighted one another the course of the *Velasquez*, as given by herself, was N.E. by N. and the course of the *Star of Ceylon*, as given by herself, was S.W. by S.

The wind was blowing a fresh breeze from E. by S., and the weather was clear but dark. The *Star of Ceylon* was under all plain sail except her mainsail, and (as was stated in her pleadings) was going through the water at the rate of between six and seven knots an hour. The *Velasquez* was under steam alone, and was going through the water at the rate of about six knots an hour.

Under these circumstances it was the duty of the *Velasquez* to keep out of the way of the *Star of Ceylon*, and it was the duty of the *Star of Ceylon* to keep her course.

The *Velasquez* was in charge of a duly licensed pilot, who had been taken on board her by compulsion of law.

The *Star of Ceylon*, when first seen, was about three-quarters of a mile off, and was on the star-board bow of the *Velasquez*. The helm of the *Velasquez* was starboarded by order of her pilot, and upon the red light of the *Star of Ceylon* coming into view, the helm of the *Velasquez* was by order of her pilot put hard a-starboard, and her engines were stopped, but a collision, nevertheless, ensued.

The owners of the *Velasquez*, the apps., set up two main grounds of defence: first, that the collision was occasioned by the *Star of Ceylon* having improperly ported her helm instead of having kept her course; and secondly, that if the *Velasquez* was in any degree in fault, the fault was solely that of her pilot, and that as she had been taken on board by compulsion of law, the apps. were not liable for the damage occasioned by the collision.

It was admitted on the part of the resps., the owners of the *Star of Ceylon*, that the helm of the *Star of Ceylon* was ported and put hard a-port, but it was alleged on her behalf that her helm was not ported until the *Velasquez* had approached so near to her on her port bow as to involve risk of collision, and that such porting was effected with a view to lessening the effect of the blow.

The evidence was taken orally in open court, and the learned judge of the court below was assisted by two of the elder brethren of the Trinity Corporation.

The cause was heard on the 14th Nov. 1866, when the learned judge of the court below pronounced the *Velasquez* to have been solely to blame, and that the fault was not solely that of the pilot, inasmuch as the crew of the *Velasquez* were to blame for not having kept a sufficient look-out, he therefore made the usual decree condemning the apps. and their bail in the damages proceeded for. His judgment was as follows:—

Dr. LUSHINGTON.—There is no doubt whatever as to the law in this case, and as to what were the

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respective duties of the two vessels at the time when they were approaching each other. But I have very great doubt as to what were the actual facts to which I must request your particular consideration. This is a collision between a vessel going down Channel and a Spanish steamer coming up. The state of the weather, according to all representations, is, that it is was a fine evening. The collision occurred about half-past seven. There is nothing in the state of the weather which requires particular observation, nor does it appear that there was any circumstance at all of any importance before the collision itself. I will now direct your attention to the conduct of the *Star of Ceylon*, the vessel that was going down the Channel. She was going down the Channel, as you have heard, at the rate of about six knots an hour, her course was westward, she had the wind from the eastward, and had the tide with her at the time. She had therefore every advantage; and, according to her own statement, which I must presume for the moment is true, she descried the steamer, the *Velasquez*, at a very considerable distance. We are so accustomed to hear distance variously described by witnesses on board ship, that I say nothing about the amount of the distance at which the steamer was seen, but she was seen from a very ample distance to enable the *Star of Ceylon* to do what she thought fit to do. Now these two vessels approach each other, and the first question in dispute is, did the steamer approach the *Star of Ceylon* on her starboard side or on her port side? I will assume for a moment that she approached her, according to the statement of the *Star of Ceylon*, on the port side. It appears, according to the evidence of her master, that the vessels approached each other in nearly opposite directions; then he says, observing the steamer's light to be a little on the port bow, from a point and a half to two points, he directed the person at the helm to keep the light on the port side. Now what did the master mean to say, or mean to be understood, by that direction? If it was, as has been contended, an instruction to alter his helm and to change his course, then undoubtedly the master of the vessel was to blame; but I have very great doubt whether that was the meaning of the master's orders to the man at the helm. I am inclined very much to think that the order to the man at the helm was to this effect—"We are now meeting each other in such and such a direction. I presume the course of the steamer will continue unaltered. I mean our course to be unaltered. The present course of the steamer is on the port side, you keep that course"—and that, in point of fact, that order was in no way directing the course of the vessel to be altered. Then the facts really appear to be that these two vessels advanced, coming nearer one to the other, and that at a later period, when the master says he apprehended danger (and whether he properly apprehended danger or not is entirely for your decision), he first ported the helm, and then, at a short interval, finding the two vessels were approaching each other, and that there was danger of collision, he ordered the helm hard a-port, but that in consequence of the *Velasquez* having starboarded her helm, according to his statement, and altered her course by passing from the port side to the starboard side, in consequence of that alteration, the collision took place. If you believe that to be the state of the case, I think we can have no difficulty in finding the steamer to blame. Whether it was or was not the fault of the pilot is to be considered presently. I come now to the course of the steamer. She was under the care of a regular pilot, proceeding up Channel, the wind against her, the tide against her, under steam only, proceeding to the port of London, and she descried the *Star of Ceylon* at a comparatively short distance com-

pared with the distance at which it appears the *Star of Ceylon* had seen her, the *Velasquez*. Now, the first question is, Was there an adequate look-out on board the *Velasquez*? There was a person on the look-out, no doubt, but I must say I have very great difficulty in understanding the evidence, as it is given, with regard to the efficiency of the look-out. The next question is, Was the *Velasquez* on the port side or on the starboard side? According to the rules, as you well know, she had a perfect right to go either on the port side or on the starboard side, but to keep out of the way of the sailing vessel. Are you of opinion that she was proceeding, we will say, nearly ahead, and that she did, at too late a period, starboard her helm; and that, in order to avoid the collision which subsequently occurred, the helm of the *Star of Ceylon* was ported? Then, with regard to the last question. If the steamer is to blame, did that blame attach on the pilot or on the ship? I can see no reason at the present moment to say (with the exception whether there was a good look-out or not) that any blame attached to the ship. I should be inclined to think, if the helm was put improperly to one side or the other by the order of the pilot, the blame would be exclusively that of the pilot. I ought to say one word about what you will find in the preliminary act with respect to the helm. It will be for you to consider whether there is any peculiarity in this helm (looking at the whole of the evidence) so great that the pilot was misled and mistaken when he gave the order, and that the effect of it was exactly the contrary to what he intended.

After consultation.—In this case we are of opinion that no blame attaches to the *Star of Ceylon*. We think that the whole blame attaches to the steamer, that blame attaches to the pilot, and that blame attaches to the crew who navigated, from the want of a good look-out.

The *Velasquez* now appealed.

Brett, Q. C. and Clarkson, for the app., contended that the collision was caused by the neglect of the *Star of Ceylon* to keep her course as she ought to have done; and if any one on board the *Velasquez* was to blame it was the pilot, for whose negligence the apps. were not liable.

Deane, Q. C. and Murphy, for the resps., contended that the *Velasquez* did not keep a proper look-out, and neglected to alter her course as she ought to have done, and so contributed to the accident, even though the pilot also was negligent.

Cur. adv. vult.

Sir W. ERLE.—This is an appeal on the part of the owners of the Spanish steamer, the *Velasquez*, against the sentence or decree of the High Court of Admiralty, which has pronounced that that vessel was in fault in running down the late barque, called the *Star of Ceylon*, and has condemned the apps. and their bail in the damages proceeded for, and costs of suit. The conflict of evidence is far less than generally occurs in cases of collision. The undisputed facts of the case are: that about half-past seven on the evening of the 11th Oct. last, the steamer, being in charge of a licensed pilot, was proceeding up Channel, steering north-east by north; whilst the barque was going down channel, heading south-west by south, and therefore on a course parallel to that of the steamer. The wind was east by south; each vessel was making about six knots an hour through the water; and the tide, which was against the steamer, was of course in favour of the barque. It is further admitted that at some time before the collision, the steamer starboarded her helm, or at least executed a manoeuvre which

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had the effect which starboarding a helm of the ordinary construction produces; and that the barque ported her helm. The result was a collision in which the barque being struck on the port bow by the stem of the steamer was sunk, her crew happily escaping on board the steamer. The case of the barque is thus stated:—The mast-head light of the steamer was first seen, at the distance of between three and four miles nearly a head, but a little on the port bow of the barque; her red or port light was subsequently made out in the same direction: she continued to approach the barque on her port bow, and in such a direction as to involve danger of a collision unless one of the vessels ported; and as no alteration was made in her course when the two vessels were so near that it was dangerous for the barque to keep on her course, the helm of the latter was ported. Very shortly after this had been done, and the vessels would otherwise have passed clear of each other, the steamship was noticed to be making towards the barque, and as the only means of avoiding a collision, or lessening the effect thereof, the helm of the barque was put hard a-port; but almost immediately afterwards the steamer having shut in her red and opened her green light, ran stem on into the barque," &c. And the contention of the plts., the owners of the barque, was, that the collision was attributable solely to the carelessness, negligence, and want of skill of those on board and in charge of the said steamship, more especially in their having omitted, either from want of a good look-out or otherwise, to take within sufficient time the proper measures to keep clear of the barque. The defence on the part of the steamer raised the following case:—"The barque was first seen at the distance of about three quarters of a mile from, and being from two to three points on the starboard bow of, the steamer, and with no light then visible on board the latter. The steamer starboarded by order of the pilot, and her head went off to port, and she kept out of the way of the barque; but the latter improperly deviated from her course, under a port-helm, and exhibited a red light to those on board the steamer, and caused danger of collision; whereupon, by order of the pilot, the steamer hard a-starboarded and stopped her engines; but the barque nevertheless ran into, and with her port bow before the fore rigging struck the steamer on her stem and starboard bow." And the contention of the defts. was that the collision was caused by the negligent and improper navigation of the barque. Another and distinct ground of defence was, that if the collision was in any way occasioned by anybody on board the steamer, it was occasioned solely by the licensed pilot, whose orders in respect of her navigation were promptly and implicitly obeyed by her master and crew. In the circumstances stated it was the duty of the steamer to keep out of the way of the sailing vessel; and provided she did so effectually, she was at liberty to do it either by starboarding or by porting her helm. On the other hand, it was the duty of the barque to keep her course, and she could be excused for deviating from it only by showing that it was necessary to do so in order to avoid immediate danger. The learned Judge of the High Court of Admiralty, after considering the evidence, with the aid of the Trinity Masters, came to the conclusion that no blame attached to the barque; that the whole blame attached to the steamer; that blame attached to the pilot; but that blame also attached to the crew, by reason of the want of a good look-out. At the close of the argument for the apps. their Lordships intimated their opinion that no ground had been made for disturbing this judgment in so far as it found that as between the colliding vessels the steamer was solely in fault. The conclusions which they drew from the evidence were: that the

vessels were meeting port side to port side; that the steamer took no steps to avoid the barque until the vessels were very near each other; and that in these circumstances the barque was justified in porting her helm when she did port it; whilst, on the other hand, the starboarding of the helm of the steamer when it took place was a dangerous and improper manœuvre, and the immediate cause of the collision. Upon the question whether the court below was justified in holding that blame attached to the crew as well as to the pilot, their Lordships having heard both sides, reserved their judgment; and it is that question alone which we have now to determine. It has been established by a long course of decisions, both in the High Court of Admiralty and at this board, "that to entitle the owners of a ship which is under the charge of a licensed pilot to the benefit of the provision in the Act which exempts them from liability where the collision has been occasioned by the fault of the pilot, it lies upon them to prove that it was caused solely by his fault." To show to what extent this general burden lies upon the owners, it is sufficient to cite the case of the *Schwalbe*, 14 Moore, 241. There the cause of collision was an improper starboarding of the helm; an act of navigation presumably attributable to an order from the pilot. Yet the owners were held liable because they had failed to prove expressly that the order to starboard was given by the pilot. Lord Chelmsford, in delivering the judgment of this committee, said: "The owners therefore fail in the evidence necessary to transfer the responsibility from themselves; and without considering whether there was any negligent act or omission on the part of the crew of the *Schwalbe*, their Lordships think it sufficient to say that the owners have not succeeded in establishing that the collision is to be attributed solely (if at all) to the fault of the pilot." Again, the cases have clearly established that if, for any act or omission which contributed to the accident, the master or crew is too blame, then, although the pilot is also to blame, the owners are not exempted from liability. One of the strongest cases of this kind is that of the *Christiana*, 7 Moore, 160, for there every act of omission (and there were several of them) which contributed to the accident was an act for which the pilot was to blame; yet, inasmuch as for one of them, viz., the omission to strike and haul down certain yards and masts, the master was held to be also in fault, the owners were not exonerated from liability. On the other hand, such cases as the *George*, 4 Notes of Cases, 161, and the *Atika*, 5 Notes of Cases, 50, seem to show, that if it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burden of proof which the law casts upon them. If, however, the evidence shows that there were acts of negligence on the part of the master and crew which may have contributed to the accident, as well as fault on the part of the pilot, the duty of showing that the former did not contribute in part to the accident seems to be involved in the obligation of the owners to prove that the *causa causans* of the collision was exclusively the fault of the pilot. The *Iona*, 4 Moo. N. S. 836, one of the most recent cases decided by this committee, seems to go the full length of this proposition. We have now to apply these principles to the present case. What are the facts deposed to by the pilot and crew of the *Velasquez*, who alone can speak to what passed on board that vessel? The pilot (p. 20) says that he was on the forepart of the bridge; that he first saw a sail on his starboard bow when the barque was about three-quarters of a mile off; that

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he saw no light; that he ordered the helm to be starboarded; that the *Velasquez* obeyed her helm, and that shortly after he had given this order he saw the red light of the barque open. The look-out man (a Spaniard) says (p. 28), that he first saw the barque on the starboard bow, and distant about a mile, more or less; that he too saw no light; and that he reported the sale to the mate (also a Spaniard). And the mate who was on the bridge with the pilot says (at p. 25), that when the look-out man sang out in Spanish "A vessel on starboard" he looked towards the pilot, who was then looking to starboard with his glasses; that he (the witness) looking in the same direction, saw the barque about three-quarters of a mile off; that, thereupon, the pilot gave the signal for going to port; and after that was done he (the witness) saw the red light of the barque, having previously seen no light. Upon this evidence it is no doubt proved that the helm was starboarded by the order of the pilot given on his own observation of the barque, and not upon any communication to him of its position. On the other hand, it is to be observed that this evidence, if strictly true and correct, would raise some inference of a negligent look-out. For nothing is seen of the barque until she is within a mile of the steamer, and nothing even then is seen of her lights, although there is evidence in the cause, believed by the court below, that her lights were burning well; and the pilot admits that on that particular night (p. 24) a good light might have been seen three miles off. The evidence, however, cannot be taken to be wholly true or correct. For all these witnesses concur in representing the barque as on the starboard bow of the steamer; whereas their Lordships have found, upon the other evidence in the cause, that the vessels were approaching each other port side to port side. If the crew and the pilot have combined consciously to put forward a false case, all that can be said is that the owners have failed to show by trustworthy evidence that the fault was exclusively the fault of the pilot. But if it be assumed, as their Lordships would willingly assume, that the witnesses honestly mistook the position of the barque, the natural inference from that is, that if there had been a proper look-out, not only would the barque have been descried at a greater distance, but her true position would have been known. That it is the duty of the crew, by means of a sufficient look-out, to give to the pilot the earliest possible information of an approaching vessel, and accurately to describe her position, was the principle enforced in the case of the *Iona*; and in the present case it may reasonably be inferred that if the pilot had received earlier information of the barque, or had been told that she was on the port side of his own vessel, he would not have given the order to starboard at all, or would have given it at a time when on a starboard helm he could have gone clear of the barque. Their Lordships are therefore unable to say that there is error in the finding of the very learned judge of the Court of Admiralty, that blame attached to the crew as well as to the pilot of the *Velasquez*, and they will humbly recommend to Her Majesty that this appeal be dismissed with costs.

Decree affirmed with costs.

Appa.' proctors, *Clarkson, Son, and Cooper.*

Reps.' proctors, *Deacon, Son, and Rogers.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

May 30 and June 4, 1867.

BURTON v. PINKERTON.

Ship and shipping—Contract of service as seaman on board—Ordinary voyage—Breach of contract by change of character of vessel—Illegal voyage—Action for breach—Remoteness of damage.

The plt. shipped as a seaman, at a certain rate of wages per month, on board the deft.'s vessel at London, under articles for a commercial voyage not to exceed twelve calendar months to Rio de Janeiro, and different ports in the Atlantic and Pacific, and to terminate by the plt.'s being brought back to some port in the United Kingdom or continent of Europe between the Elbe and Brest. On arriving at Rio, the deft. proposed to employ his vessel as a ship of war in the service of the Peruvian Government in the hostilities then being carried on between Peru and Spain. The plt. thereupon refused to proceed any farther with the voyage, on the ground that it was illegal, and exposed him to risks and dangers not contemplated by his agreement with the deft., and he accordingly left the ship, without leave, and went on shore at Rio, where he was arrested by the Peruvian authorities as a deserter from a Peruvian vessel of war, and committed to prison, where he remained some eight or ten days. Upon coming out of prison he found that the vessel had sailed away, and that his clothes and other articles belonging to him, which he had left on board, were gone. In an action to recover damages from the deft. for the breach of contract, the jury, by the direction of the learned Lord Chief Baron, found a verdict for the plt., and assessed the damages resulting from such breach under three heads, namely, first, 12l. 10s. for the loss of wages which the plt. would have earned under the contract had it been continued; and secondly, 20l. for the loss of the clothes, &c.; and thirdly, 80l. for general damages for the imprisonment and otherwise by reason of the deft.'s breach of contract:

Held, by Martin, Bramwell, and Channell, BB. (dissentiente Kelly, C.B.), that the damages given under the second and third heads, viz., for the clothes and the imprisonment, were too remote to be made the subject of an action.

(See *Burton v. Pinkerton*, ante, p. 494; *L. Rep.*, 2 Ex. 343; 36 *L. J.* 137, Ex.)

This was an action brought by the plt., a mariner in the merchant service, against the deft., the captain or master of a steam-vessel called the *Thames*, for a breach of contract. The declaration contained several counts. The first count set out the agreement between the parties, whereby the deft. agreed to employ the plt., and the latter agreed to serve on board the *Thames* as one of the crew, for the voyage from London to Rio de Janeiro or any port or ports in North and South America, and other countries and places specified in the agreement and set forth in the declaration, backwards and forwards if required, for a period not to exceed twelve months, and back to a final port of discharge in the United Kingdom or continent of Europe between the Elbe and Brest, at certain wages per calendar month. Alleging as breach that the deft. did not employ the plt. to serve on board, &c., according to the said agreement, whereby the plt. lost the opportunity of earning wages, and was left at Rio and was arrested and imprisoned there, and deprived of his clothes, &c., and was impeded in obtaining employment. The second count was similar, but alleged as breach that deft. did not employ plt. according to the said

[Ex.]

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agreement, but prevented him serving on board the said ship during a part of the voyage, by sailing and departing with her from Rio without the plt. The third count, for inducing the plt. to enter into the said agreement by a false representation of the intended voyage. Fourth and fifth counts in trespass and trover for taking away and conversion of the plt.'s clothes and tools.

The deft. pleaded 1 and 2 to the first count denying the promise and the breach. 3. To the second count denying the promise. 4. To the second count deft. was always ready and willing to employ the plt., but the latter absented himself from the said ship, and did not at any time offer to perform his duties, &c., but wholly refused so to do or to be employed as agreed. 5. To the second count, misconduct of the plt. before breach by remaining absent from the ship and going on shore without leave and neglecting his duties, whereupon deft. discharged him from his service, &c., which was the alleged breach. 6. To the second count, desertion by plt. before breach and rescission of the agreement and discharge of the plt. by the deft. thereupon. 7, 8, and 11. To the third, fourth, and fifth counts respectively, not guilty. 9. To the fourth count, leave and licence. 10 and 12. To the fourth and fifth counts, not possessed. Upon all which pleas issue was joined.

At the trial before Kelly, C.B., at Guildhall, on the 20th and 21st Feb., it appeared that the owners of the *Thames* by charter-party, dated 20th Jan. 1866, agreed to let her to Thomson, Bonar, and Co. for all lawful service and employment as per margin, such service not to exceed twelve calendar months, and the charter provided (*inter alia*) that the ship was to proceed to such ports as might be directed by the charterers or their agent on board; and also that the said steamer being intended for the service of the Peruvian Government, if she should be burnt, captured, sunk, damaged, or driven on shore by any enemy of that Government, the charterers should pay her value (agreed at 45,000*l.*) to the owners, or make good such damages. The plt. engaged himself to deft. as one of the crew on the 26th Jan. 1866, and signed articles, the terms of which are set out in the declaration. He went on board in the Victoria Docks, and sailed in her to Rio, where he discovered that the deft. was about to employ the *Thames* as a vessel of war in the service of the Peruvian Government, in the hostilities which were being then carried on between Peru and Spain. Thereupon plt. declined to proceed farther with the vessel, on the ground that the voyage had become illegal, and would expose him to risks not contemplated by his agreement, and he accordingly left her and went on shore at Rio as a deserter from a Peruvian ship of war, and was committed to prison, where he remained some eight or ten days. Upon coming out of prison he found that the deft. had sailed with the *Thames* to Callao, and that all his clothes and other articles which he had left on board were gone. On at length reaching England he brought this action against the deft.

The facts and evidence relating to the character of the voyage, and of the conduct of the plt. and deft., and the arrest and imprisonment of the plt., and the loss of his clothes, &c., are fully set out in the judgment of Kelly, C.B., in the case of *Burton v. Pinkerton*, *ante*, p. 494, and also in the judgments in the present case, so that it is unnecessary to recapitulate them here. The learned judge at the trial ruled that there was no defence to the action by reason of the voyage on which the deft. sought to employ the plt. having, through the breaking out of war, become, if not illegal, at all events of a different character from that contemplated by the agreement, and so that the deft. had committed a

breach of contract, and his Lordship therefore directed the jury to find for the plt. The damages claimed by the plt. by reason of the deft.'s breach of contract included a sum for the clothes and other things belonging to him, and left behind by him in the ship when he went on shore at Rio, and of which the fourth and fifth counts alleged a taking and conversion, and also consequential damages in respect of plt. having been arrested and imprisoned when ashore by the Peruvian authorities at Rio as a deserter from a Peruvian vessel of war; and the jury, by direction of the learned Chief Baron, assessed the damages resulting from the breach of contract under separate heads, namely, 12*l.* 10*s.* in respect of the loss of wages which he would have earned under the contract had it been continued; 20*l.* for the loss of the clothes, &c.; and 30*l.* for general damages for the imprisonment, and otherwise by reason of the breach of contract.

Leave was reserved to the deft. to move to enter a nonsuit or a verdict for himself, on the ground that the facts did not show any breach of contract on his part, or to reduce the damages by one or both of the said sums of 20*l.* and 30*l.*, on the ground that the damages in respect of which these two sums were respectively given were too remote. A rule to that effect, and also for a new trial on the ground of misdirection, was accordingly moved for in Easter term, on the part of the deft., when the Court (Kelly, C.B., and Martin and Pigott, BB., *dubitante* Bramwell, B.), after taking time to consider, refused the rule on all the points moved except to reduce the damages: (see report, *Burton v. Pinkerton*, *ante*, p. 494; *L. Rep.*, 2 Ex.; 36 *L. J.* 137, Ex.) A rule *nisi* to reduce the damages by the above sums, or for a new trial on affidavits having been granted,

May 30.—*E. James Q. C.* (with him *Watkins Williams*), for plt., now showed cause against it, and contended that all the damages given by the jury under the above-mentioned three separate heads were the direct and immediate effect and consequence of the improper conduct of the deft. in endeavouring to retain the plt. in an illegal service, not within the terms or contemplation of the agreement entered into between them, and that plt. was justified in giving notice as he had done. The case came clearly within the rule in *Hadley v. Baxendale*, 9 Ex. 341.

The *Solicitor-General* (Sir J. B. Karlake, Q. C.), *C. Pollock*, Q. C., and *Bompas*, for the deft., contra, supported their rule, and maintained that the damages for the imprisonment and the loss of the clothes were too remote to be the subject of an action. They were not the natural result of the breach of contract. They cited

Vicars v. Wilcock, 8 East, 1, and notes thereon, in 2 Sm. L. Cas. 487, 6th edit.

Cur. adv. vult.

June 4.—Their Lordships differing in opinion, the following judgments were now delivered:—

BRAMWELL, B.—In this case I am of opinion that there must be a new trial, and I am enabled to say that my brothers Martin and Channell are of the same opinion. It is not necessary to go over the whole facts of the case, but, in order to make what I am about to say intelligible, I may notice that the plt. was a sailor who had shipped on board the deft.'s vessel, under articles to the deft., for a voyage to different ports in the Atlantic and Pacific, but which voyage was not to exceed a year, and which was to terminate by the plt. being brought back to some port in the United Kingdom or continent of Europe between the Elbe and Brest. The Court has determined (see *Burton v. Pinkerton*, *ante*, p. 494) that the deft. broke that contract; for that, instead

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of carrying on the commercial voyage, for which the plt. had shipped, he proposed to carry on a voyage of a different character to that which the plt. had undertaken. This occurred at Rio, and the Court held that the plt. was justified in leaving the ship and going ashore. He did so, and, according to his own case, when he got on shore he was put in prison by the Brazilians as a Peruvian deserter, and continued there many days. When he came out the deft.'s ship had sailed, and the plt. lost his clothes which he said were on board. Whether they went away in the ship, or whether they were stolen on shore by some person, he did not undertake to say, but he said he had lost them. Under these circumstances, the action being tried before my Lord Chief Baron, the plt. recovered, and recovered properly, damages for the loss of wages that he would have earned had the voyage been continued. He also recovered under the head of general damages for the inconvenience that he had sustained in consequence of having to land at Rio and being obliged to discharge himself there. But one of those inconveniences, with respect to which he claimed damages, was being put in prison as a Peruvian deserter for the space of ten days. Now, of course, to recover in respect of that, he must show that it was a damage resulting, not from the conduct of the deft. merely, but from the breach of contract which was the subject-matter of the action, and which gave him the right of action. The jury were told that it was such a damage, and that they might give damages in respect of it. Therefore we must suppose that they did, or at all events they may have given a portion of the 80*l*. in respect of the imprisonment. I am of opinion, and my brothers Martin and Channell concur with me in that opinion, that he was entitled to recover something in respect of those general damages, but that he was not entitled to make this imprisonment an item of claim, and our opinion proceeds on this ground. It is true that, had the deft. completed his contract, had he not broken it, had he continued on such a voyage that the plt. would have been bound to go, and would not have been justified in leaving the ship, then, no doubt, the imprisonment would not have happened to the plt., because he would have continued in the ship, and been taken away in it by the deft. Therefore, in one sense, the deft. may be said to have caused the imprisonment. It may be said truly that, but for the conduct of the deft., this imprisonment would not have happened; but surely that is not enough to entitle the plt. to recover in respect of it; because, supposing, instead of meeting with the Brazilian police, who were wrong-doers, and who put him in prison, he had met with a gang of robbers on shore, who had knocked him down and robbed him of 100*l*., it is equally true that damages would have accrued to him, in one sense, owing to the conduct of the deft.; that is to say, that without such conduct it would not have happened—therefore it might have been said that the deft. had caused it; but according to the ordinary well-known rule, exemplified in many cases which have been contested, but the principle of which has never been contested at all, the damage for which a man is liable at law must be caused by him as a *causa causans*, and must be such as flows naturally and inevitably from his tortious act. To my mind, to hold that this plt. could recover in respect of this present damage would be equivalent to saying that if he had had a limb taken off owing to some disturbance or wrongful act on shore, he would have a right of action against the deft. in respect of it. Similar considerations apply to the clothes. It is true, if the plt. had continued on board the ship, which he would have done but for the breach of contract, he would not have lost his clothes. Therefore the same reason-

ing applies to show that the deft.'s conduct has caused a loss of the clothes; but the same reasoning applies also to show that that consequence is not a natural or necessary consequence of the breach of contract on the part of the deft. It seems to me, therefore, with great submission to my brothers Martin and Channell, that the plt. was not entitled to recover in respect of those two items of claim. Nor can we say how much of the 80*l*. general damages is given in respect of the imprisonment; so that, unless the parties come to some agreement as to the sum to which the verdict shall be reduced, I think there must be a new trial. For my own part (and I believe that in this matter I am also speaking the opinion of my brothers Martin and Channell), I think the affidavit which has been produced on the part of the deft. would necessitate a new trial, because, without saying that that affidavit is true, and that the plt.'s testimony is false, it certainly introduces a different state of facts to that which the plt. swore to at the trial. He then swore to an imprisonment for ten days, whereas if that affidavit is true, the imprisonment which the plt. suffered was only two days; and the deft. is entitled to have that matter put in train for further investigation. Therefore it seems to me that, for these reasons, the deft. is entitled to have a new trial.

MARTIN, B.—I am substantially of the same opinion, and think there should be a new trial unless the plt. consents to the verdict being reduced to 12*l*. 10*s*. I think the plt. is not entitled to damages in respect of the imprisonment and the clothes. The breach of the contract was, that he was supposed to be compelled by the man who had hired him for a mercantile voyage, to become a seaman on board a ship of war; and I think he had a right to leave the ship on that occurring; and after some difficulty, I arrived at the conclusion that it was a breach of contract for which he was entitled to maintain an action; but I think he was only entitled to recover the ordinary damages for breach of contract, that is, in respect of loss of employment which the deft. had contracted to give him as a seaman on board a mercantile ship. I am also of opinion that he would be entitled to recover further damages in respect of the expense and inconvenience of having, as I think rightfully, gone on shore at Rio; but I think he was not entitled to recover anything in respect of the imprisonment, for there is no evidence whatever that the contract the captain made with him had anything to do with, nor do I see that he is responsible for that, and therefore I cannot give the plt. any damages as against the deft. in respect of that branch of his claim, and if any portion of the 80*l*. is for that there should be a new trial, because we have no means of distinguishing between what are the damages to which he is entitled and those to which he is not entitled. I think, also, that he is not entitled to any damages on account of the clothes. He went away leaving the clothes on board. The deft. would probably have been liable if he himself had meddled with those clothes, or had done anything wrong in regard to them; but in point of fact, as far as the evidence goes, nothing of the sort was proved, but some person came on board, who was believed to be a friend of the plt.'s, and was permitted to carry away the clothes with him, and there is no evidence that the deft. was, either directly or indirectly, concerned in that. The clothes do not seem to have been delivered to the plt., but to the person who took them away; but I do not think that this damage arises from a breach of the deft.'s contract for which, as a matter of law, the plt. can recover. I agree with my brother Bramwell that the damage should be the direct and natural consequence of the breach of contract, and that a man cannot recover damages in respect of two matters to remove a loss

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loss of the clothes and the imprisonment. In my judgment, the deft. is entitled to a new trial unless the plt. consents to confine the verdict to 12*l*. 10*s*., the amount given by the jury on account of the wages.

CHANNELL, B.—After the pains taken by the Lord Chief Baron at the trial to have the damages separately assessed with respect to the imprisonment and the clothes, it is not without great regret that I come to the conclusion that, unless the parties consent to reduce the verdict below 30*l*., there should be a new trial. I am of opinion that the plt. is not entitled to recover in respect of the imprisonment, and I am equally of opinion that he is not entitled to recover in respect of the clothes. I think it unnecessary to repeat the observations that have been made by my brothers Bramwell and Martin upon that subject. I am not to be understood to say that, in my opinion, the damages might not, and properly so, exceed the amount of the wages that the plt. would have earned had the voyage been performed, but he is not entitled, in my judgment, to recover in respect of the imprisonment or of the clothes. It is possible that the 30*l*. may include some claim in respect of the imprisonment which ought not to be an item introduced into that calculation. Therefore I think the verdict for that amount cannot stand, and that there should be a new trial.

KELLY, C.B.—I must express my regret that I have to differ with my learned brethren on both the points on which they have given judgment. With respect to the general damage, I thought at the trial, and I still think, that as by reason of the breach of contract by the deft. in placing the vessel under the orders of the Peruvian ships of war, he had left the plt. no alternative between serving on board the vessel and so putting his life and liberty in peril, and landing at Rio, and there remaining till he could find a ship in which he could return to England, the jury might reasonably give damages in respect of such expenses, inconveniences, and hardships as the plt. might have incurred during his compulsory residence there, and as the danger would have been greater if he had been obliged to land on a desolate island, without food or clothing, and among savages, than if he had been left in a town where, at a small expense he could be well provided for, so I thought the jury might consider the difference between his being left in a place of security against all but ordinary risks and inconveniences, and his finding himself in this town of Rio, exposed to the consequences of his having belonged to a vessel engaged in the hostilities then being carried on between Peru and Spain, and, therefore, that if they thought the imprisonment of the plt. had resulted from the state of things at Rio, thus created by the deft. himself, they might fairly take it into account in estimating the damages. I am confirmed in this view of the case by what appeared to me at the trial as not improbable from the letter of the police officer to the consul, and which is now made certain by the affidavit filed on behalf of the deft., namely, that the apprehension and imprisonment of the plt. was upon the information of some one belonging to these very Peruvian vessels, perhaps Borrás himself, charging that he and the other sailors who landed were Peruvian deserters. The consul, in his letter which is now before us, which was, I believe, read at the trial, but not perhaps very much adverted to, says, "It appeared to me that the crew were committing no breach of neutrality by fulfilling the terms of their contract, and that there could be no penalty attached to them even if the ship should be again employed in carrying stores for the Peruvian vessels of war." The police officer

says, "These seamen," including the plt., "were apprehended on the 28th April from information given by Charles Pector, that they were deserters from a Peruvian vessel of war, and were all found concealed in the house of Ildefonso Vasques, a Spaniard, situated in the Rua Diario Louis de Gonzaga, No. 67*s*, Santa Cristiana." This man, after being questioned, stated that the thirteen prisoners left the Peruvian vessel, and "on going before me," that is, the consul, "they were ordered to return on board that vessel." This they refused, and they waited on the Spanish minister soliciting his assistance, as they did not wish to fight against the Spanish squadron, returning afterwards to the house of Ildefonso; and Thompson, in the affidavit now before us, and on which this rule has been obtained, says to the same effect, "I understood that we were arrested as being deserters from one of the Peruvian rams." So that it seems to me that there was no doubt at all that the state of things created on the part of the deft. and his crew, by what, in my opinion, and indeed in the opinion of the majority of the court, constituted a breach of contract (see *Burton v. Pinkerton*, ante, p. 494; 36 L. J. 137, Ex.; L. Rep., 2 Ex. 343), this very state of things, and this only, led, amongst other mischiefs and injuries, to the imprisonment of the plt. under the circumstances that now appear. I thought under those circumstances the jury might well take the whole state of things into consideration, but my learned brethren are of a contrary opinion. With respect to the contradictions arising upon the affidavit as to the men having been lodged for a few days by the Spanish consul, and the difference between an imprisonment of four days and of eight days in such a case as this, where the damages are but 30*l*., I think such small matters are of no weight whatever. Then as to the loss of the clothes—it was directly caused by their having been left on board when the plt. landed to consult the consul, and the ship having sailed when he came out of prison, and when, if he could have ventured to go on board, he might no doubt have managed to have come back again. It appears, however, that my learned brethren are of a different opinion, with respect not only to the imprisonment but also to the clothes. Adverting, then, to the terms of the rule, which is not in any shape or form directed towards a new trial, the result will be that, unless the parties can agree upon the sum to which, in addition to the 12*l*. 10*s*. for wages (about which there is now no question), the verdict shall be reduced—and 10*l*. has been suggested by one of my learned brethren as a proper sum—the rule must be made absolute to reduce the verdict by the 30*l*. and the 20*l*., so as to leave it standing for the 12*l*. 10*s*. for the wages, which we are all agreed the plt. is entitled to recover. The rule for a new trial was refused, and the rule as now drawn up is for the plt. to show cause why the damages found for him upon the trial should not be reduced as the court shall direct. I do not know that we have authority to enter the verdict for the 10*l*. which the jury have not found, unless it be by consent; and there will be no alternative in the absence of such consent, but a new trial, or that the verdict should be reduced by both the sums in respect to which alone leave was reserved.

Rule absolute for a new trial.

Attorneys for the plt., *Shoes and Roscoe*, 8, Bedford-row, W.C.

Attorneys for the deft., *Bischoff, Cox, and Bompas*, 19, Coleman-street, City, E.C.

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JONES v. HOLM.

[Ex.]

June 17 and 22, 1867.

JONES v. HOLM.

Charter-party—Full and complete cargo—Part of cargo destroyed by fire—Obligation to complete loading.

By a charter-party containing the usual exceptions of fire, &c., the deft. agreed to load and the plt. to carry a full and complete cargo. Part of the cargo was on board and part of the remainder was alongside in lighters, when the vessel accidentally took fire and had to be scuttled. The cargo on board was so much damaged that it was necessary to sell it. The captain accordingly did so, and forwarded the portion then lying alongside by another vessel. After a delay of two months, necessarily occupied in repairs, the ship was tendered to deft.'s agents, who refused to load any more cargo:

Held, that nothing had occurred to discharge the deft. from the obligation to complete the loading.

This was a case stated without pleadings for the opinion of the court.

On the 29th Jan. 1866, the following charter-party was entered into between the plt. as owner of the barque *Edith Merion*, and the deft. as charterer:

London, 29th Jan. 1866.

It is this day mutually agreed between G. W. Jones, Esq., owner of the good ship or vessel called the *Edith Merion*, A 1 nine years, and coppered, of the measurement of 348 tons or thereabouts, now at Liverpool, with leave to take an outward cargo direct, and J. H. H. Holm, Esq., of London, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Pernambuco, or so near thereto as she can safely get, and there load from the factors of the said affreighters a full and complete cargo of cotton in press-packed bales, with sufficient sugar in bags as ballast; the cargo to be brought to and taken from alongside at merchant's risk and expense, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded, shall therewith proceed to Liverpool direct, or so near thereto as she may safely get, and deliver the same on being paid freight as follows, viz. eleven sixteenths of a penny sterling per lb. net delivered for cotton, and 20s. sterling per ton of 20 cwt. net weight delivered for sugar in bags, all with 5 per cent. primage thereon in full of all port charges and pilotage (restraint of princes and rulers, act of God, Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage always excepted), the freight to be paid on unloading and right delivery of cargo in cash, as customary. Thirty running days are to be allowed the said merchants (if the said ship is not sooner dispatched) for loading the ship, and to be discharged with all dispatch as customary, and ten days on demurrage over and above the laying days at 5l. per day. Penalty for non-performance of this agreement, estimated amount of freight. The captain to sign bills of lading if required, at any rate of freight, without prejudice to this charter. The ship to be addressed to charterer's agents at Pernambuco paying 2½ per cent. commission on this charter. Sufficient cash to be allowed the captain at the port of loading for ship's ordinary disbursements.

(Signed)

G. W. JONES.
J. H. H. HOLM.

The vessel arrived at Pernambuco on the 21st March 1866, and was ready to take her homeward cargo on the 24th May 1866. On the 1st June 1866 the charterer had loaded a part of the cargo, viz., 2380 bags of sugar and 700 bales of cotton, and 118 bales were alongside in lighters for loading. On the 1st June a fire broke out in the ship, and the vessel with the cargo on board was taken across the harbour and scuttled, by or under the order of the master. The master had at that time signed and delivered to the charterers bills of lading for the whole of the above-mentioned cargo, both that aboard and alongside. The cargo aboard and that alongside was not a full cargo. The said cargo on board, viz. 2380 bags of sugar and 700 bales of cotton, was so far damaged that it was necessarily sold by auction by the master of the ship under the advice of surveyors, and realised 2586l. 14s. 6d., which was received by the master of the vessel. The 118 bales of cotton so alongside as aforesaid were

forwarded by the master to Liverpool by steamer at the following rate of freight, viz., ¾d. per lb., being one-sixteenth of a penny more than the chartered freight, and was received, and the freight of ¾d. per lb. (being the freight mentioned in the bills of lading) paid by the consignees. The ship having been repaired with all dispatch, was on the 30th July 1866, and as soon as it could be, tendered to the charterer's agents at Pernambuco to take the remainder of the cargo, but they refused to supply any more cargo. Having endeavoured to obtain a cargo at Pernambuco and failed, she sailed to Macao, a neighbouring port, and there obtained a cargo of 2529 bags of sugar and 1939 bales of cotton for England, at a freight less than that which would have been earned had the ship been loaded with a full and complete cargo under the original charter-party.

The question for the opinion of the court was, whether, upon the facts stated the deft. was bound to complete the loading of the ship.

Mellish, Q. C. (with him Day) for the plt.—The deft. was bound to complete the loading of the ship, and was not discharged from the obligation by any of the circumstances which occurred. Nothing being stated as to the cause of the fire, it must be taken to have been a mere accident, and not the result of any negligence on the plt.'s part. The exception of fire contained in the charter-party protects the plt. from any liability in respect of such a fire, and, that being so, the deft. had no right to rescind the contract. Suppose the ship had been blown out to sea while the cargo was in the course of loading, and a necessary delay had been caused while damage so occasioned was being repaired, the deft. could not have rescinded the contract on the ground of such delay. Or, suppose after a complete cargo had been loaded, part had been burnt, neither party would have been entitled to rescind. The plt. would have been bound to carry the remainder of the cargo if the deft. had required him to do so, and if one party still remained liable under the contract the other must also be liable. He cited

Bruce v. Nicolopulo, 11 Ex. 129; 24 L. J. 821, Ex.; *McAndrew v. Chapple*, L. Rep., 1 C. F. 643.

Watkins Williams for the deft.—The mere delay might not have excused the deft., but the result of the fire in this case was more than a mere delay. The deft. was bound under the contract to load, and the plt. to carry a full and complete cargo. The deft. had already loaded a large part of the cargo, which was so damaged by the fire that the plt. could not carry it. The plt., therefore, became unable to carry a full and complete cargo, for the deft. clearly was not bound to load this portion over again, and the deft. could not then, under the contract to load a complete cargo, be bound to load part of a cargo. Under these circumstances, the original voyage was frustrated, and the voyage became a different voyage from that contemplated by the charter-party. Even if this were otherwise, the plt. elected to rescind the contract by the course which he pursued as to the 118 bales forwarded.

Cur. adv. vult.

June 22.—BRAMWELL, B. now delivered the judgment of the court:—In this case, which was argued before my brothers Martin and Channell and myself, we are all of opinion that the plt. is entitled to our judgment. The action was on a charter-party, and the vessel had taken part of the cargo which the deft. was bound to ship on board, and then accidentally a fire broke out, and the cargo which was then on board was so damaged that it was necessary to sell it; the captain sold it, and then the char-

ADM.]

THE CARGO EX CAPELLA—THE WASP.

[ADM.]

terer's agents were called upon by him to give him what would be equivalent to the remainder of the cargo, that which would have filled the ship up if she had not caught fire. Now, the first objection was, that the vessel having met with this accident, and a delay of two months having been caused while she was under repair, the voyage became a different voyage, and that the case therefore came within the rule whereby the original voyage being frustrated and the voyage having become a different voyage, the charterer is exonerated from loading the cargo. I do not think that the facts here stated bring the case within the rule. There is no warranty here, no condition precedent that she shall be ready by any particular time; there is only a provision that she shall with all convenient speed sail and proceed to Pernambuco, getting as near as she can, and then load a cargo after having discharged the outward cargo. Then, if without any voluntary neglect or wrongful act on the part of the shipper she were delayed by an accident of this sort, and no cargo could be put on board at all, it appears to me that the charterer would not be excused, and he would be bound, when she was ready, to furnish a cargo. Then it was said that, inasmuch as the vessel could not take the whole of the cargo to England, as the captain had sold a portion of the cargo, and had sent another portion of the cargo by another means to Liverpool, the deft. was under no obligation to do what in one sense had become impossible, that is, load a full and complete cargo, because all that he could do now would be to put a half cargo on board, leaving the rest of the vessel to be wasted or not filled up, which was not in the original contemplation of the parties. This objection struck me at first as having considerable weight in it, but upon consideration I have come to the conclusion that it cannot be supported. The charterer's relations to his consignees in England, or his own objects and views in entering into this charter-party, are things which ought not to affect its construction; and the true construction I think of the expression, "to load a full and complete cargo," means "to bring as much merchandise as will be a full and complete cargo;" and if instead of the expression "a full and complete cargo," the parties had said what I think is clearly its equivalent, viz., "so many bales of cotton and so many bags of sugar," it would have been manifest that the deft. had not performed the contract, and that nothing had occurred to exonerate the deft. from the liability to complete the loading, although a certain number of the bales or bags had been destroyed after being loaded. For these reasons I think the plt. is entitled to our judgment.

Judgment for the plt.

Attorney for plt., *Rowell*, for Pain of Newport.

Attorney for deft., *Cotterill*.

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister-at-Law.

Saturday, May 4, 1867.

(Before the Right Hon. Dr. LUSHINGTON.)

THE CARGO EX CAPELLA.

Collision—Both vessels to blame—Claim for salvage by one of the crews.

Where a collision occurred between two vessels, and both were held to blame, the crew of one of the vessels having instituted a cause of salvage against the owners of the cargo of the other, it was

Held, that the claimants were not entitled to receive sal-

vage for property which had been put in jeopardy by their own wrong-doing.

A collision had taken place in March 1865 between the English ship *Southern Empire*, then on a voyage from Callao to Liverpool, and the Dutch vessel *Capella*, which was bound from Amsterdam to Batavia with a cargo of silver specie. After the collision the crew of the *Southern Empire* succeeded in saving the specie and bringing it into Liverpool; for this service they instituted the present suit against the cargo.

A collision cause, by the owners of the *Capella*, which had been wrecked by the collision, was previously brought against the owners of the *Southern Empire* when the Court, assisted by Trinity Masters, held that both vessels were to blame.

Dr. Deane, Q. C. and Butt, for the plts., referred to *The Sappho*, Swab. 242.

Brett, Q. C. and Lushington, contra, contended that there could be no contribution between wrong-doers. By the 33rd section of the Merchant Shipping Act Amendment Act (25 & 26 Vict. c. 68) it was the duty of the plts.' ship to assist the other. The plts. could not profit by their own wrong-doing, especially as against the owners of the cargo, who were innocent parties, and referred to *The Milan*, Lush. 388.

Dr. Deane, Q. C. in reply.—The Merchant Shipping Act does not apply. The duty to render assistance does not take away the right to salvage reward.

Curr. adv. mt.

May 7.—Dr. LUSHINGTON.—The question for me to determine is whether, when a collision has taken place between two vessels and both vessels are held to blame, one of them can sue for salvage, for having saved the cargo of the other from the perils consequent on the collision. I do not seek for authorities, but I look to the principle which ought to govern the case. In my mind the principle is this, that no man can profit by his own wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by an English court. The application of this rule to the present case is obvious. The asserted salvors were the original wrong-doers: it was by their fault that the property was placed in jeopardy. The rule would bar any claim by them for service rendered to the other ship which was co-delinquent in the collision; but the present claim, it is to be observed, is a demand for salvage against the cargo, the owners of which were perfectly innocent. There has been no decision as to this particular question, at least to my knowledge, during my practice in this court, but I am not surprised at it, because I think that the claim is so opposed to common justice as to render it unlikely that any person would make the experiment. I pronounce against the claim, with costs.

Solicitors for plts., *Marshall and Roberts*.

Proctors for defts., *Pritchard and Sons*.

May 28 and June 18, 1867.

(Before Dr. LUSHINGTON.)

THE WASP.

Pleading—Assignment of causes of action—Trusts.

Defts. in a suit having pleaded that plts.' claim had vested in their trustee under a composition-deed, in first and eighth articles of the reply alleged that plts. had assigned the causes of action before the execution of the deed, and that the suit was now brought in this

vestees for the assignees. A motion being made out these articles, it was

the allegations had been properly pleaded;

moment of causes of action carries with it action, even though inchoate at the time;

is an absolute assignment of a beneficial assignor can sue as a trustee.

motion by the deft. to strike out the th articles of the plts.' reply in a suit und equipping.

are shipbuilders. In 1864 and 1865 and equipped the *Wasp*, and now the under arrest for another matter brought under the 4th section of the Admiralty 61.

defences set up by the answer was, accruing of the causes of action the composition-deed with their creditors, stered it under the B. A. 1861, whereby causes of action and other property of same vested in William Alexander as their creditors.

ation was then made in the first and as of the reply, which were in the ms:

first article of the said answer. Before the registration of the said deed, the plts. assigned action in the petition mentioned for certain ration to the North and South Wales Bank of high assignment the defts. had notice before and registration of the said deed, and the pro- in the said deed did not include the said , and the said causes of action are not vested vested in the said William Alexander. was instituted and is prosecuted in the names sent of the plts. for the benefit of the said h Wales Bank, to which bank the said causes petition contained were assigned as in the s reply mentioned, the deft. having notice of as in the last-mentioned article stated.

upport of the motion.—The plts. have e in this court as trustees at all. The ight to assign their rights against the d no lien on her, and no right existed ll she was arrested and a cause in this ed: (*The Pacific*, Brow. & Lush. 148.) action then in the present case could e vested in the bank by this assign- not enough to state in the reply that action were assigned—they do not d. This is a mere assignment such as as security for its advances.

ra.—The replication is in the usual al use at common law; a trustee can *ergo ex Galam*, Brow. & Lush. 167.) A is can sue, the only difficulty lies in *quis que trust*. The *Pacific* is here inap- lead that the causes of action never l to the trustee under the composition- ligation is a perfectly good plea. The sel, in the course of his argument,

Leake's Precedents, 445;
Sharp, 2 H. & N. 540;
3 v. Thomas, 9 Ad. & El. 292.

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Cur. adv. vult.

Mr. LUSHINGTON (having gone through bove).—The deft. now moves the court two articles. I do not understand him objection that the plts. cannot sue in bare trustees for the bank to whom f action have been assigned. Such truth untenable; the objection relied the time of the assignment to the bank

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the plts. had no claim against the vessel to assign, as they had not commenced proceedings against her (from which date such claim would commence), and could not commence proceedings by reason of the vessel not being under arrest; that the claim against the vessel did not accrue until after the plts. had executed the deed in favour of their creditors, and consequently that the claim passed to the trustees for the creditors. It seems to me, however, that the assignment by the plts. to the bank of the causes of action would carry with it all right of action to recover the debt, including any right for that purpose to proceed against the vessel which might be as it were inchoate, but which might subsequently become complete. If so, and if the assignment to the bank was substantially an absolute assignment of the entire debt divesting the plts. of all beneficial interest in the debt, then it is clear from the cases cited, especially *Monk v. Sharp*, 2 H. & N. 540, and *Dangerfield v. Thomas*, 9 Ad. & El. 292, that the plts. might sue as trustees for the bank, notwithstanding that they subsequently executed the composition-deed in favour of their creditors. Whether the assignment was absolute and of the entire interest of the plts., I have no particulars before me to enable me to judge, the reply alleging simply in general terms that the causes of action were assigned. But from the book of Common Law Precedents (Bullen & Leake, p. 445) to which I was referred, it seems that an allegation in general terms is the form usually adopted in the common law procedure. I shall therefore refuse to strike out the first or eighth articles of the reply, but it will be open to the defts. to counterplead that the assignment was not such as to divest the plt. of all beneficial interest.

Attorneys for plts., *Field and Roscoe*.

Attorneys for defts., *Gregory and Rowcliffes*.

June 18 and 29, 1867.

(Before the Right Hon. Dr. LUSHINGTON.)

THE GREAT EASTERN.

Seamen's wages—Compensation for wrongful discharge—Jurisdiction.

This court has, as part of its ancient jurisdiction, power, in a cause of wages, to entertain a claim for compensation for wrongful discharge of a seaman, before the termination of his engagement.

The plts. in this case were a large number of seamen, lately part of the crew of the *Great Eastern*, whose actions had been consolidated.

The petition alleged that the master of the *Great Eastern* in March 1867, the vessel at that time being in the port of Liverpool, hired the plts. for a voyage, to expire on the 30th June 1867. That the plts. entered upon their service on board, and were always ready and willing to perform their contract; but the defts. wrongfully discharged them on the 1st May 1867, before the term of their engagement had expired. Part of the plts.' claim was for "damages for wages from the 1st May to the 30th June." The action was brought under the 24 Vict. c. 10, s. 10, which is as follows:

The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship, provided always that if in any such cause the plt. do not recover 50*l.* he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court.

The case came before the court on a motion by

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the defts., the owners of the *Great Eastern*, to reject the p'ts.' petition.

Butt in support of the motion.—The question is, whether a seaman who is suing the ship in this court for wages has a lien on the ship for damages occasioned to him by the owner wrongfully discharging him before the termination of the stipulated voyage. It is submitted that there is no such lien, and that the only remedy for the seaman is to sue in a court of common law. If there is no authority for such a lien, the defts. are entitled to the judgment of the court, for the right of lien cannot be extended except by the Legislature. The seaman's remedy is now a matter governed by statute; the Admiralty Court Act, sect 10, which is the last enactment on the subject, limits his right to recover to "wages earned on board ship." There is no precedent showing that a lien for damages for breach of contract has ever been distinctly affirmed in this court, yet the opportunities for claiming such a lien must have been numberless. The truth is, that for wages and towage and salvage, the lien arises out of the service done. The court has no jurisdiction over a breach of contract, unless a statute specially gives it: (*The Robert Pow*, Brow. & Lush. 99.) Nor does it exercise the machinery of a jury to whom such claims are submitted. The older cases, when carefully examined, show that there is really no authority for a lien for the damages, but the contrary. In the case of *Wells v. Osman*, Ld. Raym. 1044; 6 Mod. 238, the seamen who had been engaged for a voyage were discharged, after having done several months' work while lying in the Thames; and it is quite clear that all that the Court of Q. B. decided was, that the Court of Admiralty had jurisdiction to decree the wages for the work done. How is this case consistent with a lien for damages? In *The Exeter*, 2 C. Rob. 261, where the mate had been wrongfully discharged without wages abroad during the voyage, it is true that he claimed 127*l.* as the balance of wages and expenses incurred in returning to Europe, and true also that the court pronounced for the demand of wages, but there is nothing to show that it pronounced for wages beyond the date of the discharge. In *The Beaver*, 3 C. Rob. 92, a similar case, the court did, indeed, pronounce for the seamen's wages till the return of the ship to Liverpool, but the real contest in the case was, whether the man had deserted or not, and the measure of wages passed without argument. *The City of London*, 1 Wm. Rob. 88, was a case upon demurrer. The mariner had been discharged two days after the articles had been signed for a voyage to the East Indies and back, and before the commencement of the voyage. The ship pursued her voyage, the mariner took other employment and claimed for the balance between his actual earning and the amount of wages he would have been entitled to if he had proceeded in the original ship. The case is somewhat difficult to understand, but this is certain, that the court did no more than admit the petition, and in its observations distinctly held that it would not adjudicate on questions of unliquidated damages, which were for juries only. What is also important is, that such cases as that of *The City of London*, Wm. Rob. 88, are now specifically provided for by the 167th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) limiting the mariner's right in such cases to one month's wages. *The City of London*, therefore, may be said to be overruled by statute. The cases in which this court has entertained claims for damages for personal injuries, were apparently personal actions against the master, not proceedings *in rem*; such, for instance, as *The Ruckers*, 4 C. Rob. 73, and have therefore no application in this case.

Lushington and *R. G. Williams* contra.—It is submitted that the seamen wrongfully discharged have a lien on the ship not only for wages earned, but for wages or damages ultra, and that they have this right by the ancient jurisdiction of the court. The purpose and effect of the entire Admiralty Court Act, and of the 10th section in particular was to extend the jurisdiction of the court. If, therefore such a right as is now claimed by these seamen existed before that statute it exists still. The jurisdiction of the Admiralty Court over claims for wages has always been affirmed, and even in days of prohibition common law judges have upheld it on the ground of convenience: (*Wells v. Osman*, 2 Ld. Raym. 1044.) Here every reason of convenience points to the seamen taking their remedy in this court for their unlawful discharge. They are already lawfully suing here for their wages earned, and the actions are consolidated; are they now to be sent into another court to bring 300 actions? The Legislature has shown its desire to have all the seamen's claims settled in one simple proceeding for wages (see sects. 188, 189, 190, 205, 213, 223, and 229 of the Merchant Shipping Act 1854.) Nor can it be said that the court cannot measure claims of an unliquidated kind. It does so in all cases of salvage and collision, in claims upon bills of lading under the Admiralty Court Act, and it has a special tribunal for the very purpose of settling matters of account—the registrar and merchants, who are at least as competent as a jury. In *Parsons on Maritime Law*, vol. 1, p. 463, is a note citing many authorities to the effect that the Admiralty Court has the power to assess damages in these cases of seamen suing for their wages. The theory of the ancient jurisdiction of the court is, that the contract of wages was regarded as one and entire; that freight was the mother of wages; that accordingly if freight was earned, that the entire wages were due. This is evidently the law laid down in the leading case of *Cutler v. Powell*, 2 Sm. L. Cas. 1. The Legislature, in the Merchant Shipping Act, has now abolished the rule that freight is the mother of wages, and introduced various provisions, and in the case of wreck, &c. (sects. 181–186 of the Merchant Shipping Act), but leaving the law of the Admiralty Court unabridged in cases of wrongful discharge. The authorities cited on behalf of the defts., such as *The Exeter*, 2 C. Rob. 261, and *The Beaver*, 3 C. Rob. 92, and such cases as *The Madonna D'Ibra*, 1 Dods. 37, *The Margaret*, 3 Hagg. Adm. 238, as also the invariable practice of allowing foreign seamen a *viaticum* home, show what the jurisdiction and the practice of the Admiralty Court were. But even were it otherwise, they are totally irreconcilable with the notion that the seamen wrongfully discharged cannot recover in the Admiralty Court either damages for the breach of contract, or wages beyond the date of the discharge. Perhaps the truth is that the early theory of the contract for wages being entire was found to be inconvenient and unjust in its operation in many cases, and that even the mariner himself, as in *The City of London* and *The Camilla*, Swab. 312, did not put forward his full legal rights. But the case of *Chandler v. Griener*, 2 H. Bl. 606 n., is conclusive as to what the law of the Admiralty Court was. That was an action of assumpsit for seamen's wages. The facts of the case were, that the p't. was a seaman on board a ship which was articulated for, and sailed upon a voyage from London to Honduras, from thence to Philadelphia in North America, and from thence back again to England. The articles were drawn in the usual form. While the ship was in the bay of Honduras, the p't. received so violent a blow from a piece of timber accidentally falling upon

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him while he was on board, that he was entirely disabled from doing any duty whatever. On the arrival of the ship at Philadelphia he was put on shore and there left, and his wages paid up to that time; but the action was brought for the whole wages, including the remainder of the voyage, viz., from Philadelphia to England. The court said that clearly the law Marine ought to be followed in the construction of the contract, and they directed an inquiry to be made in the Courts of Admiralty, whether, according to the usage there adopted, a disabled seaman in similar circumstances would be entitled to wages for the whole voyage or only up to the time he was so disabled? An inquiry was made, and in every instance there was to be found, a seaman disabled in the course of his duty was held to be entitled to wages for the whole voyage, though he had not performed the whole.

Butt replied.

Cur. adv. vult.

June 29th.—Dr. LUSHINGTON (being unable through illness to appear in court) communicated through the registrar his decision, the solicitors on both sides having consented to receive it as the judgment of the court. It was as follows:—I have come to the conclusion that the Court of Admiralty has, in a cause of wages, jurisdiction to entertain a claim for compensation for wrongful discharge of a seaman during the term of his engagement, the amount of compensation to be assessed upon consideration of all the circumstances of the case, and therefore reject the defts.' motion to strike out so much of the petition and schedules thereto as relate to the claim of the plts. for damage by reason of the alleged breach of contract by the defts. If the case proceeds to a hearing, and the allegation in the petition be proved, the amount of compensation must be referred to the registrar and merchants.

Attorneys for plts. *Nethersole and Speechly*, for J. W. Carr, Liverpool.

Attorneys for defts. *Marshall, Westall, and Roberts*.

Tuesday, Nov. 5, 1867.

THE JEFF DAVIS.

Proctors' lien—Garnishee order—Priority—23 & 24 Vict. c. 127, s. 28.

Where proceeds are in court, this court is competent to take notice of a previous lien after a garnishee order has been obtained:

Semble. This power is within the ordinary jurisdiction of the court independently of the operation of the 23 & 24 Vict. c. 127, s. 28.

The Jeff Davis had been sold, and the proceeds were in the registry. In a master's suit a decree had been obtained for 105*l.* 6*s.* 11*d.*, but without costs. Subsequently a garnishee order was obtained from the Court of Ex. attaching this sum.

Pritchard having moved for an order of payment thereof,

Clarkson, for Messrs. Toller and Co., proctors, contended that this order should issue subject to the proctors' lien for costs, according to ordinary practice, and to the Solicitors Act (the 23 & 24 Vict. c. 127), a proctor has an absolute lien on the property recovered through his instrumentality:

The Philippine, 16 L. T. Rep. N. S. 34; L. Rep., 1 Adm. 809;

The Sobolowsky, 15 L. T. Rep. N. S. 393; L. Rep., 1 Adm. 298;

The Araminta, 4 W. Rob. 396, Swa. 81; 24 L. T. Rep. 43, 26;

Pritchard, contra.—The question resolves itself into one of priority between a garnishee order and a proctor's claim. The proctor has not taken action in proper time; he had notice of the intention of applying for the garnishee order, and ought to have appeared and asserted his claim. This court cannot review a garnishee order:

The Olive, Swa. 423; 30 L. T. Rep. 220;

Clarkson in reply.—In the case of the *Olive* the garnishee order had actually been paid, the mortgagees in whose hands the funds in question were, had paid them over to the judgment-creditors: the proctor had full notice of all the proceedings, and subsequently tried to obtain repayment of his costs at the hands of the mortgagees. That case is perfectly distinguishable from the present; in this case it is true that the proctor also had notice to defend his lien, but here there was no necessity, for the funds were in the hands of the court, whose officer he is.

Sir R. PHILLIMORE.—It has been contended that this court has no power to take notice of a previous lien after the obtaining of a garnishee order. Now the Solicitors Act gives an absolute lien to a proctor on the property recovered through him, and by this Act I am bound to decide in favour of his lien, notwithstanding the garnishee order. However, independently of that statute, I think it is clearly within the competence of this court to give directions that the proctor's lien be discharged before payment out of court of funds in its hands; the garnishee cannot be in a better position than the person he represents, who could not have got the money out without payment of the proctor's fees. I therefore order payment to the garnishee of the balance after the satisfaction of the proctor's lien. The costs of the present motion to come out of the funds.

Proctors: *Neal and Philpott; Nelson and Son; and Toller and Sons*.

Nov. 9 and 12, 1867.

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Salvage—25 & 26 Vict. c. 63, s. 33.

This section does not debar the innocent sufferer in a collision from salvage reward for services subsequently rendered to the other party to the collision.

The case of a towing ship is not a casus omissus from the statute, and where

The tug of the vessel declared not to blame in a collision, rendered salvage services to the wrongdoer, it was

Held, that this section did not affect the right of the tug to salvage reward.

This was a cause of salvage brought by the steam-tug *Retriever* against the steamer *Queen*, under the following circumstances:—

It appeared that the *Retriever* had, on the 14th Dec. last, been towing a vessel called the *Hannibal*, when a collision took place between the *Hannibal* and the *Queen*. After the *Hannibal* was towed clear the *Retriever* went to the assistance of the *Queen*, and towed her into Liverpool, a distance of about eleven miles from the place of the collision. A cause of damage had been brought by the *Queen* against the *Hannibal* in this court, and heard immediately before the present suit, when the *Queen* was held solely to blame.

Brett, Q. C. and *V. Lushington* for plts.

Dr. Deane, Q. C. and *Butt* for defts.

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Nov. 12.—Sir R. PHILLIMORE.—The *Retriever* now appears in court as a salvor, and claims salvage remuneration for the services to the *Queen*. I put the question to the Trinity masters as to whether the *Queen*, her cargo, or her crew, were in danger, and they replied that there was danger, but not great danger, to the *Queen*. It occurred to me, however, that previously to determining whether any and what salvage was due to the *Retriever*, there arose a question whether, under the particular provisions contained in 25 & 26 Vict. c. 63, s. 33, the rendering of salvage in this instance had not been taken out of the category of a voluntary service, and become the mere discharge of a positive duty cast by the statute upon the salvor, for the neglect of which he would have been punishable. As the interpretation of this clause had not been the subject of any judicial decision, I deferred my judgment on it until this morning. This clause was, as is well known, introduced into the statute by Lord Kingsdown, a name never to be mentioned by me without a feeling of the deepest respect for one of the wisest, most able, and most upright who ever administered justice in this or in any other country. He introduced it in consequence of some case which came within his cognisance while sitting in the Judicial Committee of the Privy Council. It was a case in which, after a collision, one ship had sailed away and left the other to perish. The clear object of the clause is to visit with deserved penalty and punishment such a transgressor. It could not have been the intention of the framer of the clause to prevent a vessel which had been an innocent sufferer from obtaining a salvage reward in this court to which, in the ordinary principles of law, it would have been entitled, because this vessel had been injured in the collision which preceded and rendered necessary salvage services. In this case the tug itself did not come into collision, but the ship which it towed, and it has been argued that the case of a towing ship is a *casus omnisus* from the statute; but I am not of that opinion. I think the *Retriever* is entitled to salvage remuneration, but having regard to all the circumstances, to one of very moderate amount. I award 40% with the usual costs.

Proctors for the *Retriever*, Gregory and Co.

Proctors for the *Queen*, Jennings and Son.

Nov. 5 and Dec. 7, 1867.

THE HALLEY.

The lex fori—The lex loci—Pilotage compulsory by foreign law.

Where a tort has been committed abroad, and redress is sought in this country, the *lex fori* will regulate the procedure and the form of the remedy alone, the *lex loci delicti commissi* will govern the case and the nature of remedy itself, unless it be prevented by its repugnance to natural justice or public policy.

And where a collision took place in foreign waters between an English and a foreign ship, and it appeared from the pleadings that pilotage was compulsory by Belgian or Dutch law, but that the owner was not relieved from his responsibility by having given the sole charge of the vessel to a duly licensed pilot, it was

Held that the case was governed by the *lex loci*, and that the deflt. (the English ship) was liable for the damage.

The *Milford* and the *Jonathan Goodhue* dissented from.

The *Amalia* distinguished.

Brett, Q. C. and Cohen, in support of the motion.

Manisty, Q. C. and Clarkson, contra.

This case arose out of a collision which had taken place in January last in Flushing Roads in the Scheldt between the British steamer *Halley* and the Norwegian barque *Napoleon*. The 11th article of the defts.' answer to the charge contained in the petition alleged that they had on board a pilot by compulsion of law, who was in charge of the vessel, and whom they had no power of selecting. The plts.' reply alleged that by the laws in force at the time and place, the owners of the vessel doing damage are liable for it, though the statement in the 11th article of the defts.' answer be true.

The case was now argued on a motion to reject the 3rd article of the reply.

Brett, Q. C.—This is an objection to the 3rd article of the plts.' reply in the nature of a demurrer, that is to say, we contend that even if the facts be true they are no answer to the plea. This is a petition in a case of collision between an English and foreign ship; the answer is that there was a compulsory pilot on board, and the reply is that the owners are liable even though a compulsory pilot was on board, and the damage caused solely by the pilot. The point raised is a very important one. The question is, whether the *lex fori* must govern the case or not. No English court administers foreign law. Part of the general maritime law of other countries has been adopted into the English law, but our courts do not administer the statute law of any other country. This collision occurred in waters where it was either governed by Belgian or Dutch law. The English law in this case is clear, its principles are clear and well established, damage has been done to the plts. by the negligence of an individual, namely, the pilot; according to English law he is responsible, but another is also or may be liable; that is the person who stands in the position of his master. It is not a case of principal and agent, but of master and servant and where the master is liable for the tortious act of his servant. It is sufficient for me now to say that a pilot who has a right to take command of a ship is not a servant of the owner of the ship. The owner may prevent the pilot coming on board, but if he does, he is subject to a penalty. He must take one for whom he has not sent, and he is not liable for his negligence. According to common law principles the deflt. is not liable when the pilotage is compulsory, and there is no remedy for negligence unless it can be proved that the person whose negligence caused the damage was the servant of the owners of the vessel. The question comes to this, what remedy does the English law give? That remedy is the very essence of the *lex fori*. The English law does not take notice of foreign laws. If there be a contract brought forward it is construed according to the law where made: but that construction is not a remedy. You have no question of remedy till you construe the contract. The remedy is the remedy of the *lex fori*. This is the offspring of another principle of English law, the principle of construing a contract according to the intention of the parties. In the case of a custom you take the custom into account, because of the intention of the parties to be governed by the custom. That a contract then is construed according to the *lex loci* is out of no deference to the laws of the foreign country, but to carry out the intention of the parties according to an established principle of English law. [The Court.—In the case of domicile we are obliged to take into consideration foreign law.] Domicile also becomes a question of intention. We look at the circumstances under which the parties acted. The English law adopts the foreign law as evidence of the intention of the parties, the moment that purpose is fulfilled, English law takes no further notice of the foreign law. [The Court.—

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In cases of intestacy abroad, the English courts admit the foreign law in the distribution of the property.] In case of intestacy abroad you may suppose that it was the intention of the party that his property should be distributed according to the law of the country where he died. If he made a will abroad it would be with the intention it should be carried out according to the law of the country he resided in at the time of his death. The English law gives a remedy only if it is shown that the negligence was that of the defts.' servant. If that is not shown English law gives no redress. I add the question whether the pilot is compulsory or not, is entirely a question of fact. That fact is decided by another fact, namely, under what law he came on board. All you can look at the foreign law for, is to see whether the pilotage was compulsory or not. That fact ascertained, you can make no further use of the foreign law. In this case of compulsory pilotage the want of remedy does not depend on the English statute, it depends on this: that the plt. fails in showing that the pilot was the servant of the party aggrieved:

The Maria, 1 Wm. Rob. 95, 101;

The Annapolis, 1 Lush. 355; 5 L. T. Rep. N. S. 38, 326, 692;

The Vernon, 1 Wm. Rob. 317;

Cohen.—Where the relation of master and servant does not exist, there is no responsibility: (*Reedie v. London and North-Western Railway Company*, 4 Ex. 250; *Story on Agency*, ss. 458 b and 456 a.) This liability cannot apply to a case like the present. No one is liable for the act of another in his service when he has not had the power of selecting himself. It is the general maritime law which this court has here to administer. According to its principles it is clear that the defts. are not liable. The defts. have violated no Belgian law. It was only when this suit was instituted, and that here, and not there, that Belgian law was violated. Again, there has always been a great distinction drawn by jurists between contracts and torts. In cases of tort, you must always look to the *lex fori*. According to the best authorities when an action is brought for a tort you must administer the *lex fori*. There never has been a case in which it has been held that where a tort has been committed abroad, which is so by foreign law, and is not so by English law, that an action can be maintained here. The learned counsel, in the course of his argument, referred to

The Hamburg, 1 Brow & Lush;

Phillimore's International Law, vol. 4, p. 581;

The Peerless, Lush. 30, 103; 2 L. T. Rep. N. S. 25; 3 L. T. Rep. N. S. 125;

The Diana, Lush. 539; 7 L. T. Rep. N. S. 257, 397;

Savigny's Roman Law, vol. 8, sect. 37;

Scott v. St. Mour, 32 L. J. 61, Ex.; 6 L. T. Rep. N. S. 607; 8 L. T. Rep. N. S. 511; 81 L. J. 457, Ex.

Manisty, Q. C. contra.—This is a case of a foreign ship seeking compensation against a British. *Prima facie* the injured vessel has a right to recover anywhere; but in this country and others there are certain laws by which a shipowner is compelled in certain districts to place his ship under the care of a pilot. The common law is no doubt this: if I am prevented from selecting my servant or agent, my responsibility is taken away; but here the law which imposes the duty does not take away the obligation, but expressly enacts that that obligation shall continue. At common law there is no obligation to take on board a pilot. If this collision had taken place in British waters, no difficulty could have arisen at all. It has been contended that there was no violation of Belgian law. Can my learned friends contend that if one vessel ran down another in this very river that that would not be, apart from the question of pilotage, a violation of Belgian law?

Assuredly it would be so. The relation here between the owner and pilot, by statute, is the ordinary relation of master and servant. The maxim, then, *qui facit per alium facit per se* applies. If we take into consideration the whole Belgian law, the defts. are liable; are we to take only part and leave the rest? My learned friends seek to confound the right and the remedy; the *lex loci* governs the right, the *lex fori* governs the procedure by which that right is vindicated. In a sense that is the remedy; for the term remedy as used does not mean the compensation, but rather the procedure. Let us look at *Campbell v. Sewell* (5 H. & N. 728, Ex. Ch., and in the court below, 3 H. & N. 617.) It is most important to see the true principles on which this case was decided. The captain of a vessel having taken on himself to sell goods to a purchaser in Norway, who would have a good title to them according to Norwegian law, he was allowed to retain them by our law, according to which he had no title to them. The principle is exactly the same, whether it be a question of tort or of contract. Transitory actions that arise abroad, in the adjudicating upon them will be governed by the law of the country in which they arose. [By the Court.—Suppose a Belgian brought an action against an Englishman in this country for driving his carriage against him there, if that was wrong there and not here, would the Belgian get damages?] He would. [By the Court.—Must the same redress be given there as here?] Yes, that would be the proper course. If a good cause of action of a transitory nature arises abroad, the aggrieved party ought to recover here, and the Court in which the action is brought ought to administer the law in the same way as where the cause of action arises.

Scott v. St. Mour, supra;

Story on Agency, 456;

Moelyn v. Fabrigas, 1 Sm. L. C. 621, and note;

Donne v. Lipman, 5 Cl. & F. 1.

Clarkson.—The first point to be considered is, in transitory actions, what are the rights of a foreign nation when ships of another country are within its jurisdiction? It is competent for such foreign country to declare that such ships shall be in charge of a pilot, but under certain terms and conditions, e.g. that there shall be constituted between the owner and pilot the relation of master and servant. There is, however, another way of viewing this case. This is a question of lien. The lien is a qualified property vested in the plt., which he comes to this court to enforce. Before the Act of 1861 this court had not the power in cases like the present to enforce the lien. The foundation of the action in *rem* is the lien, and that lien accrued the moment that the collision happened. The plts. having acquired a lien there at the time of the collision, by the *lex loci* are entitled to enforce that lien here.

Cammell v. Sewell (supra);

Smith v. Condry, 1 Howard's U. S. Rep. 128;

Cope v. Doherty, 4 K. & J. 367;

The Saxonia, Lush. 410; 6 L. T. Rep. N. S. 6;

The Zollverein, Swa. 96; 27 L. T. Rep. 160.

Brett, Q. C. in reply.—The whole argument depends on the proposition of Mr. Manisty that, where in a foreign country there is a wrong and a remedy, and the action is transitory, that cause of action can be enforced in any other country. By what law is this so? It is not so by the law of England. Is it by the law of nations? No authority has been cited to show the truth of this proposition according to either. If it is so according to the law of nations, municipal law cannot get rid of it. In the *Amalia*, if that proposition were true, the foreign ship having suffered wrong her own country's law would have given a remedy, and hence a vested right in a

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cause of action that ought to have been enforced by the law of nations, and this country had no right to pass an Act of Parliament limiting the remedy in particular cases. Again, you may have that which would give rise to a cause of action abroad, and would not do so here. For example, in the case of adultery in Holland, an English court could only administer English law. In cases of tort, the right and remedy are the same thing. The whole question comes to this, is the remedy part of the procedure? The cause of action must be looked at with regard to the law of both countries, for there may be Acts which could support a cause of action in one country and which in another could not. In cases of contract, the cause of action is the breach; in tort, it is the injury. What right does this give you? A right to a remedy. What is that remedy? The judgment of a court of law. What is the judgment that court gives? It is part of the procedure of the court.

Cur. adv. vult.

Dec. 7.—Sir R. PHILLIMORE.—In this case the owner of a Norwegian vessel has brought an action against the owner of an English vessel for damage done to the Norwegian ship in the territory of Belgium. One of the functions, and not the least important, of the High Court of Admiralty is to administer international justice in maritime suits between foreigners who resort to its jurisdiction, or, as in the present instance, between the foreigner and the British subject. The prize jurisdiction of this court administers the *jus inter gentes*, or public international law, and what is called the instance jurisdiction administers the *jus gentium*, or private international law. In order to attain this end the rules of pleading, and the general mode of investigating and trying the merits of such cases when they come before it, are simple, free from technicality, and calculated to do substantial justice. In this court, as Sir J. Nicholl observes in the *Girolamo*, 3 Hagg. Rep. 177, "the law maritime according to the law of nations is to be administered;" and again he says (p. 189) it "is governed by the rules" (he is not speaking of the prize court) "of international law." To the same effect in the *Zollverein*, 1 Swab. p. 99, Dr Lushington, in the case of a collision between a British and foreign vessel, says, "The case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place." And in the *Golubchick*, 1 W. Rob. p. 147, he says, "Upon general principles I apprehend that this court, administering, as it does, a part of the maritime law of the world, would have a right to interpose in cases of the present description." If, therefore, this collision had taken place upon the high seas it must upon general principles, have been adjudicated according to the *lex maris*. The petition of the plt. in this cause sets forth that the Norwegian barque *Napoleon*, of the burthen of 740 tons, while riding at anchor in Flushing Roads, in the month of January of this year, was run into by the British steamship *Halley*, and thereby suffered considerable damage. In their answer to this charge contained in the petition, the defts., the owners of the *Halley* state that by "the Belgian or Dutch laws, which prevail in and over the river Scheldt, and to which the said river is subject, from the place where the said river pilot came on board the *Halley*, and thence up to and beyond the place of the aforesaid collision, it was compulsory on the said steamer to take on board and to be navigated under the directions and in charge of a pilot, duly appointed or licensed according to the said laws, and it was by virtue of such laws" (the words are not unimportant) "that the *Halley* was compelled to take on board and to be given in charge, and until the time of the said

collision as aforesaid to remain in charge of, and did take on board, and was given in charge, and up to the time of the said collision remained in charge of the said river pilot, who was duly appointed or licensed according to the said laws, and whom the defts. or their agents did not select, and had no power of selecting." To this defence the owners of the *Napoleon* reply as follows: "That by the Belgian or Dutch laws in force at the time and place of the said collision, the owners of a ship which has done damage to another ship by collision are liable to pay and make good to the owners of such lastly-mentioned ship all losses occasioned to them by reason of such collision, notwithstanding that the ship which has done such damage was, at the time of the doing thereof, being navigated under the direction and in charge of a pilot duly appointed or licensed according to the said laws, and notwithstanding that such damage was solely occasioned by the negligence, default, or want of skill of such pilot, without any contributory negligence on the part of the master or crew of such lastly-mentioned ship, and notwithstanding that it was, at the time and place of the collision, by the said laws compulsory on such lastly-mentioned ship to be navigated under the direction and in charge of such pilot; and the defts., the owners of the *Halley*, are by virtue of the said laws liable to pay and make good to the plts. all losses occasioned to them by the said collision, even if the statements contained in the 11th article of the said answer be true." The admission of this plea is objected to by the owners of the *Halley* upon the ground that the law of England alone governs this case. On this subject elaborate arguments have been addressed to the court by the counsel for both parties. The point, it is said, has never before been raised, and I have now to give judgment upon it. The claim of the petitioner in this case is founded, according to the Norman language of our common law, upon a tort committed by the deft.; according to the language of jurisprudence, familiar to this court, upon an *obligatio ex maleficio*, or as it is more generally, though perhaps less accurately, termed, an *obligatio ex delicto*, incurred by the deft. "*Res sic habet*," Donellus says, "*ut omne delictum est malefium, ita non ex quovis delicto nascatur obligatio sed solum ex maleficio*" (Donellus l. xv. c. 23). In the case before me this tort was committed, or this *obligatio* was incurred, in the territory of a foreign state. I think it expedient therefore to dwell for a moment on the peculiar character of this *obligatio*, with the reasoning upon which my judgment is in some measure connected. According to the Roman law, which on this subject has been generally adopted by continental Europe, the facts which give rise to a legal obligation are said to be four—*contractus*, *quasi contractus*, *malefium*, *quasi malefium*. The two former create an obligation with the consent of the obliged person (*obligatus*); the two latter without his consent. It is with the third alone with which we are at present concerned; namely, *obligatio ex maleficio*, or *delicto*, for it is not necessary to consider the distinction between this and the *obligatio ex quasi delicto*. Delictum (Donellus says, with his usual accuracy and perspicuity), "*Id est factum id, quo nocetur alteri, jure ita coarctetur, ut sarciat alteri quod abstulit*" (l. xii. c. 5). *Ex tali culpa*" (that is *maleficio*). Grotius says, "*obligatio naturaliter oritur, si damnum datum est, nempe ut id resarciatur*" (De Jure Belli et Pacis, l. ii. c. xvii. s. 1). This is in truth the language of natural justice. The form of remedy under the Roman law was supplied by the "*Lex Aquilia*." The passage in the Digest upon this very subject of collision at sea contains (as so many other passages in that repertory of jurisprudence do) the written equity which the reason of the thing requires. "*Si nave*

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tua impacta in meam scapham, damnum mihi dedit, quæsitum est, quæ actio mihi competerit? Et ait Proculus, si in potestate nautarum fuit, ne id acciderit et culpa eorum factum sit, lege Aquilia cum nautis agendum: quia parvi refert navem immittendo, aut serraculum ad navem ducendo, an tuâ manu damnum dederis; quia omnibus his modis per te damno afficior; sed si fune rupto, aut, cum a nullo regeretur navis incurrisset, cum domino agendum non esse." (Dig. L. ix. Tit. ii. 29, 2.) According to the principles of natural justice, the wrong-doer to this Norwegian vessel is bound to replace her owner in the position in which he was before the wrong was done; the owner is entitled to what civilians call a *restitutio in integrum*. I gladly avail myself of Dr. Lushington's language in this matter, in a case in which he distinguishes (speaking of the duty of the registrar and merchants, as referees of the High Court of Admiralty) between cases of collision and cases of insurance. "One," he says (the *Gazette*, 2 W. Rob. Adm. Rep. 280), "of the principal and most important objections to the report under consideration is this, that the registrar and merchants, in fixing the amount to be paid for repairs, and the supply of new articles in lieu of those which have been damaged or destroyed, have deducted one-third from the full amount which such repairs and new articles would cost. This deduction, it is said, has been made in consideration of new materials being substituted for old, and is justified upon the principle of a rule which is alleged to be invariably adopted in cases of insurance. The first question then which I have to consider is the applicability of the rule in question to a case of the present description; and this question, it is obvious, involves a principle of considerable importance, not only as regards the decision in this particular case, but as establishing a rule for assessing the damages in all other similar cases. Now in my apprehension a material distinction exists between cases of insurance and cases of damage by collision, and for the following reasons." And then the learned judge explains the nature of an insurance contract, and he continues, "With regard to cases of collision, it is to be observed that they stand upon a totally different footing. The claim of the suffering party who has sustained the damage arises not *ex contractu*, but *ex delicto* of the party by whom the damage has been done; and the measure of the indemnification is not limited by the terms of any contract, but is co-extensive with the amount of the damage. The right against the wrong-doer is for a *restitutio in integrum*, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur), the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party, and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification, without exposing him to some loss or burthen which the law will not place upon him." Again in the case of the *Amalia* (1 Brow. & Lush, 152) the same learned judge says, "The principle of limited liability" (and in this case it is contended that the liability of the British owner is taken away altogether) "is that full indemnity, the natural rights of justice, shall be abridged for political reasons." This is a subject to which I must again advert in another part of my judgment. At present it is enough to say that the dictates of natural justice appear to be in favour of the petition of the Norwegian vessel in this case, which prays this court to cause the British vessel, the wrong-doer, to make that reparation for wrong done by her which

the *lex loci commissi delicti*, had the suit been brought in a Belgian court, would have enforced. It is, however, contended on behalf of the British vessel that this court cannot apply this law to this case; that it must, partially at least (the importance of this qualification will be presently seen), disregard the law of the place in which the wrong was done, and apply that of the place in which the action for redress is brought; that, in other words, the *lex fori*, and not the *lex loci commissi delicti*, governs this case. If this be so, the foreign owner will obtain, practically speaking, no compensation for the wrong done to his vessel by the British ship, the owner of which will practically escape altogether unscathed. It is not, therefore, too much to say that the arguments and the precedents which are brought forward in favour of such a result must be narrowly examined and carefully scanned. It certainly may be that the hands of the court are tied by municipal law, and prevented from administering the relief which, upon general grounds, it must desire to administer to the petitioner in this case. I now proceed to examine the reasoning and authorities which have been advanced in support of this proposition. The contention on the part of the British owner is that the *lex fori* must govern this case not because that law is made binding on the court, as in the case of the *Amalia*, by a British statute, but because it is made binding on the court by an established principle of law, which is to be collected from judicial decisions and the dicta of accredited writers. It is contended then that this question belongs to the domain of the *lex fori*, inasmuch as it is a question relating to the remedy, and not to the right, of the party suing. It becomes important to see what authority, in principle or precedent, there is for this proposition. It is well settled by decisions of the tribunals of this country that all which relates to the form of the remedy, and the mode of enforcing it, all that relates to the conduct of the suit in court, the rules of evidence and to procedure, shall be governed by the *lex fori*. Indeed, it is a well-established rule of international comity, as old, certainly, as the time of Bartolus, that "de his quæ pertinent ad litem ordinationem inspicitur locus iudicii." But to the further proposition, namely, that the nature and character of the remedy itself—for instance, the measure of civil damages for a breach of contract, or for the non-fulfilment of any legal obligation—is to be regulated by that law, I cannot assent. I am not aware of any direct authority for it; certainly it cannot, in my opinion, be maintained upon principle; and so far as the analogy of the obligation arising from contract applies to this case of *obligatio ex delicto*, the judicial precedents which I have been able to find are adverse to this proposition. Mr. Justice Washington, in a judgment delivered in the District Court of Pennsylvania, observes (Peter's Circuit Court Reports, p. 230), "The rate of damages to be recovered for a breach of contract is a part of the right to which the injured party is entitled, and it is totally distinct from the remedy provided for enforcing it. In the former case the *lex loci*, where the contract was made or broken, is to prevail; in the latter, the *lex loci* of the *forum*, where the remedy is provided." The same learned judge, in an earlier and very singular case (*Courtois v. Carpentier*, 1 Washington's Am. Rep. p. 377), laid down the same principle. It was an action in the Pennsylvanian Court, on a note payable in sugar, and given in Guadeloupe, where a particular custom prevails in relation to the payment of such notes in sugar. Mr. Justice Washington said, "The laws of the country where this contract was made must govern. These notes were payable in Guadeloupe, in sugar, at a valuation. The debt, having sued here, cannot complain, if his situation is not made worse than

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it would have been in Guadeloupe. But as according to our forms of proceeding (and as to them the laws of the country must govern) a judgment cannot be rendered for sugar, the value in money must be given, which, in effect, is the precise sum stated in the note." Mr. Justice Story refers to these and to other American, as well as some English, cases in the following paragraph (Story's Conflict of Laws, c. 8, s. 307):—"Analogous to the rule respecting interest would seem to be the rule of damages in cases of contract, where damages are to be recovered for a breach thereof *ex mora*, or where the right to damages arises *ex delicto*, from some wrong or injury done to personal property. Thus, if a ship should be illegally or tortiously converted in the East Indies by a party, the interest there will be allowed by way of damages in a suit against him. So the rate of damages on a dishonoured bill of exchange will be according to the *lex loci contractus* of the particular party. So, if a bill of exchange be made in one state and indorsed in another state, and again endorsed by a second endorser in a third state, the rate of damages upon the dishonour of the bill will be against each party according to the law of the place where his own contract had its origin, either by making or by endorsing the bill. So, if a note made in a foreign country is for the payment of a certain sum in sugar, and by the custom of that place the like notes are payable in sugar at a valuation, the law of the place is to govern in assessing the damages for a breach thereof." In the case of the *Zollverein* (Swa. 98), Dr. Lushington observed, "The principle which governs all these questions of jurisdiction and remedies is admirably stated by Story, J. (Conflict of Laws, c. 14), 'In regard to the rights and merits involved in actions, the law of the place where they originated is to be followed; but the forms of remedies' (it is important to observe these words), 'and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act.' And in another part of his judgment he says, 'Generally, when a collision takes place between a British and foreign vessel on the high seas, what law shall a Court of Admiralty follow? As regards the foreign ship, for her owner cannot be supposed to know or to be bound by the municipal law of the country, the case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place; if the foreigner comes before the tribunals of this country, the remedy and form of proceeding must be according to the *lex fori*.' It is to be observed here that the learned judge is reported as having used the expressions 'the remedy and form of proceeding must be according to the *lex fori*,' but I think that if these words be correctly reported there must be an unintentional error in the language of the learned judge, who must have meant to say 'the form of remedy and of proceeding,' an alteration which brings these words and the judgment in harmony with the previous citation from Story, on which indeed it was mainly founded. I must not, however, pass by two judgments of my immediate predecessor in this chair, to which I drew the attention of counsel, because they may be fairly cited by the defts. as favourable to the position for which they contend. They are, in fact, the converse of the present case. In them the judge decided that the *lex fori*, where more favourable to the foreign suitor than the *lex loci contractus*, should be administered. In the case of the *Milford* the question as to the application of sect. 191 of the Merchant Shipping Act 1854, to the suit of a foreign master against the freight for wages arose,

and the court observed as follows (Swa. 367):—"There are no negative words which tend to show that the court should not apply sect. 191 to foreign masters and seamen. As there are no such words, is it consistent with justice that the court should hold its hand in all these matters, and say that as to foreign masters it will impose a restriction not found in the statute? I think I am bound to apply the remedy given by the statute. In the case of the *Jonathan Goodhue* (Swa. 526) Dr. Lushington remarked, 'When this case was first brought before the court, it was said that the American law would exclude the master from the benefit of the statute,—that it was a legal incident of the contract that the master should have no lien on either ship or freight for wages or advances. But pending that question, the court decided in the case of the *Milford*, that the remedy must follow the *lex fori*, and that a foreign master was entitled to the same remedy against ship and freight as a British master. I adhere to that judgment, though I repeat what I then said, that it was a case of great doubt and difficulty.' I must say that the reasoning of the learned judge which led to the decisions in these cases was never satisfactory to my mind, and I am glad to learn that in a more recent case mentioned to me by Mr. Clarkson (*The Sylphide*), the learned judge expressed himself willing to reconsider the principle of these decisions. It is to be observed also that they rested in great measure upon the construction of a British statute, and in the present case we have no statute to consider. With respect to the application of the *lex fori* to this case, an observation of some importance arises out of the special character of the law itself. The *lex fori* in this instance is founded, as Lord Stowell observed in the *Carl Johann* (1 Hagg. Adm. 113), upon considerations of domestic policy. The English Legislature has thought it expedient that only certain persons under certain restrictions shall be allowed to act as pilots in certain British waters, and that it shall be compulsory upon all masters of ships to place the navigation of their vessel while passing through these waters under the control of one of these licensed pilots. And the common law of England has ruled that in such cases the natural responsibility of the owner of the vessel for injuries done to the property or persons of others by the unskilful navigation of that vessel shall cease and be transferred to the pilot. This law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant, and gives him orders which he is bound to obey, and that the acts of the servant so far as the interests of third parties are concerned, must always be considered as the acts of the owner. No such presumptions, it is said, exist in the case of compulsory pilotage, in which the State forces its own servant upon the owner, and indeed to some extent reverses the usual order of things on board ship by rendering it incumbent on the master to obey the orders of the pilot. But the considerations of domestic policy which have created this peculiar law are not founded on principles of universal law or natural justice. They are considerations of British policy, which apply to British waters and territory, but not to the Flushing Roads in which this collision took place. In the earlier part of this judgment I said that natural justice appeared to favour the admission of the plt.'s reply in this case. I must here observe that it has not been argued before me that the Belgian law is contrary to natural justice, and therefore one which falls under a well-known category of exception to the general rule of international private law, according to which one state accepts in cases of contract the law of another state. It has not been so argued, and in my opinion such an argument could not be success-

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fully maintained. To say to the innocent owner of a ship which the unskilful navigation has damaged, perhaps destroyed, "you cannot recover any damages from me, because I had a pilot on board, and I obeyed his orders. You may bring your action against the pilot, from whom you cannot obtain any substantial redress,"—to say this is surely not to speak the language of natural justice. Should the innocent sufferer reply, "that if the State chooses to compel you to employ an officer of its own, it is no reason why a third person, no party to this arrangement, should suffer a grievous wrong without redress. It may be a reason why you should have an action against the pilot, or why the State should combine with the measure for your exemption from a natural liability, some measure for the reparation of the innocent sufferer; but this is a matter with which he is not concerned. He has a right to compensation,"—this would be a reply entitled to a hearing surely in any court desirous to adjudicate upon the case according to the ordinary principles of justice. Lord Stowell's mind, furnished as it was with the principles of jurisprudence, naturally rejected the argument for the immunity of the wrong-doing vessel. In the case of the *Neptune the Second* (1 Dod. 467), he said, "It is acknowledged in this case that the damage was done by the ship proceeded against; but it has been set up, in the way of excuse, that she was at the time under the care of a regular pilot, and was acting in obedience to his directions; and it has been contended in the argument that the pilot alone is answerable for any damage that may have been sustained in consequence of the mismanagement of the vessel. If the position could be maintained, that the mere fact of having a pilot on board, and acting in obedience to his directions, would discharge the owners from responsibility, I am of opinion that they would stand excused in the present case; for I think it is sufficiently established in proof that the master acted throughout in conformity to the directions of the pilot. But this, I conceive" (says this great master of jurisprudence), "is not the true rule of law. The parties who suffer are entitled to have their remedy against the vessel that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had, for compensation. The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount as well as they can against him. It cannot be maintained that the circumstances of having a pilot on board, and acting in conformity to his directions, can operate as a discharge of the responsibility of the owners." I will frankly say that it appears to me difficult to reconcile the claims of natural justice with the law which exempts the owner, who has a licensed pilot on board, from all liability for the injuries done, by the bad navigation of his ship to the property of an innocent owner. *Obligatio* is (according to the admirable definition in the Institutes) "*vinculum juris quo necessitate astringimur alicujus rei solvendæ*;" it is *lien de droit*, as the French say. No one acquainted with the working of this law, which exempts the wrong-doing vessel from liability in this court, can be ignorant that it is fruitful in injustice. On the one hand the master is tempted to abstain from all control over his vessel, lest he should afford grounds for the argument that by interference with the pilot he has deprived himself of the legal immunity which he would otherwise enjoy. On the other hand it is obvious that great inducements may be offered to the pilot to shield the incapacity or mismanagement of the master and his officers by taking all the blame upon himself. It is true that by so doing he may subject himself to censure and punishment from the *Triumvir* House. Certainly in

cases where the evidence clearly established very gross negligence or want of skill on his part, such would be the result; but the greater number of cases are not of this extreme description. It is impossible to doubt that an owner who, as in a recent case before me, would, but for the fact of having a licensed pilot on board, have been compelled to pay perhaps 25,000*l.* to the ship which he had sunk, lies under a very strong temptation to take whatever measures may be necessary to obtain the two necessary statements of the pilot; namely, first, that he alone had the management of the vessel; and, secondly, that his orders were obeyed; the two stereotyped questions necessarily and invariably put to the pilot by those who conduct the defence of the wrong-doing vessel. Again, I cannot help thinking that the doctrine, so clearly explained by Lord Cranworth, in *Reedie v. London and North-Western Railway* 4 Ex. Rep. 255, of the owner being responsible only for the acts of his own servant, has been somewhat strained in its application to the case of the licensed pilot. I do not quite understand why, because the State insists, on the one hand, upon all persons who exercise the office of pilot within certain districts being duly educated for the purpose and having a certificate of their fitness, and insists, on the other hand, that the master shall within these districts take one of these persons on board to superintend the steering of his vessel, the usual relation of owner and servant is to be entirely at an end; and still less do I see why the sufferer is to be deprived of all practical redress for injuries inflicted upon him by the ship which such a pilot navigates. If compulsory pilotage be at all expedient, a question open to very considerable doubt, it seems to me more just that the master of the wrong-doing ship should be left to his action against the pilot who has badly navigated her, than that the owner of the injured ship should be placed in that predicament. I incline to the opinion that the Belgian law, as it appears in these pleadings, is more consonant with natural justice than our own on this subject. Be this, however as it may, it has not, I repeat, been argued that the Belgian law is inadmissible here, because it is at variance with natural justice, and if such an argument had been advanced, I should have expressed my dissent from it. Having regard then to the fact that the *lex fori* is founded upon special considerations of public policy applicable only to British territory, and that the admission of the foreign law, the *lex loci delicti commissi*, to govern this case is not prevented by reason of its repugnance to natural justice or to public policy—if the question before me were as to the law which ought to govern the fulfilment of the obligation arising out of an ordinary contract made in Belgian territories, it could not, I think, be successfully contended that I ought to apply the English law to such case. To such a contract I might apply the principle of Lord Stowell's judgment in *Dalrymple v. Dalrymple* (2 Consist. Rep. 38), and adopting with a slight alteration his very words, say, "This contract being established in an English court must be adjudicated according to the principle of English law." But the only principle applicable to such a case by the law of England is, that the character of this obligation (the validity of Miss Gordon's marriage rights) Lord Stowell says must be tried according to the law of the country in which it had its origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Belgium.

A question, however, arises as to whether because in this case the obligation to pay damages arises, not, as in a case of contract, out of the free will of the obligor, but out of the order of the law consequent upon the wrongful act.

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of the obligor, the application of the principle ought to be different. Does it affect the principle upon which justice ought to be administered that the obligation arises out of a *delictum* and not out of a *contractus*? The authority of Savigny, which it was truly said would have great weight with me, is cited in favour of the application of the *lex fori* in such a case (Savigny, *System des R. R.* 8, 208, 278). The opinion of this most learned and admirable writer is that the law which prevails in the place in which a contract was intended to be fulfilled ought to be administered by the forum before which the fulfilment is sought to be enforced. He places the exceptions to this rule under two categories; it is only with the first that we are now concerned. Under this category of exceptions he ranges all cases in which the *lex loci* or the *lex loci solutionis* comes into conflict with what he calls a positive stringent law of the forum. Having laid down this principle he proceeds to place the *obligatio ex delicto* under it. The passages in which he does so are perhaps the least satisfactory in his work, and this particular branch of his subject is but cursorily treated. I think, however, that under this category of a positive stringent law, he did not intend to include such a law as the English law with respect to pilots and the irresponsibility of masters. He is not to be understood as saying that a *lex fori* which is founded exclusively on local considerations, should be applied to the transactions of a foreigner happening in a place to which these local considerations do not apply. But if he is to be so understood, if his proposition be unqualified and universal, it is opposed to the opinion of a great, I believe the greater, number of German jurists. Dr. Bar, the assessor to the Royal Court of Hanover, a jurist of eminence, expressing his dissent from the opinion of Savigny, lays down the contrary doctrine, and refers in a note to the opinion of many of his brother jurists, who are of the same opinion (Bar, *Das Internationale Privat und Strafrecht*, Hanover, 1862, pp. 66, 317, 437, 477). To these may be added John Voet, who says, "Ita quoque delinquens videtur tacite per delictum, velut contractum involuntarium esse obligasse ad talem pœnæ modum qualis præstitutus est per legem loci in quo delictum perpetravit." (L. 48, t. 19, xi.) It is well remarked by Savigny that in applying the principles with respect to the enforcement of the obligations which arise *ex contractu* to the obligations which arise *ex delicto*, some difficulty is caused by the peculiar character of the latter obligation, inasmuch as the enforcement of it borders very closely upon the administration of criminal law. Now it is a maxim of private international law, not indeed universally recognised, but I think firmly incorporated into the jurisprudence of this country, that the court of one state cannot be required to administer the criminal law of another. It is with the view of getting rid of any embarrassments created by this difficulty between the civil obligation and the punishment of the criminal offence, that eminent jurists have generally adopted the following distinction, which appears to me just and sound. The *obligatio ex delicto* may be followed by two distinct consequences—to make compensation in civil damages for the injury inflicted, and the liability to undergo a punishment, such as a penal fine or imprisonment, whether at the instance of the person injured, or by the intervention of a public officer of the State. "Eodem delicto et civilis persecutio ad penam privatam et iudicium publicum esse possit," J. Voet (L. 47, t. 1. 1.) says; and Donellus distinguishes between the civil action "*de privato damno et pecuniâ quam inde debitam actor prosequatur*," and "*quatenus de his agitur criminaliter ad penam et vindictam criminis*" (L. xvii. c. 16, *Comment. de jure civili*). To the same effect is the passage in the Institutes, L. 4, t. 4. It is with

the former consequence alone of the *delictum* that the forum of a foreign state can be properly concerned. I must now advert to the case of the *Amalia* decided in this court, and afterwards adjudicated upon by the Privy Council, which it is said renders it incumbent upon me to apply the *lex fori* to the present case. The *Amalia* was a cause in which the owners of a British steamship, the *Amalia*, petitioned this court for the purpose of obtaining a declaration of the limitation of their liability under sect. 54 of 25 & 26 Vict. c. 63, in respect of a collision which had taken place between that vessel and a Belgian steam vessel, the *Marie de Brabant*, in consequence of which the *Marie de Brabant*, with her cargo, was sunk and lost, and several of the crew drowned. The collision in question happened on the 15th May 1863 in the Mediterranean sea. When this case was before this court, Dr. Lushington observed (Brow. & Lush. 152), "the principle of limited liability is, that full indemnity, the natural right of justice, shall be abridged for political reasons." And further on he observes, "I have always recognised the full force of this objection, that the British Parliament has no proper authority to legislate for foreigners out of its jurisdiction. . . . Now fully recognising the force of this objection, I do not think it is removed by the ingenious suggestion that limited liability is a part of the *lex fori*." And here I may ask if the limitation of liability be not part of the *lex fori*, why should the exemption from all liability belong to that category? And Dr. Lushington then decided that the construction of the 54th section of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), which contained the words "the owners of any ship, whether British or foreign, shall not, &c.," related equally to British and foreign vessels, and that to the latter, in a British court, as well as the former must be applied the doctrine of limited liability. The Judicial Committee of the Privy Council upheld, not without doubt apparently, this decision. Lord Chelmsford, who delivered the judgment of their Lordships, observed (1 Moore, N. S., 484), "The apps. say that the moment a collision occurs there is a lien upon the vessel which is in fault, and supposing the vessel injured to be a foreign one, that the foreigner immediately acquires this lien to the extent of the damage, and cannot be deprived of it by the municipal law of this country. But suppose the foreigner, instead of proceeding *in rem* against the vessel, chooses to bring an action for damages in a court of law against the owners of the vessel occasioning the injury, the argument arising out of the acquired lien would be at once swept away, and the rights and liabilities of the parties be determined by the law which the court would be bound to administer. And it may be asked what breach of international law or interference with the natural rights of foreigners is produced by the Legislature saying that all suitors having recourse to our courts to obtain damages for an injury from a person not himself actually in fault, but being responsible for the acts of his servant, shall recover only to the value of the thing by which the loss or damage was occasioned, estimated in a particular manner. It is to be observed that under this view of the 54th section the foreigner will be entitled to the benefit of the Act, as well as the British owner of a ship occasioning damage, and he will, therefore, not be exposed to a more extensive liability than the British subject." It is not necessary for me to make any remark upon the reasoning by which their Lordships arrived at this conclusion. I may be permitted to observe, however, that the limitation of the owner's liability to the whole value of the vessel which did the damage, stands upon a very different footing with respect to the claims of natural justice, from the total exemption of the owner from all liability whatever for the

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act of his vessel. However this may be, the judgment in the *Amalia* does not appear to me to govern this case. The *res decisa* in the *Amalia* was that the 54th section of the Merchant Shipping Act must be held by a British court of justice to apply to a foreigner as well as a British vessel, although the collision had taken place between them upon the high seas. It was a decision upon the words of that statute, and so far it is binding upon this court. In no other way am I able to reconcile their Lordships' judgment in this case with the principles of their previous decision in the case of the *Bold Buccleugh*: (*Harmer v. Bell*, 7 Moo. 284.) Hear what Jervis, C. J., delivering the opinion of their Lordships, says as to the character of the lien which binds the wrong-doing vessel from the moment that the collision has taken place. "Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story (1 Sumner, 78) explains that process to be a proceeding *in rem*, and adds that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached. This simple rule, which in our opinion must govern this case, and which is deduced from the civil law, cannot be better illustrated than by reference to the circumstances of the *Atmi*, referred to in the argument, and decided in conformity with this rule, though apparently upon other grounds. In that case there was a bottomry bond before and after the collision, and the court held that the claim for damage in a proceeding *in rem* must be preferred to the first bondholder, but was not entitled against the second bondholder to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties and he could be bound by that transaction. This rule, which is simple and intelligible, is, in our opinion, applicable to all cases." The decision in the *Amalia* therefore does not, in my opinion, govern the case now before me. Now let me mention a judgment delivered in the Supreme Court of the United States of North America, and certainly entitled to the highest respect in this court. In the case of *Smith and others v. Condry* (1 Howard U. S. Rep. 28, and 14 Curtis, 48), to which I was referred by Mr. Clarkson, two ships belonging to subjects of the United States in North America came into collision in the port of Liverpool. The action was brought in the Circuit Court for the district of Columbia, and came up by writ of error to the Supreme Court. Mr. Chief Justice Taney, in de-

livering the opinion of the Court, observed (p. 32) as follows:—"Upon the evidence above stated, the deft. asked the court to instruct the jury that under the statutes of Great Britain of the 37 Geo. 3, c. 78, 52 Geo. 3, c. 39, and 6 Geo. 4, c. 125, the deft. was not responsible for any damage occasioned by the default, negligence, or unskilfulness of the pilot. The Court gave this instruction, and that is the subject of the first exception. The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes then in force, and if doubts exist as to their true construction we must of course adopt that which is sanctioned by their own courts." This decision of the Supreme Court of the United States of North America seems to go the whole length of the way which the Norwegian plt. desires me to travel, for it is in fact a decision that the court before which a plt. sues for the enforcement of the damages growing out of an *obligatio ex delicto* ought to measure those damages by the law which bound the obligor and the obligee at the time when the *factum obligans* (as civilians speak) took place, or, in other words, when the *delictum* was committed. Lastly, I must observe upon not the least remarkable feature in the present proceeding, namely, that the deft. is the first to invoke in his own favour the law of Belgium. He pleads that by that law, applicable to this case, the taking of a pilot on board was compulsory, and there his citation from the Belgian law ceases. The plt., not unnaturally, pleads in his turn the other part of the Belgian law, which is to the effect that the compulsory taking on board of a pilot does not release the master from his liability under the general law for all damages occasioned by the unskilful navigation of his vessel. The deft. contends that the plt. has no right to finish the citation, so to speak, which he the deft. has begun, from the Belgian law; that I must only look at that portion of it which he has selected as being in his favour and which, as such, he is pleased to lay before me; that it is my duty not to apply either the general *lex maris*, mentioned at the beginning of this judgment, or the whole Belgian law, which combines the obligation to take a pilot, with the continuing responsibility of the owner; but to take the former part of that law which relates to the obligation to take a pilot, and add to it the English law which exempts the owner from responsibility. This is the tessellated piece of jurisprudence which I am told the law requires to be applied to the case before me. I hope there is no law or legal rule in this country which would compel me to do an act of, what seems to me, such manifest injustice; as at present advised I know of none. Upon the whole, after an anxious and, I trust, careful consideration of the principles of law applicable to this case, and of the authorities and arguments which have been laid before me, I am of opinion that the plt. is entitled to plead that the law of Belgium, within whose territorial waters his vessel received damage from the vessel of the deft., renders the owner of the latter vessel, although compelled to take a pilot on board, liable to make reparation for the wrong which she has done. The question is one of grave importance, and submitted in this country for the first time unhappily to my decision. I am glad to remember that, if I have erred, my error will be corrected by the Court of Appeal, and I will readily accord to the deft., if he desire it, the permission to appeal, which the statute requires, from this decision upon the admissibility of the plt.'s plea.

Proctors for the plts., *Clarkson, Son, and Cooper*.

Proctors for defts., *Field and Co*.

V.C. W.]

GREEN v. BRITTEN.

[V.C. W.]

V. C. WOOD'S COURT.

Reported by W. H. BENNETT and R. T. BOULT, Esqrs.,
Barristers-at-Law.

Monday, July 1, 1867.

GREEN v. BRITTEN.

Administration—Earnings of ships—Expenses of fitting out—Tenant for life.

A testator, a shipowner, gave to his sister for life the interest of an investment to be made of certain parts of his residuary personal estate, and which should arise under the following direction in his will:

He directed that his executors should not sell any of his ships, or private shares in ships, for a period of seven years from the time of his death, unless the keeping of them should cause loss to or diminution of his estate, and in such case he gave his said executors a discretionary power to sell same; but, subject as aforesaid, he directed them to retain his said ships and shares of ships for the period of seven years at the least, upon trust to superintend and manage the same.

At the time of the testator's death many of his ships were employed in various voyages, all of which turned out profitably. Some of the other ships in which he had shares incurred losses:

Held, that the whole must be considered as one general mercantile adventure, and that the amount of the necessary outfits, repairs, alterations, permanent improvements, and general expenses incurred before and subsequently to his death, should be deducted from the profits made and received after his death. The tenant for life entitled to the interest of the balances invested.

This cause came on for further consideration on the chief clerk's certificate, and a statement of facts upon which the parties interested had agreed, and the questions now raised were as to the interests which a tenant for life took, and the parties interested at her death, under the following circumstances:—

The suit was originally filed by the executors of the testator, for the purpose of administering the estate of Mr. Richard Green, the large shipowner of Blackwall. By his will, dated the 3rd April 1849, he directed (*inter alia*) that his executors thereby appointed should not sell any of his ships, or the shares to which he was entitled in private ships, for a period of seven years from the time of his death, unless the keeping of them should cause loss to or diminution of his estate, and in such case he gave them a discretionary power to sell the same; but, subject as aforesaid, he directed his said executors and trustees to retain his said ships and shares in ships for the period of seven years at the least, upon trust to superintend and manage the same, indicating certain voyages in which they were and would be engaged.

By a codicil to his said will he directed the residue of his estate and effects to be invested as therein mentioned, for the sole use and benefit of his sister Mrs. Mary Britten during her life, and at her death to be equally divided between her surviving children.

By a decree made in the cause, pronounced in Aug. 1863, it had been declared that the property of the testator in his ships and shares of ships ought to be retained by the executors and trustees in specie and worked by them for a period of seven years from the time of the testator's death, which took place on the 17th Jan. 1863, unless in the meantime (according to the terms of the testator's will) the keeping of them should cause loss to or diminution of his estate. And it was further declared that Mrs. Britten was entitled during her

life for her sole and separate use to the whole net earnings of such of the said ships and his shares in other ships forming part of the said testator's residuary estate as might from time to time remain unsold until the end of such period of seven years.

The case on the hearing is reported in 1 De G. J. & S. 649. By the chief clerk's certificate it was found that several of the ships belonging to the testator were performing voyages at the time of his death, and it set out at length the names of the ships, the voyages on which they were engaged, and various other particulars. All the ships belonging to the testator had made profitable voyages; some of those in which he held shares had not, but sustained losses. A statement of facts accompanied the certificate, and the cause now came on for further consideration thereon.

Sir Roundell Palmer and A. G. Marten, for Mrs. Britten, the tenant for life, stated that the questions which arose for the consideration and direction of the court, all which related principally to the first year subsequent to the testator's decease, were: 1. Whether the voyages of all the several ships were to be taken as one mercantile adventure, or whether the expenses of such ships were to be set off against the profits made by such ships, and the tenant for life entitled to the gains of those which had been profitable, without deducting the expenses of outfit, &c., of those which had been unprofitable. 2. Whether against the gains made were to be set off all the expenses of the repairs which had been necessary to several of these ships (including permanent repairs) before as well as after the death of the testator; or only the expenses of repairs, &c., incurred since his death, exclusive of profit and special alterations, &c., on the voyages; and 3, whether the profits were to be apportioned over the whole voyage between the testator's estate and residuary legatees in proportion to the periods of the voyage occurring before and after the testator's decease. They contended that the Apportionment Act did not apply to the circumstances of this case, and that the tenant for life was entitled to the most favourable interpretation of the testator's directions in the result of the whole of the voyages made by the ships. They cited

Shirley v. Witham, 24 Beav. 275;
Ibbetson v. Eland, L. Rep., 1 Eq. 188;
Slack v. Carron Company, 3 De G. F. & J. 214;
Green v. Higgs, 6 Hare, 286;
Johnson v. Meade, 7 L. J., N. S., 463;
Brown v. Gellatly, W. Notes, 94 (under appeal).

Rendall, for the executors, took no part in the argument.

J. H. Taylor for parties in same interest.

Giffard, Q. C. and Fischer, for the children entitled in remainder after death of tenant for life, contended that the whole of the voyages were to be considered as one mercantile adventure, and that the losses incurred, and the necessary expenses incurred at any time either before or after the testator's death, should be deducted from the amount of the profits made.

The VICE-CHANCELLOR considered, and so held, that all the voyages must be considered as one adventure, that all the expenses as well of outfit as of all special alterations in the ships and permanent improvements therein—those of necessary repairs in the course of the several voyages as well before as after the death of the testator—should be deducted from the amount of profits made by the several ships. He also held that the Apportionment Act did not apply, and declared accordingly that Mrs. Britten was entitled to the net profits which

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had been received on account of the testator's estate since his decease in respect of the voyages on which the ships were engaged at the time of his death, after deducting the amount of all the expenses incurred, whether before or after his decease, in respect of such voyages; and deducting the amount of the losses on those ships which had incurred losses from the profit and gains made by the others.

Minutes to be prepared on the footing of this decision.

Solicitors: Baker, Nairne, and Oxley; Farrer, Ouwry, and Co.; Fox.

UNITED STATES DISTRICT COURT— IN ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate.

SOUTHERN DISTRICT OF NEW YORK.

JAMES KENNEDY AND ANOTHER v. WILLIAM E. DODGE AND ANOTHER.

Bill of lading—Damage to cargo—Negligence in discharging cargo—Delivery—Recoupment—Freight.

A vessel brought goods to New York under an ordinary bill of lading, and coming to a dock which was sufficient if the cargo had been properly discharged upon it, proceeded to discharge, giving notice to the consignees of the landing of the goods. After the goods were discharged, the ship employed a watchman to watch them on the dock, but at the expense of the consignees.

While a part of these goods remained on the dock, the ship so overloaded it with other goods, that it gave way, and these goods were thrown into the water, and damaged to an amount exceeding the freight. The shipowners sued for the freight, and the consignees sought to recoup the damages:

Held, that landing goods at a proper time and upon a proper dock with notice to the owners is equivalent to a delivery, after which the owners take all risks except those which proceed from the ship herself.

That the master of this ship is, however, liable for this damage, as it was caused by his negligent act, and that, as it was in the ordinary discharge of his duty as master, the ship is liable for the damage.

That the damages can be recouped to the amount of the freight, but the excess cannot be recovered against the libelants in this suit.

This was a libel in personam, brought by the owners of the ship *Jeremiah Thompson*, to recover the freight money on a considerable quantity of tin plate and iron rods shipped on board the *Thompson* at Liverpool, by Phelps, James, and Co., and consigned to the resps. in New York. The bill of lading was in the ordinary form, and the libel alleged performance of the contract, including the delivery of the goods at New York.

The answer admitted that the goods were shipped as stated, and their arrival at New York. But it averred that they were not delivered in good order; that, on the contrary, the cargo of the ship was discharged in such an unskillful and negligent manner that the dock on which it was placed broke down, and 313 boxes of the tin plate were precipitated into the river and greatly damaged; that the resps. were at great expense in recovering them, which, with the injury to the plates in being immersed in the water, amounted to more than the freight money sued for. The resps. asked to recoup and set off this damage and expense, to the extent of the libelants' claim for freight, and recover the balance.

The following were the facts proved, as found by the court:—

1. That the ship arrived at this port about the 11th Aug. 1866, with a general cargo, including the tinplate and iron rods mentioned in the bill of lading, and also a considerable quantity of pig-iron and other freight for other parties.

2. That on the application of the ship the harbour master assigned her a berth at pier No. 45, East River, which she took and proceeded to unload her cargo, which she continued to do for several days.

3. That the pier was a good one, with sufficient strength to have supported the cargo had it been properly placed thereon.

4. That as the cargo was discharged from time to time, the resps. had notice of the landing of that part of it which belonged to them, and took portions of it from time to time to their warehouses as was convenient.

5. That before they had removed it all, the ship had so overloaded the bridge of the dock with other cargo, and especially with the iron, that it gave way, and precipitated a portion of the resps.' goods into the river.

6. That the goods were thereby damaged, and the resps. incurred expense in recovering them from the water.

7. That by a standing agreement between the ship or her owners and the resp., when the latter had goods on the dock, landed from ships owned by the libelants, and such goods remained on the dock over night, the master or agent of the ship was to employ a night watchman to watch the goods, at the expense of the resps., and that they did so in this case.

SHIPMAN, J.—It is insisted by the libelants that these goods were delivered to the resps. when they were placed on the dock with notice to them, and were, consequently, at their risk thereafter. With regard to cargoes arriving at this port under ordinary bills of lading from foreign countries, landing them at a proper time and upon a proper dock, with notice to the owners, is equivalent to a delivery. After such landing and notice the owner takes all the risks arising from every other cause except that which proceeds from the ship itself. The parties to this suit evidently recognised this rule of law, when the watchman was employed at the expense of the resps. to watch this tin during the night-time. Had this tin been stolen, or removed by other parties without the intervention of the officers or agents of the ship, or damaged by the elements, the ship could not have been made responsible. But this does not meet the question before the court. The clear proof is that the pier was broken down by the weight of the iron placed upon it by direction of the master. He, and not the resps., selected the dock, and he broke it down. The fact that the resps. did not instantly remove their goods on being landed is no answer. The notice to them was not a notice against the wrongful and destructive acts of the ship in discharging the rest of her cargo, nor against a defective pier. The master had no more right to break the dock down and precipitate this tin into the water, than he would have had to pile his iron on crates of crockery and crush them. I attribute to him no intention to injure the pier or the resps.' goods. I am speaking of the legal, not the moral quality of his acts. He doubtless thought the dock would support the load he was placing upon it, but the result proved that he was mistaken. The consequences of that mistake are not to fall on the owners of the cargo, when they had no agency in causing it. The only doubt I have felt in the case is in relation to the responsibility of the ship for the damages. The master is clearly liable, for it was by his act that the goods were injured. There was a constructive delivery, and the question has

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arisen in my mind whether, after such constructive delivery, the wrongful act of the master in damaging the goods can be visited on the ship. But this wrongful act was not malicious or intentional on his part, but was one committed in the ordinary discharge of his duties as master, and within the scope of his powers as the agent of the owners. For this I think the ship is liable. Much stress was, during the hearing, laid on the fact that the master had no notice, nor any reason to suspect that the pier was not perfectly safe, and sufficiently strong to support the load he was placing upon it. There is, however, some evidence that he had doubts on this point. But whether he did or not is not material here. A ship is bound to deliver her cargo in a proper place—that is, a place proper for the amount that is to be landed, and which it is to support at any one time. (*The Majestic*, Legal Obs., N. Y., p. 100; Judge Ingersoll's remarks, p. 105.) This dock or place is selected by the ship, and it is for her, and not the owners of the cargo, to see that it is sufficient to support the load that she places upon it, and that the weight of the cargo is properly distributed over the pier so as to secure its safety. The only remaining question is, whether the damages of the resp. arising out of this accident can be recouped from the claim for freight, and if there is a balance in their favour, whether it can be recovered in this suit. That the damages suffered by the resps. can be recouped from the freight money, which the libelants would otherwise recover, appears to be settled upon authority: (*Bearse v. Ropes*, Sprague's Decis. 331; *Snow v. Carruth*, Ibid. 324; *Thatcher v. McCulloch*, Olcott Adm. 365; *Bradstreet v. Herron*, Abbott Adm. 209; *Zerega v. Poppe*, Ibid. 397.) By way of recoupment, the resp. can, as the damages arise out of the same transaction, extinguish a portion or all the claim of the libelants. But they can go no further. The court cannot pronounce in their favour for any sum in which their damages may exceed the amount of the libelants' demand. In *Nicholls v. Tremlett*, Sprague's Decis. 367, the court says: "The Admiralty does not take cognisance of pleas in set-off, no statute having given it that authority, and it has been thought by some that a distinct claim by the resp., founded upon the violation of the contract by the libelant is in the nature of a set-off, and so not cognisable by this court. But I am of opinion that where the counter claim is founded upon the same charter-party, the resp. may set it up in his answer, so that the damages that he has sustained may be recouped from the amount which the libelant might recover. But in this case, if the damages sustained by the resp. should exceed the just claim of the libelant, the court can give no decree for the excess, the utmost effect being to diminish or extinguish the claim of the libelant; nor could the resp. afterward maintain a suit for such excess. He cannot be permitted to split up his demand and litigate the same question twice. Having once voluntarily submitted his claim for damages to the court, he must be content with such relief as the tribunal may afford him." I understand this to be a correct statement of the law both in the Admiralty and common law courts: (*Sickles v. Patterson*, 14, Wend. 257.) And it follows that this court can render no judgment for the resps. to recover any excess beyond the libelants' just claim. Had the resps. filed a cross or independent libel they would have recovered their whole damages. But it is too late now. They must content themselves with a diminution or extinguishment of the libelants' just claim. Let an order be entered referring the case to a commissioner to take the proofs, and report to this court the amount of freight which might be due to the libelants under the bill of lading, and the amount of damage which

the resps. have suffered by the injury to their goods from the cause mentioned in the answer, together with the expense which they incurred in recovering it from the water. On the coming in of the report a final decree will be entered in conformity to the rules laid down in this opinion.

For libelants, *Bebee, Dean, and Donohue*.

For resps., *Phelps and Feller*.

THE PATRICK HENRY.

Bill of lading—Foreign coin carried as cargo and lost—Damages—Freight.

Where a ship at Melbourne bound for New York received on freight a quantity of sovereigns and gave a usual bill of lading therefor, but failed on her arrival to deliver them to the indorsee of the bill of lading:

Held, that in fixing the amount of damages, the bill of lading was to be treated, not as a contract to pay money, but to carry and deliver goods.

That the value of the sovereigns was not to be fixed by a statute which fixed its computation for ordinary transactions, but by their actual value in the currency of the country:

That the clause in the bill of lading fixing the freight at so many pounds sterling was a promise to pay money, and in calculating the freight the pound sterling must be taken at its legal value.

This was a libel filed against the ship *Patrick Henry*, by Reuben Ross, jun., who was indorsee of the following bill of lading:

Shipped, in good order and well-conditioned, by James Patrick, in and upon the good ship or vessel called the *Patrick Henry*, whereof is master for the present voyage Wm. Page, and now riding at anchor in Hudson Bay, and bound for New York, one bag containing ninety sovereigns British sterling, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid port of New York (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation, of whatever nature or kind soever, excepted), unto order or its assigns, he or they paying freight for the said goods, 21 sterling in full, with primage and average accustomed. In witness whereof, the master or purser of said ship or vessel hath affirmed to four bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void.

(Signed)

Wm. C. Page.

Dated in Melbourne, Sept. 19, 1865.

The ship having received the goods, and given the bill of lading, proceeded to New York, where she arrived in Dec. 1865, but failed to deliver the sovereigns. Her owners contended that they were only liable for the value of the sovereigns, as fixed by a statute passed years before, fixing their value for commercial transactions, instead of the actual value in the currency, which had depreciated, though made a legal tender by statute for the payment of debts.

SHIPMAN, J.—The only question in this case is as to the true rule of damages, the breach being admitted. The libellant claims that he is entitled to recover the market value of the coin at this port at the time it should have been delivered. The claimant, on the other hand, insists that in estimating the damages the value of the sovereigns should be taken at the rate fixed by law for computation in ordinary commercial transactions, the same as if this were a suit to recover the amount of a bill of exchange or other promise to pay. I do not accede to this view. The agreement in this bill of lading is not a promise to pay money, but to transport certain articles on freight. Whether these articles were gold coins, gold bars, gold dust, or gold in any other form of use or ornament, can make no difference. Like every other article placed on freight, and covered by a bill of lading, unless delivered

according to the terms of the contract of affreightment, their value may be recovered by the holder of the bill. That value is to be estimated in the currency of the country in which the port of delivery is situated, and where the suit is brought, unless otherwise provided for in the contract itself. The proof is that these sovereigns were worth in this market at the time they should have been delivered 7dols. 5c. a-piece in our money. Our recent Legal Tender Act and the decisions under it cited at bar have no application to this part of the case. There is another question of trifling importance so far as the amount depending upon it is concerned, which requires to be disposed of, and that is whether any deduction should be made on account of freight. No freight was strictly earned, as the contract was not fulfilled. But admiralty courts have power to do substantial justice between parties, and substantial justice in this case is to make the libellant good for the loss sustained. He is, under this breach of the contract, entitled to the value of ninety sovereigns at the market rate, less two pounds sterling freight money. As the stipulation to pay these two pounds was a promise to pay money at this port, they should be reckoned in the currency of this country, according to our laws. The legal value of the pound sterling in commercial transactions in this country is fixed by Act of Congress at 4 dols. 44 c. The value of ninety sovereigns at the time of the breach was 634 dols. 50 c. From this deduct two pounds sterling, computed in our money (8 dols. 88 c.), will leave 625 dols. 62 c.—the principal sum the libellant is entitled to recover. To this should be added interest at the rate of 7 per cent. from Dec. 28, 1865 to the date of the decree. The clerk of this court is hereby directed to compute the interest, and add to it the principal sum. Then let a decree be entered for the amount of principal and interest in favour of the libellant, with costs.

DIGEST OF CASES IN GENERAL AND PARTICULAR AVERAGE.

FROM 1860 TO 1867 (a).

1. Goods "warranted free from particular average"—Warehouse rent and other charges in case of shipwreck—Suing and labouring clause.—Underwriters on goods insured "free from particular average," held not liable under the suing and labouring clause in the policy to pay warehouse rent, transshipping charges, &c., where the goods were not considered to be in immediate peril of a total loss: (*The Great Indian Peninsular Railway Company v. Saunders*, Q. B., April 23 and 24, 1860, 1 Mar. Law Rep. 65; 1 B. & S. 41; 30 L. J. 218; 7 Jur. N. S. 823; 4 L. T. Rep. N. S. 249; Ex. Ch. Feb. 3 and 8, 1862, 1 Mar. Law Rep. 211; 2 B. & S. 266, in error; 31 L. J. 206; 9 Jur. N. S. 198; 6 L. T. Rep. N. S. 297. *Booth v. Gair*, C. B., Nov. 7 and 18, 1863, 1 Mar. Law Rep. 393; 15 C. B., N. S., 291; 33 L. J. 99; 9 Jur. N. S. 1826; 9 L. T. Rep. N. S. 386.)

[NOTE.—These decisions were in conflict with the practice of average, as briefly described in the treatise under the title "Total Loss," in the Digest of Maritime Law Cases, 1867 to 1860, No. 2267b. But it has been finally determined in the case of *Kidson v. Empire Marine Insurance Company*, L. Rep., 1 C. P. 535; and L. Rep., 1 C. P. Ex. Ch. 857, that the distinction between "particular average," signifying damage by sea water or partial loss, and "particular charges" forms by long settled usage a part of the ordinary contract of Marine Insurance. See sect. 7 hereof.]

2. Barge sunk in crossing river—Action of detainee—Question as to lien on cargo for expenses of raising it by order of underwriters—Salvage or general average.—

(a) The great importance and interest attaching to the difficult subject of average, will doubtless give special value to this Digest of the cases decided since 1860. We intend to follow it with similar Digests of some other important branches of Maritime Law.

A barge employed to convey copper ore from a ship having sunk, an order from the underwriter was obtained for raising it: Held, that the owners of the goods had a right of action for damages on account of the copper ore having been detained in security for expenses of raising it, and that against them there was no lien at common law for salvage or general average. The underwriter was the person liable under the express contract: *Hollis v. Claridge*, 4 Taunt. 807; and *Steadman v. Hockley*, 15 M. & W. 553, referred to. (*Castellain and others v. Thomson and another*, C. B., Nov. 21, 1862; 13 C. B., N. S., 105; 32 L. J. 79, C. P.; 7 L. T. Rep. N. S. 424; 1 Mar. Law Rep. 259.)

3. Insurance on steamship—Clause "particular average recoverable on hull and machinery separately"—Expense of extinguishing fire.—Under a policy of insurance on a steamship, wherein the hull and machinery were, as usual, separately valued, and particular average amounting to 3 per cent. stipulated to be recoverable on each, as if separately insured: Held, that the expense of extinguishing a fire in the hull of the ship was properly apportioned as a general charge, or general average, on hull and machinery, and could not be added as an expense incurred upon the hull only to the particular average on the hull, in order to make up 3 per cent. on its insured value: (*Oppenheim v. Fry*, Q. B. May 4, 1863, 1 Mar. Law Rep. 333; 3 B. & S. 873; E. C. May 10, 1864, 2 Mar. Law Rep. 17; 5 B. & S. 348; 33 L. J. 267.)

4. Average—Jettison.—Construction of clause in a policy of insurance on goods: "Free from average or claim arising from jettison or leakage, unless consequent upon stranding, sinking, or fire:" the absence of punctuation renders the meaning uncertain: (*Carr and another v. The Royal Exchange Assurance Company*, Q. B. Nov. 20, 1863, 2 Mar. Law Rep. 4; 33 L. J. 63; 10 Jur. N. S. 316.)

5. Lien for freight and general average—Bottomry—Transshipment—Arrest of cargo—Right to forward it for earning freight—Suits as trustees for underwriters when claim satisfied by them.—Lien on cargo for freight on transshipping and forwarding it to its destination, and for general average in preference to bottomry bond. A ship called the *Galam*, bound from Hayti to Europe, calling at Falmouth for orders, put into the port of Angra, in Terceira, under average, and was there condemned. The cargo was transhipped into a vessel called the *Mary Jane*, and the expenses secured by a bottomry or respondentia bond on the cargo payable at Falmouth. The *Mary Jane* was wrecked at Scilly, and the owners settled with their underwriters for a total loss of that ship and her freight. The cargo was ordered to Hamburg, but was arrested in the Admiralty Court by the bottomry bondholder, and brought to London, where it was sold. The underwriters on freight per *Mary Jane*, did not abandon their right to forward the cargo to its destination: Held, reversing the judgment of the Admiralty Court, that there was a lien for freight, and for general average per *Mary Jane*, upon the proceeds of the cargo in preference to the bottomry bond. The *Constancia*, 2 W. Rob. 287, and the *North Star*, 1 Lush. 45, as to the Admiralty Court not having jurisdiction in questions of general average, or in claims for loss on cargo sold to pay expenses, considered not applicable to the present case. The expense of transshipping and forwarding the cargo of the *Galam* was in the nature of a salvage charge whereby the cargo was rendered available for the bottomry bondholder or any one else. Suits in the Admiralty Court or at common law, are made in name of the master (or owner) as trustee for the underwriters where his claim has been satisfied by them: (*Cleary v. Macandrew*; *Cargo ex Galam*, J. C. P. C. Dec. 9, 1863, 1 Mar. Law Rep. 408; 9 L. J. Rep. N. S. 550; 10 Jur. N. S. 477; 33 L. J. 97) (5 Law Digest, 258, case incorrectly described.)

6. Jettison of cargo adrift.—Loss of goods stowed on deck, jettisoned after having been washed adrift, and obstructing the pumps, held to be recoverable by general contribution. Where a charter-party stipulates that a deck cargo shall be carried, its jettison becomes a subject of general contribution. Practice of average adjusters, not allowing wreck cut away as general average approved of: (*The Shooting Star*, *Johnson v. Chapman*, C. P. 1865, May 3, and July 10, 35 L. J. 23.)

[NOTE.—The effect likely to be given to this judgment

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seems to be not altogether satisfactory. The jettison of deck cargo adrift is often, indeed, perhaps in most instances, a matter not of choice, but of inevitable necessity.]

7. *General average—Advance of freight.*—Held, that freight paid in advance, not being at the risk of the shipowner, the charterer, by whom the cargo was shipped, is liable to contribute on the advance of freight to general average after the ship's arrival at her port of destination, which advance is virtually increased value of the cargo. According to *Hicks v. Shihl* (7 E. & B. 633) the advance of cash, being by the terms of the charter-party made subject to insurance by the charterers, was an absolute advance of freight not recoverable back from the shipowner in the event of the loss of the ship, and therefore at the charterer's risk: (*Trayes v. Worms*, C. P. June 8, 1865, 2 Mar. Law Rep. 209; 34 L. J. 274 12 L. T. Rep. N. S. 347.)

[NOTE.—This case clearly points out the impropriety of deducting any wages or port charges from the contributory value of freight advanced in adjustments of general average.]

8. *"Particular average" does not include "particular charges"*—*Transshipping and extra forwarding expenses on cargo in case of shipwreck, recoverable on a policy on freight, "warranted free from particular average."*—This was an action under a policy of insurance on freight, "warranted free from particular average unless the ship be stranded," for a voyage, with a cargo of guano, from the (Chincha Islands to the United Kingdom. The ship was not stranded. In the course of the voyage she was seriously damaged by perils of the sea, put into Rio, and was there condemned as irreparable. The cargo was transhipped into another vessel, and forwarded to its destination at an expense which amounted to less than the original freight insured: The Court held, that the underwriters were liable for the charges of transshipping and forwarding the cargo to the United Kingdom, as an expense within the suing and labouring clauses incurred to avert a total loss of the freight. In delivering the judgment of the Court of C. P., Willes, J. observed that, without incurring the expense in question, the freight insured would never have had any complete existence; it would have been totally lost. That the only right of the shipowner in respect of freight was to detain the cargo for a reasonable time at Rio, in order to send it on in another vessel to its destination, and so earn the freight. As the cargo lay at Rio, no part of the freight had become due; no freight, even *pro rata itineris* could be claimed by the shipowner. The expense was incurred in consequence of a peril insured against, to prevent the destruction of the subject-matter, for which in the event of its loss, the underwriters must be answerable. The terms of the suing and laboring clause in the policy of insurance are that "in case of any loss or misfortune it shall be lawful for the assured to sue, labour, and travel in and about the defence, safeguard and recovery of the subject-matter of the insurance, or any part thereof, to the charges whereof the underwriters will contribute in proportion to the amount insured." And the court held that the true construction of this clause is, that it extends not only to every case in which the thing insured becomes, or may become, by abandonment, the property of the underwriters; but to every case where labour is expended in warding off loss, damage, or detriment, for the consequences of which the underwriters would be answerable, to every case where they might incur liability, and might, therefore, derive a benefit by the extraordinary exertions, that they ought

to contribute to the expense of avoiding detriment, in proportion to what they would have to pay if the detriment had come to a head for want of timely care. In the course of their reasoning on the subject the court took occasion to express their opinion that the evidence given before the jury established an understood meaning of "particular average," as applicable only to a partial loss of or damage to, the thing insured, and not including "particular charges;" and also to mark their approval of the existing rules of average adjustment on goods by the following examples; For instance, in a case where goods are, by the memorandum at the foot of the policy, warranted free from particular average under 5 per cent., and the goods are wetted by sea water in a storm which drives the ship into a port of refuge, by drying the goods at an expense of less than 5 per cent., the damage may be prevented from amounting to 5 per cent., whilst if not dried they would decay and become damaged over 5 per cent. It is obviously then the duty of the master to use all reasonable means to preserve the goods, and obviously for the interest of the underwriters to encourage the performance of that duty by contributing to the expense incurred. Accordingly the rule has been to pay for damage to memorandum articles only when it exceeds the specified percentage, and not to allow the percentage to be eked out by expenses falling within the meaning of the suing and labouring clause. The amount of expense reasonably incurred in preserving the goods is, according to practice, contributed to by the underwriters, however small in result the actual damage to the goods may be, and the partial loss or damage is paid only if it amounts to the stipulated percentage. Thus, if in the case put, the expense was 2 or 3 per cent., and the damage only 2 or 1 per cent., according to the present practice the underwriters would pay the expense, but not the damage. Were the practice otherwise, the underwriters, though saved from loss, would be altogether exempt from contribution, and they would be exposed to the very inconvenience which the memorandum has been supposed to obviate by the protection it affords them from frivolous demands in respect of small losses: (*Kidston v. Empire Marine Insurance Company*, C. P. May 8, 1866, 1 L. Rep., 1 C. P. 535; Ex. Ch. Feb. 4, 1867, 1 L. Rep., 2 C. P. 337, Ex. Ch.)

9. *General average.*—Extra expenditure of coals bringing auxiliary screw steamer home from Rio instead of discharging cargo and repairing ship there: Held not to be general average, and not recoverable as a charge substituted in lieu of other expenses. Question as to unshipping and warehousing gold: (*Wilson v. Bank of Victoria*, Q. B. Feb. 12, 1867, 16 L. T. Rep. N. S. 9; L. Rep., 2 Q. B. 208.

[NOTE.—Considering the practice of average in regard to substituted expenses, and the equity of the case, this judgment seems open to objection.]

We select the following decision from a "Digest of the United States Reports."

CARRIER.

1. Where goods are shipped which must pass through the hands of several intermediate carriers before arriving at the place of their destination, an intermediate carrier does not relieve himself from liability as common carrier by simply unloading the goods at the end of his route, and storing them in his warehouse, without delivery, or notice to, or any attempt to deliver to, the next carrier: (*McDonald v. The Western R. R. Corp.* 34 N. Y. 497.)



